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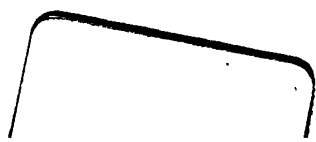
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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH;

WITH

TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

BY EDWARD HYDE EAST, ESQ.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

*Si quid novisti rectius istis,
Candidus imperti: si non, his utere mecum.*—HON.

SIXTEEN VOLUMES IN EIGHT.

VOLUME VI.

EMBRACING VOLS. XI. AND XII. OF FORMER EDITIONS,

AND CONTAINING

THE CASES OF EASTER AND TRINITY TERMS IN THE FORTY-NINTH, AND OF
MICHAELMAS, HILARY, EASTER AND TRINITY TERMS IN THE FIFTIETH
YEAR OF GEORGE III....1809-10.

SECOND AMERICAN EDITION,
WITH THE ADDITION OF NOTES AND REFERENCES.

BY G. M. WHARTON.

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JUDGES
OF THE
COURT OF KING'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

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Sir SOULDEN LAWRENCE, Kn't.

Sir SIMON LE BLANC, Kn't.

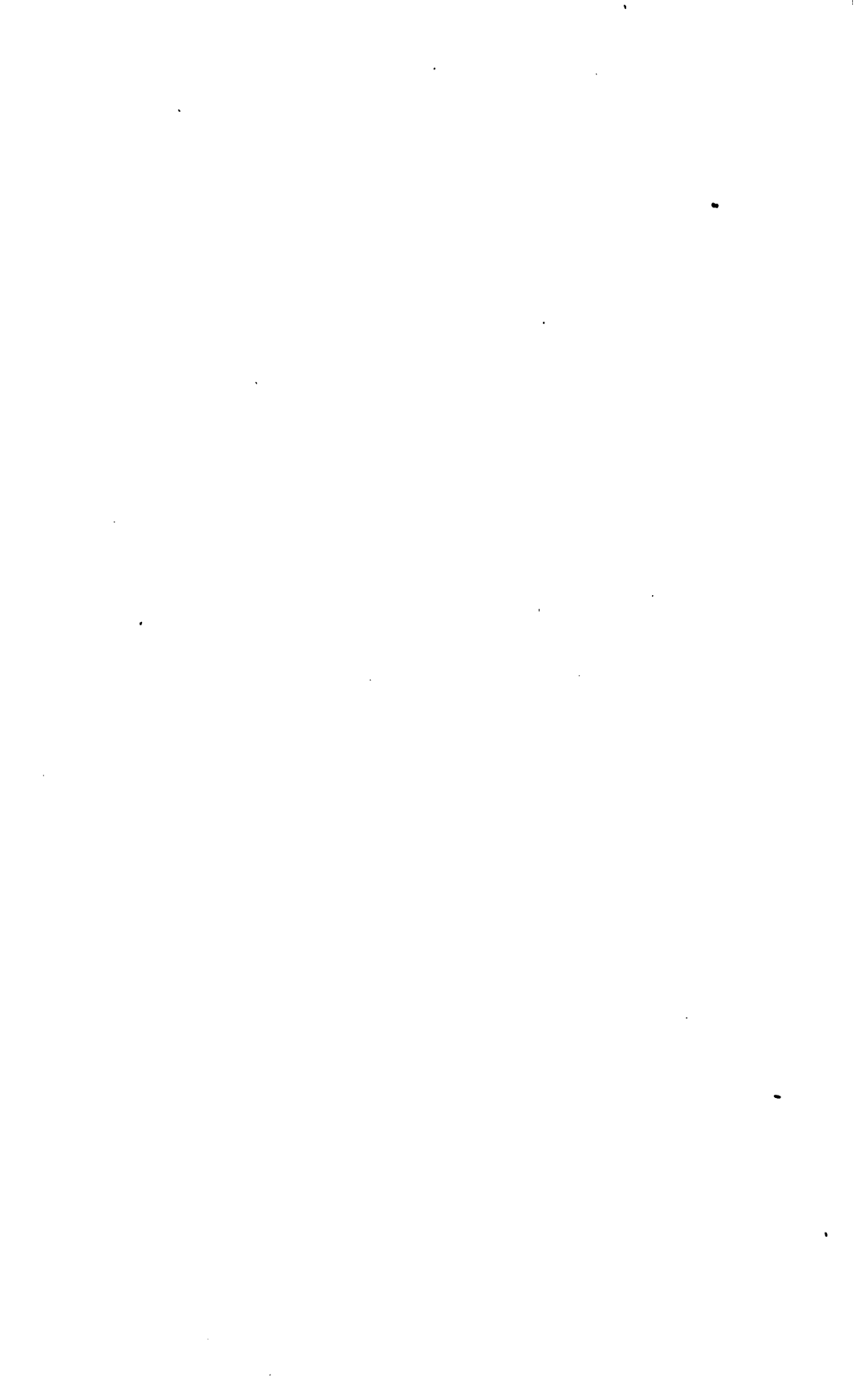
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IN

EASTER TERM,

IN THE FORTY-NINTH YEAR OF THE REIGN OF GEORGE III.

Priestly, and Mary his Wife v. Jane Wynne Hughes, an Infant,
and Others.

11 East, 1. 1809.

All marriages, whether of legitimate or illegitimate children, are within the general provisions of the marriage act 26 G. 2. c. 33, which requires all marriages to be by banns of licence: and by three Judges, a marriage of an illegitimate minor had by licence with the consent of her mother, is void by the 11th section: the words *father* and *mother* in that section meaning legitimate parents: by one Judge, it is *cusus omissus* in the act, and the marriage good.

UPON a bill filed, which came on to be heard before the Master of the Rolls, wherein it appeared, that the plaintiff *Mary* claimed certain estates of considerable value in the counties of *Merioneth* and *Carnarvon*, as heiress at law of one *Zacheus Hughes*, who had an only son *John Wynne Hughes*, who died in the lifetime of his father; the principal question turned upon the validity of that son's marriage, whose lawful issue the defendant *Jane Wynne Hughes* claimed to be; and his Honour directed the following case to be made for the opinion of this Court.

On the 9th of *September* 1792, a marriage was solemnized in the parish church of *Denis*, in the county of *Carnarvon*, between *John Wynne Hughes*, then above the age of 21 years, and *Jane Hughes* (one of the defendants) then an infant of the age of 16 years, the illegitimate child of one *Jane Roberts*, single woman, by *Thomas Jones*, who died several years before the said marriage. The marriage was had by licence, and without the publication of banns, but the licence was obtained and the marriage had with the consent of *Jane Roberts*, but without the consent of any guardian of the person of *Jane Hughes* appointed by the Court of Chancery. After the marriage, *John Wynne Hughes* and *Jane Hughes* had issue the defendant, *Jane Wynne Hughes*, and no other child. On the 30th of *January* 1795, *John Wynne Hughes* died; and on the 10th of *February* 1796, *Zacheus Hughes*, the father of *John Wynne Hughes*, died intestate, and seised in fee of certain real estates. The question was, whether the marriage between *John Wynne Hughes* and *Jane Hughes* the mother, on the 9th of *September* 1792, in manner aforesaid, were a good and lawful marriage, to entitle *Jane Wynne Hughes* to succeed as heir to the real estates of which *Zacheus Hughes* died seised; or whether such marriage were not void by the marriage act 26 Geo. 2. c. 33.

This case was first argued in *Easter* term 48 Geo. 3, by *Owen* for the plaintiffs, and *Williams*, Serjt. for the defendants; and again in *Hilary* term

last, by *Lens*, Serjt. for the plaintiffs, and *The Attorney-General* for the defendants.

The stat. 26 Geo. 2. c. 33, for better preventing of clandestine marriages, prescribes (s. 1.) the manner and place, in which banns of matrimony shall be published, and enacts, "that all other the rules prescribed by the rubrick concerning the publication of banns, and the solemnization of matrimony, and not hereby altered, shall be duly observed." Sect. 3. provides, that no minister shall be punishable for solemnizing marriages of infants "without consent of *parents or guardians, whose consent is required by law*, unless he shall have notice of the dissent of *such parents or guardians*;" and such dissent publicly declared at the time in the church where the banns are published shall avoid them. Sect. 4. regulates the granting of licences of marriage by any Ordinary or other person having authority to grant them. And sect. 6. saves the right of the Archbishop of *Canterbury* to grant special licences. Sect. 8. enacts, that "all marriages solemnized in any other place than a church or such public chapel, unless by special licence as aforesaid, or that shall be solemnized without publication of banns or licence of marriage from a person having authority to grant the same first had, shall be null and void to all intents and purposes whatsoever." And then sect. 11. (on which the question turned) enacts, "that *all* marriages solemnized by licence, where either of the parties (not being a widower or widow) shall be under the age of 21 years, which shall be had without the consent of the *father* of such of the parties so under age, (if then living,) first had and obtained; or, if dead, of the *guardian or guardians* lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then of the *mother*, if living and unmarried; or if there shall be no *mother* living and unmarried, then of a guardian of the person appointed by the Court of Chancery; shall be absolutely null and void to all intents and purposes whatsoever." Sect. 12. reciting that the *guardian or mother* of the party so under age, may be *non compos*, or beyond seas, or unduly refuse their consent to a proper marriage, enables the Lord Chancellor, &c. on petition, to authorize the same, as if such the *guardian or mother* had consented. Sect. 15. gives a form for the marriage register required to be kept, which mentions the "consent of *parents, guardians,*" &c.

The questions made in argument were two; 1st, Whether illegitimate children were bound by all or any of the provisions of the marriage act, and particularly by those in the 11th section: and if they were, then, 2dly, Whether the consent of a *natural* father or mother to the obtaining of a marriage licence for their infant child would satisfy the words *father* and *mother*, as used in that clause.

For the plaintiffs it was contended, that the 8th section, enacting that *all* marriages solemnized without *banns*, or *licence*, should be void, necessarily included the marriages of illegitimate as well as of legitimate children; and both were equally within the general policy of the law, which was for the prevention of clandestine marriage, and to protect infants from surprize and imposition in contracting matrimony. The act is framed with reference to the ancient approved usages and discipline of the church as to the manner of celebrating marriages; the common and regular manner of doing which is by banns, and in that mode of celebration a bastard would have no more difficulty than any other person. But the act also recognizes another mode, by licence, which was practised before in the church, not as a matter of right, but indulgence, granted upon special application and for good cause; and for which the consent of lawful parents, authenticated upon oath, was an indispensable requisite; on pain of avoidance of the licence, as well as of ecclesiastical punishment. Canon 101. 103, 104, 2 Burn's Eccl. Law, tit. Marriage Licence. Then the act, allowing of marriages by the one mode as well as by the other, also imposes a condition upon the party obtaining the licence, which

must be complied with in order to make it effectual, and that, by the 11th section, is the consent of the *father* of such party; if living; or, if dead, of the *guardian lawfully appointed*: or if no such guardian, then of the *mother*, if living and unmarried; or, if no such mother, then of a *guardian appointed by the Court of Chancery*. Now, it is no argument to say, that if some of these required consents cannot be obtained by a bastard, therefore he is absolved from the necessity of having any consent whatever for obtaining his licence; for the 8th section having first avoided *all* marriages solemnized *without banns or licence*; which would clearly include the marriages of bastards: the 11th section avoiding *all* marriages *by licence*, unless with the consent therein required, must necessarily also include all such persons. Nor will it follow, if the words *father*, *guardian lawfully appointed*, and *mother*, used in that clause, must be confined to *legitimate* father and mother, and guardian appointed by a legitimate father, that a bastard cannot be married by licence: because a guardian may still be appointed by the Court of Chancery to consent for such a person: and it is well known, that since the marriage act, that Court is in the habitual practice of appointing guardians for that purpose; and that, frequently upon the application of the natural parents: and the very existence of such a practice in that court gives a sanction to the argument for the necessity of it. In *The King v. The Inhabitants of Hodnett*, 1 Term Rep. 96, the marriage by licence of an illegitimate infant, to which there was no consent of either parents or guardian of any description, was held to be void, within the 11th clause of the act. And in the case of *Horner v. Liddiard*(a) it was expressly decided by Sir Wm. Scott, after much deliberation, that bastards were bound by the provisions of that clause. And upon this point of the argument the case of *The King v. Edmonton*, E. 24 Geo. 3. B. R. 2 Const. 85, is not at variance with those decisions.

The next and most contested question was, whether the consent of the *natural mother* to the marriage licence after the death of the putative father, (and there being no guardian appointed, even if such an appointment could lawfully have been made by the putative father) would satisfy the words of the 11th clause; or whether the terms *father* and *mother* there used must not be taken in their strict legal sense, as denoting legitimate parents of children born in wedlock. The plaintiffs' counsel contended for the latter sense, in which sense the legislature, they said, (following the principle of the common law,) was always to be understood when speaking generally of fathers, mothers and children. The common law considers a bastard as nullius filius. And the stat. 18 Eliz. c. 3, for the first time recognized the relation of an illegitimate child to its parents; but this was only for the purpose of burthening the parents with the maintenance of the child in exoneration of the parish; and the second section of that act describes them as guilty of an offence against the laws of God and man. Besides, it only uses the terms "*reputed father*," and "*bastard child*." The stat. 13 and 14 Car. 2. s. 7, making further provision for the same purpose, uses the terms "*putative father*, and *lewd mothers of bastard children*." On the other hand, *bastards* have been held, *Thorntorn's case*, Dy. 345, a. not to be within the stat. 32 H. 8. c. 1, enabling persons holding lands in chivalry to dispose of 2-3ds thereof in advancement of *children*. And the stat. 43 Eliz. c. 2. s. 7, which requires the *father* and *grandfather*, and the *mother* and *grandmother* of poor *children* to contribute, if of ability, to their relief, has been held(b) not to extend to a putative grandfather. Two instances only are relied upon,

(a) Report by Dr. Croke.

(b) *Rez v. Reeve*, 2 Bulstr. 344, was cited; but the order on the *reputed grandfather* seems to have been discharged rather on a collateral ground, as he was bound over again to appear at the next Quarter Sessions. An opinion, however, to the effect stated is clearly expressed by *Whillock and Croke*, Justices, in the case of *The City of Westminster v. Gerrard*, p. 346, of the same book.

in favour of the defendants, as leading to a different conclusion: the first is on the construction of the statutes 25 H. 8. c. 22. s. 3, and 28 H. 8. c. 16. s. 2, (a) relative to prohibiting marriages within the Levitical degrees only, which speak of father, mother, brother, sister, &c.: and in *Haines v. Jeffreys*, (b) on motion for a prohibition to the ecclesiastical court to stay proceedings there against a man for marrying his sister's bastard, the Court appears to have considered that such a marriage was within the Levitical degrees. Whether this were ultimately decided does not with certainty appear; some of the reports of the case saying that the matter was adjourned; but the opinion thrown out proceeded wholly on the ground of the particular subject matter of the law, the intent of which was to prohibit any connubial approach between persons of the same *natural blood*, and not merely of the same *civil* or *legal* blood. And what is said in *The Queen v. Chafin*, 3 Salk. 66, is to the same purpose. Those statutes of H. 8, were passed in order to enforce the ecclesiastical law, to which they referred, and therefore the construction was necessarily to be governed by that law: and the whole argument proceeded on the foundation that the ecclesiastical law, concerning the consanguinity of persons within the Levitical degrees, extended to illegitimate as well as legitimate relations; which appears by 1 Gibs. Cod. 413, (2d edit.) The other instance relied on is the construction put upon the stat. 4 & 5 Ph. & M. c. 8. s. 3, which inflicts punishment on such as unlawfully take any maid or woman child unmarried within the age of 16 out of the possession and against the will of the *father* or *mother* of such *child*, or out of the possession and against the will of *such person as then shall happen to have by any lawful ways or means the order, keeping, education or governance of any such maiden or woman child*: and in Strange's report, Hil. 15 Geo. 2. 2 Stra. 1162, of the case of *The King v. Cornforth and others*, it is said, that the Court granted an information against the defendants for taking away a natural daughter under 16, under the care of her *putative* father: being of opinion that it was within that section of the act. But this might well have been decided upon the latter words of it; as the putative father has a natural right(c) to the care and education of his child; and this was a taking of the child from the possession and against the will of a person having by lawful means the governance of her. And it appears from another report(d) of the case that it was decided on that ground.

(a) And see 32 H. 8. c. 38.

(b) *Haines v. Jeffreys*, Com. Rep. 2. 1 Ld. Ray. 68. 5 Mod. 168, and Comb. 356.

(c) The putative father, long before the determination, and at least since the stat. 18 Eliz. and subsequent statutes, was chargeable with the maintenance and care of the bastard child. These statutes speak of the offence of the reputed father and mother *leaving* such children to be kept at the charge of the parish; which seems to imply, that they have a duty imposed on them not to leave such children to be a charge on the parish: and that they have the *lawful keeping* of them at least till dispossessed of that charge by the crown. Vide *Newland v. Osman*, Tr. 27 Geo. 2. 1 Const. 406, and Sayer, 93. 1 Burn's Just. tit. Bastard. And Vide *Rez v. Soper*, 5 Term Rep. 278. *Rez v. Dr. Moseley*, 5 East, 244. *Rez v. Hopkins*, 7 East, 579, and *Ward v. St. Paul*, 2 Bro. Ch. Cas. 583. And vide what is said by Sir Wm. Scott in *Horner v. Liddiard*, Dr. Croke's Rep. 174, 5.

(d) The book referred to was 1 Const's Bott, 405. tit. Bastards, which cites the case from MS. That this was the true ground of the decision is also confirmed by two MS. reports of the same case in my possession; one by Mr. Ford, the other by Mr. Short, a cotemporary at the bar. In the latter, the judgment of the Court is thus briefly, but intelligibly stated: "*Curia*. The point of the act is not whether the lady is legitimate or not, but the taking her from the possession of a person having by lawful means the government of her. The putative father of a natural child has a natural right to the care and education of it, and it is an act of humanity in him so to do; and he has therefore the care of it by lawful means; and the taking her from his possession is the abuse within the act. Information granted."

Mr. Ford's note is, as usual, most full and satisfactory.—

The King against CORNFORTH.—An information was moved for against the defendant and others for taking and carrying away one *Mary Boone*, then under the age of 16 years, out of the custody of her father, and marrying her without his consent to the defendant *Cornforth*.

If these decisions upon the statutes of Hen. 8, and Philip and Mary be shewn to have no fair bearing upon the present question, and the rule of law remain unshaken, that the general terms *father*, *mother*, and *child*, used in acts of

On shewing cause, it was sworn by several affidavits, that *Mary Boone* was an illegitimate child; and therefore it was insisted, that this was neither an offence at common law, nor against the statute 4 and 5 Phil. and M. c. 8. That a bastard was considered in law as the child of no particular person, nor could any one be her guardian, either by common law, or by testament. That her reputed father could not have ravishment of ward at common law, nor any remedy whatsoever for disparagement of marriage. That he was neither guardian by nature, nor nurture, and so could not be within the intent and meaning of the act of parliament, which is declaratory of the common law; and, that to bring her within the words, &c. she ought to be an heiress. Sed. vide the stat. 5 P. and M. c. 8.

E contra, it was insisted, that this was an offence both at common law and within the statute. As to the statute, it might be the first primary intent of it to protect young heiresses or inheritors; but both the preamble and the enacting part of it have a much larger view and extent. The words of the preamble are "maidens, and women children, as well such as be heirs apparent to their ancestors, as others," &c. Then follows the enacting part, (s. 2.) That it shall not be lawful to take and convey away any maid or woman child unmarried, being within the age of 16 years, out of the possession and custody or governance, and against the will of the *father* of such maid or woman child, &c. But supposing the word *father* in this clause should be confined to the strict legal sense of the word, to import a legitimate father only; yet the words in the next clause are large enough to extend to the present case. "That if a person or persons shall unlawfully take or convey any maid or woman child unmarried out of the possession and against the will of the father or mother, or out of the possession and against the will of such person or persons as then shall happen to have by any lawful ways or means the order, keeping, education, or governance, of any such maiden," &c. These words are general and include all persons (not only parents and guardians, who are expressly mentioned and provided for before) but every person whatsoever that shall happen by any lawful ways and means to have the order, keeping, &c. And it cannot be denied but that the parent of an illegitimate child has by lawful ways and means the order, keeping, &c. The statute 18 Eliz. calls the parent of an illegitimate child the *father*, and obliges him to maintain and provide for it, and nature equally obliges him to provide for such children, as if they were legitimate. As to the common law; the offence that is here charged against the defendants is in nature of a conspiracy, which has always been considered as an offence at common law; it was so declared in the case of *Lord Ossulston*; and the case of *The King v. Twisleton*, 1 Sid. 387. 2 Lev. 257, is similar to this in its circumstances.

LEE, C. J. The foundation of the application to the Court is for a contrivance to do an unlawful act, by taking and conveying away a young lady under the age of 16 years out of the possession and against the will of the person who by lawful ways and means happened to have the custody and government of her; and therefore it will not be necessary for this Court to enter into the consideration of that part of the case. Whether this young lady was the legitimate or illegitimate child of Mr. Boone; because that is not the foundation upon which this Court doth always proceed in cases of this nature. In regard to the fact, that is not denied; that the defendant came to Mr. Boone's house with a number of people in order to take and carry away this young lady; of his bribing and corrupting the servants; of swearing that the young lady was 21 years of age, in order to procure a licence, when he had full knowledge to the contrary: that this was against the will of Mr. Boone, who had educated this young lady as his daughter, and under whose custody and government she then was. And as to the willingness and consent of the child to go with the defendant and marry him, that makes no difference at all, but is a circumstance taken notice of by the statute, (viz.) That maids and young women unmarried being allured and won by flattery and fair promises to contract matrimony, &c. and that was one of the principal mischiefs intended to be remedied by the statute.

CHAFFLE and WRIGHT, Justices, to the same effect.

Per Cur.

Let the rule for an information against all the defendants be absolute.

In addition to this, I am able to state, that the two first counts in the information, which was afterwards filed, were for a conspiracy, and did not conclude "against the form of the statute:" the third and fourth counts were framed upon the statute, with an apt conclusion: but did not state whose child she was, but merely that she was taken from the possession of J. B. he then and there having by lawful ways and means the order, keeping, education and governance of her. The first count stated her to be the illegitimate daughter of J. B. and it had been inserted in the third and fourth, but was struck out. The defendants were afterwards convicted, fined 5*l.* and imprisoned for a year.

parliament, must be taken to mean legitimate relations of that description, unless the contrary be expressed, or of necessity to be implied from the subject matter, or by reference to some other law which excludes the distinction; this brings the case to the true construction of the marriage act itself, which has these general words in the 11th section, and must therefore be taken to mean legitimate parents and children, unless the contrary be expressed on the face of the act, or must necessarily be implied. It must be admitted that a construction favourable to the defendant *J. W. Hughes* was put upon this clause of the act in *The King v. Edmonton*, E. 24 G. 3. B. R. 2 Const. 85, by two at least of the Judges who decided that case; who relied however principally on *Cornforth's* case which has been sufficiently distinguished from this: but the third^(a) said it was not necessary to give a decisive opinion on the construction of the marriage act; for if the case were within the act, there was nobody to consent to the licence but the *putative* father, and no body else could be meant: and if the act only extended to cases where there was a *lawful* father, then the case was not within it, and no consent was necessary. It is uncertain therefore on which of those alternatives the learned Judge meant to rely: and if the legal conclusion does not necessarily follow from the alternatives so stated, it lessens in this instance the weight justly attached to his opinions in general. But in *The King v. The Inhabitants of Hodnett*, 1 Term Rep. 96, the marriage by licence of an illegitimate child under age was expressly held to be void within the 11th section of the act, for want of the consent thereby required: though that does not conclude the present question, because there was no consent of any person given in that case. The authority, however, of *The King v. Edmonton* is directly opposed by the judgment of Sir Wm. Scott in *Horner v. Liddiard*; for there the mother who had been appointed guardian by the putative father, consented to the licence, and yet the marriage was decreed to be void: and also by the established practice of the Court of Chancery, since the passing of the marriage act, to appoint a guardian to consent to the marriage by licence of an illegitimate minor, although the natural parents were still living. It is also material to be considered, that by the ecclesiastical law to which the marriage act necessarily refers when speaking of licences, no licence can be obtained by a minor without oath of the consent of the father, if living, or if dead, of the testamentary guardian, if any; and no such oath could be made by, or would be received from a *natural* father, who must in the same breath accuse himself of an ecclesiastical offence for which he would be punishable by that law. Neither can any other but a legal father appoint a testamentary guardian by the stat. 12 Car. 2. c. 24. s. 8, as is shewn by Sir Wm. Scott in *Horner v. Liddiard*, Dr. Croke's Rep. 180; and the guardian interposed by the 11th section of the statute, between the father and mother, whose consent is required to the licence, must be a testamentary guardian: for the only other guardian known to the law for this purpose is the one appointed by the Court of Chancery, who is mentioned after the mother in the same clause; and as the same learned Judge observed, *ib.* 173, the *father* and *mother* spoken of must be *ejusdem generis*, not a legal father and an illegal mother. And he has also pointed out the manifest inconvenience and uncertainty that would ensue from admitting the power of a putative father to bind the child by his consent, from the difficulty in many instances of ascertaining by whom such consent must be given. By the same rule it must be admitted, that the publication of banns cannot be forbidden by natural parents. The result of the whole is, that illegitimate children are within the general provisions of the act prohibiting marriages otherwise than by banns or licence: but the consent of *fathers* and *mothers* required by the 11th section to the validity of a marriage by licence, where the child is under age, must, upon the principle as well of the common law as of the ec-

(a) *Buller, J.*; Lord Mansfield, C. J. was absent.

clesiastical law, be understood of *legitimate* fathers and mothers : and no such consent having been given in this case, nor any consent by a guardian appointed by the Court of Chancery for this purpose, the consequence is, that the marriage was null and void by the express enactment of the statute.

For the defendants, the case was argued in the alternative, either that natural children and their parents were within the several provisions of the marriage act ; and then the words of the 11th section were satisfied by the consent of the natural mother *Jane Hughes* ; the natural father being dead, and no guardian intervening : or if the words of that section comprehended only legitimate fathers and mothers ; then that this was *casus omissus*, and no consent was necessary to the obtaining of the marriage licence of the illegitimate infant. First, it must be admitted, that the case falls within the express words of the act : and though the words *father* and *mother* there used must have the same relative construction : yet considering the nature of the subject matter, and the avowed object of the act, to protect the youth and inexperience of children from surprize and imposition, there is no reason for restraining the natural meaning of the words, as there may be in respect of laws regulating the succession to property, which are always governed by legal technical rules. The consent of illegitimate parents where they are known, as in this case, is as much within the general scope and reason of the act as that of legitimate parents, and their moral duty is the same. The marriage act, as Sir *Wm. Scott* states in *Horner v. Liddiard*, P. 167, of Dr. Croke's Report, introduced a new rule ; for at common law a marriage by parties at the age of consent (14 in males, 12 in females) was good, though without the consent of parents ; and even when contracted before that age, if they did not dissent when they attained it. The canons of 1603, requiring the consent of parents to a licence, never bound the laity, but only the clergy ; and before the marriage act nothing was more common than for minors to marry without any such consent. The question then is, whether the Court is bound to narrow the words of a new statute law against the freedom and policy of the common law, which admitted of no restraint in this matter. The act does not speak of *ancestor* or *heir*, or other words of legal technical signification, but of *father* and *mother*, which are terms of mere natural relation : *hæres est nomen juris ; filius est nomen naturæ* : the word *guardian* was interposed merely to meet the provision of the stat. 12 Car. 2. c. 24. s. 8, enabling a father to appoint a testamentary guardian to his children. What is said in the books, as to a bastard being *filius nullius*, is merely applied to real descent and personal succession : but according to Lord *Coke*, Co. Lit. 3. b. a bastard may take as a purchaser by the name of the *son* of *J. S.* after he has gained a name by reputation as the son of *J. S.* ; and this even in a deed, where the greatest certainty is required. And though Lord *Coke* goes on to say in the same place, that a remainder cannot be limited to a bastard by the name of son or issue of such an one, before his birth ; yet the contrary of that was expressly adjudged in *Blodwell v. Edwards*, Noy, 35. Moor, 430. 2 Roll. Abr. 43, pl. 11, cited in the margin of the book, where the remainder was granted to the issue, whether lawful or unlawful, of *A.* on the body of *B.* to be begotten. So in Bro. tit. *Graunts*, pl. 17, where baron and feme had a daughter *Agnes* before their marriage, and afterwards made a feoffment, with remainder to *Agnes the daughter of the said baron and feme* ; it was held to be a good name of purchase, and she recovered by that name in assize. If a woman, having a child before marriage by a man by whom after marriage she had other children, devise to her *children* ; it was considered (in Moor 10. pl. 39,) to be clear, that the bastard would take under that description, as being without doubt *her* child ; though it was then doubted in the case of such a devise by the man. Certainly, however, the bastard would take in both cases, if such appeared to be the intention of the devisor. Before the statutes of H. H. 25 H. 8. c. 22. s. 3. 28 H. 8. c. 16. s. 2, and 32 H. 8. c. 38, the courts of com-

mon law had no jurisdiction in matrimonial causes; but now, having jurisdiction to construe those statutes, they would grant a prohibition to the ecclesiastical court, if it attempted to impeach any marriage not within the Levitical degrees as recognized by those statutes. But it is admitted, *Horner v. Liddiard*, Dr. Croke's Rep. 177, that natural relations within the terms of *father, mother, brother, sister, &c.* there used, would be prohibited from intermarrying; and this does not rest merely on the principle on which it is put in the ecclesiastical court, that moral restraints attach upon natural consanguinity, but upon the true construction of those words in the statutes of Hen. 8, made *in pari materia* with the marriage act, as settled in the case of *Haines v. Jeffreys*, Com. Rep. 2. 1 Ld. Ray. 68. 5 Mod. 168, and Comb. 356. The argument derived from the difficulty of ascertaining the natural father applied as strongly to the statutes of H. 8, as it does to the marriage act; but the Court thought that it was not insuperable, and that the fact might be ascertained by a jury upon evidence, as in all other cases of disputed facts. The decision upon the stat. 4 & 5 Ph. & M. c. 8, followed in *The King v. Cornforth*.(a) The 2d section of that statute first gives the power to the *father* to bequeath or grant by his *will*, or other act in his *lifetime, the order, keeping, education or governance* of his child; and it prohibits the taking such unmarried child, under 16, out of the possession and against the will of the father, or of such person to whom by his will or other act in his lifetime he shall have bequeathed or granted the order, keeping, &c. of such child; with an exception of any taking, without fraud, by a master or mistress, or guardian in socage or chivalry, of such child. Then the 3d section on which the case of *The King v. Cornforth* was decided, speaking of a taking from the possession of the father or mother, or of "such person as shall *then* happen to have, by any lawful means, the order, keeping, education, or governance" of such child, must be understood of persons appointed by the *will or other act in the lifetime of the father*, that is, after his death, and deriving their authority from *him*: it could not mean that the consent of a school-mistress, with whom the child happened to be placed by her natural father, would take the case out of the act. If therefore the natural father, from whose possession the child was taken, were not, as such, within the act, it seems difficult to bring the case within it, as there was no pretence of authority from any other person named therein: and the report in Strange puts the decision on that ground; and so it was considered by Buller, J. in *The King v. Edmonton*, 2 Const. 85: which latter case is a direct authority at law, and is so admitted to be, upon the very point now in judgment. The case of *Thoroton v. Thoroton*(b) must also be considered as an authority on the same side. An action was first brought by the husband for criminal conversation with the wife, which was tried before Mr. Justice *Grose* on the *Midland* circuit. Mrs. *Thoroton* was an illegitimate child, who had been married by licence with the consent of her putative father Mr. *Manners*: and it was open to the defendant to have taken that objection to the marriage if well founded; but it was not taken. Afterwards the husband libelled in the Court of Arches for a separation for adultery, when all the circumstances appeared on the face of the libel; and after sentence, there was an appeal to the delegates by whom the sentence for separation was confirmed: but no objection was taken to the marriage, either by the civilians who argued, or by the Judges who decided the case; though Sir *Wm. Scott* said(c) that he could not take upon him to assert, that it did in no degree fall under the consideration of the Court in the decision of the case. As to the objection arising from the provision of the 11th section of the marriage act interposing the consent of a testamentary guardian between the father and mother, because such a guardian cannot be appointed by a putative father under the stat. 12 Car.

(a) 2 Stra. 1162. And vide ante, p. 9, note.

(b) Mentioned by Sir *Wm. Scott*, in *Horner v. Liddiard*, p. 183, of Dr. Croke's Report.

(c) *Ib.*

2. c. 24. s. 8; the reason why such an appointment could not be made under that statute, which was for the abolition of feudal tenures, was because it had relation to the descent of real property. Unless lands descended, there could be no guardian in socage; and the 8th clause was to enable fathers to substitute guardians by will of their children for guardians in socage, and to extend the period from 14 to 21 years; but substantially they are the same. (a) But the words of the 11th clause of the marriage act are as well adapted to the case where the father has no power to appoint such a guardian, as to the case where, having such a power, he has not chosen to exercise it; for they are, "in case *there shall be no such guardian*," (not, "in case *the father shall not appoint such guardian*") then the mother is to consent. Then the practice of the Court of Chancery in appointing guardians to consent to the marriage by licence of bastards, which is relied on, cannot press much upon the argument as to the legal construction of the statute; for it would be sufficient to account for it as a matter of abundant caution, that the question had been doubted by any professional adviser at any time: it is an *ex parte* proceeding, which could admit of no controversy; and the practice of the Court has always been to appoint the acknowledged father if living, or, if dead, the mother.

But, 2dly, if the natural parents cannot consent within the act, then this is *casus omissus* altogether, and no consent was necessary. At common law no consent of parents was necessary, if the parties were of the age of consent: and the legislature could never have intended to impose a condition on any persons which was impossible to be performed by them. Of those to whom the law denies father, mother, or testamentary guardian, the consent of such cannot be required: the consent therefore required in that clause must be confined to legitimate children; and to make the construction of it consistent and uniform, the consent of a guardian appointed by the Court of Chancery must be taken to be only substituted in the place of the consent of the father, testamentary guardian, and mother, where there might have been persons standing in those relations to the minors spoken of. Considering the object of the act, this is a question of common sense rather than of technical construction on the words of it. If natural children be within the act at all, they must be within all the provisions of it; but they must be either altogether within or altogether out of it.

The Court took time for consideration; and finally the Judges not being all agreed in opinion, the following separate certificates were sent to his Honour.

THIS case has been twice argued before us by counsel: we have considered it, and are of opinion, that all marriages, whether of legitimate or illegitimate persons, are within the general provision of the statute 26 Geo. 2. c. 33, which requires all marriages to be by banns or licence; and that the consent of the natural mother to the marriage by licence of an illegitimate minor is not a sufficient consent within the 11th section of that act: consequently, that the marriage had and solemnized between the said *John Wynne Hughes* and *Jane* the mother, on the 9th September 1792, in manner aforesaid, was not a good and lawful marriage, but was void by force of the said statute of 26 G. 2. c. 33.

ELLENBOROUGH.

S. LE BLANC.

J. BAYLEY.

HAVING heard this case argued by counsel on the part of the plaintiff and defendant, and having considered the words and purview of the stat. 26 G. 2. c. 33, and particularly of the 11th sect. of that statute, it seems to me from the words of that section, that the legislature had in their contemplation only the marriages by licence of such legitimate children who had, or might have

(a) Vaugh. 179. *Duke of Beaufort v. Berty*, 1 P. Wms. 704, and *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 107, &c.

either parents to consent to the marriage of such children, or guardians whom the legislature intended to substitute for such parents under different circumstances; and that they had not in their contemplation to provide for the marriages of illegitimate children whose parents could not legally forbid the banns, if they were to be married by banns, and who could have no such parents as are intended to be described in the 11th sect. of the act above mentioned, that is, legitimate parents, if they were to be married by licence: and therefore that the marriage had and solemnized between the said *John Wynne Hughes* and *Jane Hughes* the mother on the 9th September 1792, was *casus omissus* in the statute, and a good and lawful marriage to entitle the said *Jane Wynne Hughes* to succeed to the real estates of which the said *Zachary Hughes* died seised as aforesaid, as his lawful heir.

N. GROSE.

Parkin v. Tunno.

11 East, 22. April 20, 1809.

[S. C. at *Nisi Prius*, 2 Campb. 59.]

A policy of insurance from *Bristol* to *Monte Video*, or other port in the river *Plate*, where the ship, after arriving off *Maldonado* at the mouth of the *Plate*, was immediately ordered off by the *British* Commander there, (the enemy having before got possession of every other port in the river,) will not cover a loss which happened to the goods insured by a peril of the sea after the ship's departure from thence in her way to *Rio Janeiro*, which was the nearest friendly port, and to which she was under a necessity of going for water and repairs.

THIS was an action on a policy of insurance on goods on board the ship *Laurel*, at and from *Bristol* to *Monte Video*, and any other port or ports in the river *Plate* in possession of the *English*; and the plaintiff declared on a loss by perils of the sea. It appeared at the trial at *Guildhall*, before Lord *Ellenborough*, C. J. that when the vessel arrived in the *Plate*, *Monte Video*, and every other port in that river, except *Maldonado*, was in possession of the enemy; (there being then war between *Great-Britain* and *Spain*;) and the *English* commander of *Maldonado* ordered the vessel away immediately upon her arrival, in consequence of the urgency of public affairs, which did not admit of any delay: whereupon the vessel, being short of water, and in want of repairs, bore away directly for *Rio Janeiro* in the *Bravils*, being the nearest friendly port of safety, and in her course thither she met with a peril of the sea, to which the injury sustained by the goods might fairly be attributed in the absence of any direct evidence of a prior cause of damage.

It was therefore insisted at the trial, and now again by *The Attorney-General*, in moving to set aside a nonsuit, that the ship not being able under these circumstances to proceed to any port in the river *Plate* in the possession of an enemy, and being ordered away from *Maldonado* immediately after her arrival there, by the authority of the *British* commander whom the master was bound to obey, the policy continued to cover her to the nearest port of safety to which she was under the necessity of repairing. But

Lord *ELLENBOROUGH*, C. J. at the trial, and the rest of the Court now, were of opinion, that the policy containing a contract for a specific voyage could not be extended by implication to cover the ship in her voyage to *Rio Janeiro*, notwithstanding the circumstances which had occurred to induce the necessity of it: and therefore refused the rule.

Irwin v. Dearman.

11 East, 23. April 20, 1809.

Damages ultra the mere loss of service having been given against the defendant for debauching and getting with child the *adopted* daughter and servant of the plaintiff, by which he lost her service, the Court refused to set aside the inquisition.

THIS was an action on the case for damages, charged in one count to be, for debauching and getting with child the *adopted* daughter and servant of the plaintiff, by which he lost her service; and, in another count, for debauching his servant, generally, per quod, &c.: and the defendant having suffered judgment by default, a writ of inquiry was executed before the sheriff of *Middlesex*, when it appeared in evidence that the plaintiff, an officer in the army, had taken charge of the infant daughter of a deceased soldier in the regiment, who had been a friend and comrade of his, which daughter he had bred up for several years in his house, where she was performing the offices of a menial servant, (being the only one he kept,) at the time she was debauched by the defendant. The only actual damage proved by the plaintiff was the loss of the young woman's service for 5 weeks, during the time of her absence in the parish workhouse, where she lay in; the expence of her lying in having been paid by the defendant. But the jury under these circumstances gave 100*l.* damages.

Abbott now moved to set aside the inquisition of damages, as being greatly excessive, with respect to the general count; and having no legal foundation, with respect to the count charging in aggravation that the servant was the plaintiff's *adopted daughter*. The allowing of an action of this description even by a legitimate parent is an anomalous case; as enabling one person to recover damages for an injury done to another; but having been so long countenanced by the courts in practice, it cannot now perhaps be questioned upon principle. And the extension of the remedy, in *Edmondson v. Macbell*, 2 Term Rep. 4, to an action by an aunt with whom the niece was living, was very much doubted at the time; and the case ultimately ended in a compromise. At least that cannot be called into precedent for a further extension of the principle to the case of one who is no relation at all, but only, as the count states, *by adoption*, which is not recognized by our law.

Lord ELLENBOROUGH, C. J. This has always been considered as an action *sui generis*, where a person standing in the relation of a parent, or in *loco parentis*, is permitted to recover damages for an injury of this nature *ultra* the mere loss of service. But even in the case of an actual parent, the loss of service is the legal foundation of the action. And however difficult it may be to reconcile to principle the giving of greater damages on the other ground, the practice is become inveterate and cannot now be shaken. And having been considered, in the case of *Edmondson v. Macbell*, to extend to an aunt, as one standing in *loco parentis*, I think that this plaintiff, who had adopted and bred up the daughter of a friend and comrade from her infancy, seems to be equally entitled to maintain the action, on account of the loss of service to him aggravated by the injury done to the object on whom he had thus placed his affection.

Per Curiam,

Rule refused.(1)

(1) Vide 2 Esp. Dig. 279. New-York edit.

Sturmy qui tam v. Smith.

11 East, 25. April 20, 1809.

Action lies upon the stat. 44 Geo. 3. c. 13. s. 4, by a common informer, suing for himself and the king, to recover a penalty against the sheriff for the misconduct of his bailiff, in wilfully suffering a seaman to go at large who had been taken out of the king's service by arrest on civil process, on which he was afterwards bailed, instead of delivering him over to the charge of a proper naval officer: the statute which speaks of *sheriffs, gaolers, or other officers arresting, apprehending, or taking in execution* such seamen, or in whose custody they may be, and who are made liable for their escape, meaning by "*other officers*" such as may be charged with the execution of criminal warrants against such seamen, or to whom any process may properly be directed for their arrest, detention, or discharge; and not the inferior officers of the sheriff. And the sheriff may be charged in such action for *wrongfully* and *wilfully* permitting the escape.

THE stat. 44 Geo. 3. c. 13. s. 1, reciting that seamen had of late been taken out of the king's service by means of arrests and detainers, as well for real or pretended debts as upon charges for alleged criminal offences, and have been afterwards discharged out of custody by due course of law, or by consent of the persons at whose suit or on whose complaint they had been so arrested or apprehended, in order to enable them to desert from the king's service; for remedy enacts, that whenever any seaman, &c. shall be arrested, apprehended, or taken in execution *by any sheriff or other officer or officers*, on mesne or other process, or by virtue of any warrant for any alleged criminal offence, and shall be thereby taken out of the king's service, &c. *the sheriff, gaoler, or other officer or officers, who shall have arrested or apprehended any such seaman, &c. or in whose custody* any such seaman, &c. shall happen to be by way of detainer, &c. shall not discharge any such seaman, &c. out of his or their custody either on satisfaction of the debt, or want of prosecution for or upon acquittal of the charge on which such seaman, &c. shall be in custody as aforesaid, or on bail or by consent, &c.: but shall detain every such seaman, in his or their custody, and with all convenient speed convey and securely deliver him to the commander in chief of some of his majesty's ships, or to some authorized commissioned officer, &c. nearest to the place where such seaman, &c. shall be; in order that he may be kept to serve on board the fleet as before. And s. 4, enacts that "in case any *sheriff, gaoler, or other officer or officers* shall not securely convey and deliver any such seaman, &c. to such commander in chief, &c. but shall *either wilfully or negligently* permit such seaman, &c. to escape; every such sheriff, gaoler, or other officer or officers, shall for every such offence forfeit 100*l.*, to be sued for by action of debt," &c.

The present was an action of debt framed upon this statute, stating that *J. W.* was an impressed seaman in his majesty's navy on board the ship *Enterprize*, &c. and was in custody of a lieutenant of his majesty; that a bill of latitat issued to the sheriff of *Middlesex* to arrest him for 1*l.*, which was delivered to the sheriff to be executed, and by virtue of that the defendants did arrest *J. W.* and took him out of the said vessel, and that *J. W.* afterwards gave bail to the sheriff; yet the defendants, not regarding the statute, did not convey *J. W.* to any commander in chief, &c., but unlawfully and *wilfully* did permit *J. W.* to escape, whereby, &c. they forfeited 100*l.*, which the plaintiff sued to recover, half for himself, and half for the king.

At the trial before Lord *Ellenborough*, C. J. at the Sittings at *Westminster*, the latitat issued against *J. W.*; his arrest by one of the sheriff's bailiffs; the sheriff's return of *cepi corpus*; the situation of *J. W.* as an impressed seaman in the navy as stated in the declaration; and the wilful escape permitted by the bailiff after *J. W.* had given bail, were proved; and the only question was, Whether the sheriff were liable in this action for the acts of his bailiff, within

the true construction of the statute; or whether the action should have been brought against the immediate bailiff who permitted the seaman to escape after his arrest; in other words, whether proof of the *wilful* act of the *officer* who suffered the escape were sufficient to sustain the allegation of a *wilful* escape against the *sheriff* in a penal action. The plaintiff recovered a verdict for the penalty at the trial: and leave was given to the defendant's counsel to move to enter a nonsuit, if the Court thought the action ill founded. This was accordingly moved in *Hilary* term, and a rule obtained, on the ground that the sheriff was only answerable civiliter, and not criminaliter, for the act of his bailiff; that a penal action was of a criminal nature; and that there was no instance in the books of such an action maintained against a sheriff for the act of his bailiff; though the sheriff was admitted to be liable in remedial actions by the party grieved; as in *Woodgate v. Knatchbull*, 2 Term Rep. 184. On this day, Lord *Ellenborough*, after making his report, and stating the question as above mentioned, referred to *Laicoock's* case, Latch. 187, where the general rule is laid down, that the sheriff shall be answerable for every act of his officers in the execution of his office, except that he shall not be imprisoned or indicted for the act of his under-sheriff; but for other matters of damages to the party, the sheriff, (and not the under-sheriff, whose act there was complained of,) shall answer to the party, and shall be fined and amerced; and *Whitlock*, J. agreed that the sheriff, and not the under-sheriff, should be charged for an escape, because it was a misdemeanor in the execution of his office, and the sheriff was the sole officer as to the Court.

The Attorney-General, Garrow, and Richardson, shewed cause against the rule; and relied on the manifest intention of the statute in question to make the sheriff liable for the acts of his bailiffs, by naming him in the several clauses; although the Legislature could not have contemplated that arrests were made by his own hand: and therefore they must have intended to make him liable in respect of the acts of his officers: and the words "or other officer or officers," in addition to *sheriffs* or *gaolers*, mean other officers of the same kind, such as bailiffs of liberties. They also referred to *Woodgate v. Knatchbull*, 2 Term Rep. 184; and *Pechell v. Layton*, 2 Term Rep. 512, 712, which last was the case of a penal action against the sheriff for the act of his officer.

Marryat and *Comyn*, contra, said that they could find no case of an action by a common informer for a penalty against the sheriff for the act of his officers; though he was answerable in damages to the party grieved by their misconduct: and they observed that both *Woodgate v. Knatchbull* and *Pechell v. Layton*, were actions by the parties grieved, to whom alone the treble damages in the one case, and the penalty in the other, were given by the stat. 29 Eliz. c. 4, and the stat. 32 G. 2. c. 28. s. 12, on which those actions were respectively founded. They contended that the object of the act, in mentioning "*sheriffs, gaolers, or other officer or officers*," was to make each of them personally liable to his own misconduct in the particular case provided, and not to make the superior only answerable; if this were otherwise, *gaolers* would not have been mentioned by name, for whom as well as for his bailiff the sheriff is civilly responsible by the general law. No doubt the bailiff arresting and permitting the escape would be liable to the penalty. [Lord *Ellenborough*, C. J. That is not so clear: for if the sheriff were meant to be made responsible for the acts of his own officers, I am not prepared to say that any of his bailiffs would be liable to the penalty in this clause: but it is not necessary to decide that question now.] At most the sheriff himself can only be charged as for a *negligent* escape by the improper conduct of his bailiff, and not for a *wilful* escape with which he is charged in the declaration; for *wilful* implies a personal act. Like any other master he may be chargeable with negligence through the medium of his servant, for whose acts within the scope of their employment the master is liable; because it is his duty to employ proper per-

sons to execute his orders; but if the act be charged to be wilfully done by the servant, the master would not be liable.

LORD ELLENBOROUGH, C. J. Before the act of the 44th of the King was passed there existed that great inconvenience to the public naval service, that seamen who had volunteered or been impressed were afterwards taken out of the service by means of arrests or detainers for alleged debts or offences, from which they were afterwards discharged either by due course of law or by collusion with the parties, and were thereby enabled to withdraw themselves from the service. The act recites the mischief and provides a remedy, by requiring the sheriff or sheriffs, gaoler or gaolers, or other officer or officers who shall have arrested or apprehended any such seaman, or in whose custody he shall be by virtue of any writ, process, warrant, charge, or accusation, or of any judgment or sentence of a court, after the party would otherwise have been entitled to his discharge in respect of the arrest or detainer upon civil or criminal process, &c.: to detain him and deliver him over to some proper officer of the navy. And the penalty is afterwards given against the sheriff, gaoler, or other officer, who shall not make such delivery, but wilfully or negligently permit an escape. The legislature meant, therefore, to extend the duty of the officer who had the civil or criminal custody of the seaman, when that duty would otherwise have concluded with discharging him, to hold his person over for the other purpose, provided by the act, of the naval service in which he was before engaged. Now, though it is admitted that this seaman was for all civil purposes to be considered as in the custody of the sheriff, by virtue of the arrest of his bailiff; and though the act expressly mentions seamen arrested, apprehended, or taken in execution by any "sheriff or sheriffs or other officer or officers;" yet it is in effect contended that the word *sheriff* in the act does not mean *sheriff*, but means under-sheriff or some other inferior officer in whose actual custody the seaman is. But why should not the legislature have meant that which they have expressed? Why should not that officer who is personally liable to the plaintiff at whose suit the seaman is arrested or detained upon civil process for his safe custody, be also made personally liable to the crown for his restoration to the public service out of which he had been before taken? In every case where the sheriff is mentioned in the act he must necessarily be liable; and there are other parts of the act where he is named as doing or liable to do certain acts, which it is notorious are always in fact done by his officers: and by the general rule of law the sheriff, though not personally acting, is liable for the wrongful act of his bailiff. As in *Laicock's case*, in *Latch*, 187, where the contention was that the under-sheriff was liable upon his personal misconduct for not arresting and detaining a person against whom a writ had issued at the suit of the plaintiff, which was delivered to the under-sheriff in whose presence the defendant in the suit then was: but *Doderidge*, J. held that for every default in the execution of his office, although by the neglect or fraud of the under-sheriff, the sheriff shall be amerced and fined here and in the Exchequer: and *Jones*, J. agreed, with this difference only, that the sheriff shall not be imprisoned, nor shall any indictment lie against him for the act of his under-sheriff. And *Whitlock*, J. agreed that the sheriff, and not the under-sheriff, should be charged because it is a misdemeanour in the execution of his office, and the sheriff is the sole officer with respect to the court. In truth, in all cases where the sheriff is attached for not bringing in the body, although by that proceeding he be made amenable to the benefit of the party injured, yet it is penal in the form of it, by fine to the King. But then it is said, that there is no instance in which a sheriff has been held liable in a *qui tam* action for the act of his officer. Such an action was, however, brought in *Stanway q. t. v. Perry*, 2 Bos. & Pull. 157, and the plaintiff recovered a verdict; no question was made but that the sheriff was liable in the penalty upon the 29 Eliz. c. 4, for the extortion of his officer; though that was not the principal point in the case, and a new trial was granted upon ano-

ther ground : but the plaintiff afterwards had a verdict and judgment ; so that the point did arise ; but no objection was ever taken to it. Then as the sheriff is liable to the plaintiff in an action for the escape of the defendant out of his custody by the wilful act of his bailiff ; so is he liable upon this statute to the King, who has an interest in the persons of those seamen who constitute the national force, and is injured by their being withdrawn from it.

GROSE, J. The question is, whether the seaman must not be said to have been *arrested* by the sheriff at the suit of the plaintiff in the action ? for if so, the statute is clear that the sheriff is chargeable with the delivery of the seaman over to the custody of the King's naval officer after satisfaction of the writ. Is such arrest then to be deemed the act of the sheriff, or of his officer ? It is made by the officer of the sheriff, and by virtue of the sheriff's warrant. Then why is it not to be deemed the act of the sheriff as much as it is with respect to the party at whose suit the seaman was arrested. And as the sheriff would be liable to such party for the wilful act of his officer in permitting an escape ; it would be strange to say against the plain words of this statute, that the King should not have a remedy against his own officer for the misconduct of those employed by him in the execution of his office, when every subject has a remedy in like cases against the sheriff.

LE BLANC, J. The question arises on the construction of the stat. 44 G. 3, which specifically imposes a forfeiture of 100*l.* on every *sheriff*, *gaoler*, or other officer, who shall not safely conduct and deliver to a naval officer any seaman in the King's service who shall have been arrested, apprehended, or detained by such sheriff, gaoler, or other officer, by virtue of any process, warrant, &c., when the seaman would otherwise have been entitled to be discharged out of custody upon such civil or criminal process. And the question is, whether the legislature meant to impose the penalty on the sheriff only in case of his having personally arrested, apprehended, or detained the seaman. Now, if the statute had not had the words "*or other officer or officers*" in it, it could hardly have been contended that the sheriff would not have been liable for the acts of his own officers : it is therefore material to consider what is the meaning of those words, "*or other officer or officers.*" The statute in the first instance only speaks at first of seamen *arrested*, *apprehended*, or taken in execution, by any *sheriff* or other officer or officers ;" by virtue of any writ or *process whatsoever*, or by virtue of any *warrant* for an alleged criminal offence : but when speaking afterwards of seamen *in custody*, it introduces the word *gaoler*, in addition to *sheriff* or *other officer*. The word *sheriff* therefore is used with reference to arrests, &c. of seamen charged with any process civil or otherwise, directed to the sheriff ; and *officer*, with reference to such as may apprehend seamen charged with any offence by virtue of any warrant from magistrates ; and *gaoler* is used when speaking of seamen committed to his custody. That this is the meaning of the word *officer* is further evident from the 2d section, which requires that in case any such seaman shall be removed out of the custody of any sheriff, gaoler, or other officer, by whom he shall have been arrested or apprehended, or in whose custody he shall be, into the custody of any other sheriff, gaoler, or officer by habeas corpus, &c., the sheriff, gaoler, or *other officer*, so having arrested or apprehended such seaman, or in whose custody he shall be, shall *certify* in writing to the sheriff, gaoler, or *other officer into whose custody the seaman shall be so removed*, upon the back of the writ or other proceeding by which such seaman shall be removed, that he is liable to be detained for his majesty's service. Now it is clear that *other officer* than the sheriff or gaoler, could not there mean any sheriff's officer ; for who but the sheriff himself, or the gaoler to whose custody the party is committed, or other officer having the execution of process, is the officer to whom the writ of habeas corpus is ever directed, or who is to certify as there required. It cannot apply to any inferior officer of the sheriff, who is a mere servant of his, in whose actual custody the seaman may happen to

be; but to such an officer to whom, as such, the writ of habeas corpus may be directed. Then if the sheriff only be meant, and not any of his inferior officers, under the description of "*sheriff, gaoler, or other officer*," it is clear that the sheriff would be liable upon the statute for the act of his officer.

BAYLEY, J. It is said that there is no instance where a sheriff has been held liable in a penal action by a common informer for the act of his officer: but in *Woodgate v. Knatchbull*, where the sheriff was held liable in the penalty of treble damages to the party grieved on the stat. 29 Eliz., Mr. Justice Ashurst intimated a strong opinion that the sheriff would be liable on the clause giving the penalty, half to the informer, and half to the King. And Mr. Justice Buller explained the expression in the books, that the sheriff is answerable civiliter, and not criminaliter, for the acts of his bailiffs, by reference to the authorities, to mean that the sheriff shall not be indicted for the acts of his bailiff, but shall be liable in a civil action to make pecuniary satisfaction. And Mr. Justice Grose said, that he would not give any opinion on the point whether the action could be maintained against the sheriff for the penalty, though he had not much doubt on that. Then the case of *Stanway qui tam v. Perry* was an action for the penalty by a common informer against the sheriff. It was twice tried, and the plaintiff recovered: and therefore if it had occurred either to the Court or the Bar, that the action was improperly brought against the sheriff himself for the act of his officer, no doubt it would have been questioned. Half of the penalty there went, to the King, and half to the informer. It appears therefore that the assumed ground of objection to this action, from the want of precedent, is not so strong as was supposed. Upon the words of this act there can be no doubt. It speaks of *seamen arrested, apprehended, or taken in execution, by sheriffs or other officers*. Now, it is well known, that the sheriff personally never does arrest defendants, but always performs that duty by his officers. In fact, the word *sheriff* must be struck out of this clause as for any real purpose, if he be not liable for the act of his officer. Then the observation made by my brother *Le Blanc* upon the second clause is very strong. The writ of habeas corpus is never directed to the sheriff's bailiff, but to the sheriff himself; considering the actual custody of the party by the bailiff as the sheriff's custody.(a)

Rule discharged.

Favenc and Others v. Bennett and Others.

11 East, 36. April 20, 1809.

Goods sold by a broker for a principal not named, upon the terms, as specified in the usual *Bought and Sold* notes, delivered over to the respective parties by the broker) of "*payment in one month, money*," may be paid for by the buyer to the broker within the month, and that by a bill of exchange accepted by the buyer and discounted by him within the month, though having to run a longer time before it was due. But where the buyer was also indebted to the same broker for another parcel of goods the property of a different person, and he made a payment to the broker, *generally*, which was larger than the amount of either demand, but less than the two together, and afterwards the broker stopped payment; such payment ought to be equitably apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer.

THIS was an action for goods sold and delivered, and the question was, whether certain coffee, the property of the plaintiffs, which had been sold to the defendants by the intervention of the *Kennions*, brokers employed by the

(a) "This, (said Mr. Justice Buller, in *Woodgate v. Knatchbull*, 2 Term Rep. 156.) "has been carried so far, that a return made by a sheriff, that the person arrested was "rescued out of the custody of the bailiff, has been held to be bad: the return must be, "that the person was rescued out of *his* custody."

plaintiffs for that purpose, had under the circumstances been duly paid for by the defendants, who had purchased the coffee from the brokers without knowledge of their principals, by means of a bill of exchange drawn by the *Kennions* on the defendants, and accepted by them, for a larger amount than the value of the goods in question; the defendants having also purchased other coffees of a different owner through the like intervention of the *Kennions*; for which they were at the same time indebted. The particular circumstances of the case are stated hereafter. A verdict was found for the plaintiffs under the direction of Lord *Ellenborough*, C. J., before whom the cause was tried at *Guildhall*, after *Hilary* term, 1808: and the merits of the case upon that direction were first discussed in *Easter* term, 1808, upon a motion for a new trial, which, in the ensuing term, was supported by *Park*, *Topping* and *Holroyd*, and opposed by *The Attorney-General*, *Garrow*, and *Taddy*. The cases of *Fenn v. Harrison*, 3 Term Rep. 576; *George v. Clagett*, 7 Term Rep. 359, and *Waring v. Favenc*, 1 Campb. Ni. Pri. Cas. 85, were referred to in the argument. The case stood over for consideration till the end of *Trinity* term; when the judgment of the Court was given.

LORD ELLENBOROUGH, C. J. On the motion for a new trial in this cause, which was tried before me, the question was, Whether 22 hogsheads of coffee bought by Messrs. *Kennion* and Son, brokers, from *Favenc* and Co., the plaintiffs, and sold to the defendants, and which were sworn by one of *Kennion's* sons to have been paid by the defendants to *Kennions*, the brokers, in a bill of exchange for 800*l.*, before the latter stopped payment, (which was on the 6th of *July*.) were so paid for, as to preclude the plaintiffs, the sellers, from afterwards demanding the price thereof from the defendants, the buyers? The brokers had sent *bought* and *sold* notes on the same day, (i. e. the 12th of *June*, the day of the sale,) to both the plaintiffs and defendants. In the sale note sent to the plaintiffs they had described *themselves* as the buyers from the plaintiffs, and in the bought note sent to the defendants, as the sellers to the defendants: in each there was this stipulation, "payment in a month, money, 1 per cent. discount." The plaintiffs gave the *Kennions* the *West India* Dock warrants, (which represent the goods sold, and enable the holders thereof to obtain immediate delivery of the goods therein mentioned,) on or about the day of the sale, i. e. the 12th of *June*; and the *Kennions* thereupon sent them to the defendants. The price of the plaintiff's coffee, after deducting the stipulated 1 per cent. discount, amounted to 707*l.* 10*s.* 8*d.* On the 15th of *June*, which, as far as I collect from the evidence, was three days after the brokers had delivered to the defendants, the buyers, the *West India* Dock warrants, without having taken any security in the meantime on the behalf of their employers, the plaintiffs, for the price of the goods, the defendants paid *Kennion* and Son in a bill drawn by *Kennion* and Son on them, the defendants, and accepted by the defendants, payable in a month, the sum of 800*l.*, which was meant to cover the above mentioned price of the coffee in question, after deducting the 1 per cent. discount: and the difference was to be applied in part-payment for another parcel of goods sold on that same 15th of *June* by *Kennions* to the defendants, in another account with which the plaintiffs had no concern, for 272*l.* 10*s.* 4*d.* This bill for 800*l.* the defendants, the acceptors, immediately discounted for the convenience of the *Kennions*, the drawers; so that the *Kennions* thereupon became paid in cash on the 15th of *June* for the price of the coffees, to be paid for by the terms of the contract (i. e. in a month, money,) on the 12th of *July* following: deducting, however, discount on the whole amount of the bill for 800*l.* down to the 18th instead of the 12th of *July*, including the three days of grace. The Court is desirous of being further informed, by another investigation to be had before a jury, respecting the mode of conducting sales between parties by the intervention of a broker, in order that they may judge, whether a payment made to a broker, in the manner, and under the circumstances, already stated, be such a payment as is

usually made in the course of trade to a broker on account of his principal. They wish also to know with precise exactness what, in the dealings and understanding of commercial men, is meant by the stipulation "*in a month, money*;" whether it be considered as importing only that the buyer shall pay for the goods in cash at the end of one month from the date of the contract; or that the buyer, whenever he should receive the goods, either at or before the month's end, should immediately give a bill for the amount of the price, so as to put the seller in cash for the same at a month's end from the date of the contract. The Court have thought it proper to suggest thus particularly the points to which it wishes the evidence to be addressed, in order that the opinion of a jury may be hereafter taken, and their own judgment ultimately formed, with better advantage and effect upon the important commercial questions which this cause embraces.

Rule absolute for a new trial.

On the second trial, the jury were of opinion, upon the evidence, that the stipulation in the contract, of "*a month, money*," meant, in the understanding of commercial men, *payment at any time within a month*; and they were also of opinion, that the payment in question within the month to the brokers with whom the defendants had dealt, without the knowledge of their principals, was a good payment to bind the principals; and they therefore found a verdict for the defendants.

The plaintiff's counsel thereupon moved, in the last term, for a new trial, on the ground of the verdict being against law and evidence, and against the direction of the Lord Chief Justice. And they relied principally on an objection, which had been urged on the former occasion, and on which main stress was laid at the last trial, that there was no evidence to shew that the bill drawn by the *Kennions* and accepted by the defendants, and since paid, was intended at the time to cover the demand for the 22 hhds. of coffee in question. The facts were these:—The brokers sold this lot of coffee to the defendants on the 12th of June for 707*l.* 19*s.* 3*d.* (deducting the discount of 1*l.* per cent. on payment in a month, money.) The brokers had also sold to the defendants another lot of coffee belonging to another person to the amount of 272*l.* 10*s.* 4*d.* Then the *Kennions*, on the 15th of June, drew the bill for 800*l.* on the defendants payable in a month, which they accepted, and which would not of course become due till the 18th of July, several days after the price of the first lot of coffee would be due by the terms of the contract of sale. This was relied on to shew that it was intended as a payment by the defendants to the *Kennions* on their general account, and not for the purpose of covering this demand in particular; the sum being greater, and also payable at a future time. And they also urged against this being taken as a specific payment to the brokers on account of the plaintiff's coffee, that the plaintiff could not have brought trover against the *Kennions* for the bill, because it was given for more than their demand: neither could they have maintained an action for money had and received; because the money was paid to the *Kennions* on account generally, and the sum was not sufficient to have paid both the plaintiffs and the owners of the other coffee their respective demands: and it could not depend on which of them first prosecuted their action for the amount. And how, they asked, was the amount of the bill to be apportioned between the different claimants? They also relied on a distinction between payments made to a factor, and to a broker; in the former case, unless the factor name his principal, he is dealt with as the principal: but a broker is known to be only an agent for another, though that other may not be known: the form of the *Bought* and *Sold* notes(a) declares him to be so. And though by the

(a) This was the form of the *Bought* note; and the *Sold* note was in like form, only substituting *sold* for *bought*, and addressed to *Fevenc* and Co. instead of the defendants.

Messrs. Bennett and Co.

London, 12th June 1807.

"We have this day bought by your order and for your account 22 hhds. Jamaica coffee, as per sample, at 5*l.* 8*s.* per cwt.—Payment in one month, money—1 per cent. discount.

Your's, &c.

I. Kennion and Son."

course of trade he may receive payment for his principal, yet such payment, in order to be binding upon the principal, must be made by the contracting party according to the terms of the contract; otherwise it cannot be taken to have been made on account of the principal, but on the general account of the broker himself. If the defendants had intended to have paid their money in discharge of any particular account, they should have declared such intention at the time, or have paid the specific sum due on that account, which must have been known to them. But by paying money generally on account to their brokers with whom they had different accounts to settle, they trusted to them, and did not thereby discharge themselves to the individual principals whom the brokers represented.

The defendants' counsel insisted that there was evidence sufficient to warrant the jury in finding that the bill for 800*l.* drawn by the *Kennions* was accepted by the defendants in order to cover the 707*l.* 19*s.* 3*d.*, the price of the plaintiffs' coffee, inasmuch as it appeared that the defendants themselves had discounted their own acceptance on the 22d of *June*, within the month for which time of payment was given for these coffees, and had given their check of that date for 797*l.* 3*s.* which was the exact amount of the 800*l.* bill, deducting the discount on the payment for the coffees within the month. But when pressed by the Court to account for the bill having been drawn for so much more than the price of the plaintiffs' coffee, if it were not meant to be a general payment of so much on the whole account between the brokers and the defendants; they said, that it was a question for the jury whether the payment had not been made to cover the plaintiffs' whole demand in the first instance, and the surplus only to be applied to the other demand. And if it were to be so taken, as they contended that the verdict of the jury warranted them to do, it would follow that the *Kennions* were in cash on the 22d of *June* for this specific lot of coffee, and the plaintiffs, their principals, might then have maintained an action for money had and received against them, as upon a payment to them for the use of the plaintiffs.

Lord ELLENBOROUGH, C. J. The defendants were indebted for two parcels of coffee which they had purchased by the intervention of the *Kennions*, brokers; the one parcel amounting to above 707*l.*, the other to 272*l.* and upwards. They accept a bill for 800*l.*, which is much more than either of the sums alone, but less than the two together, and there is no specific appropriation of it to either at the time: why then is the whole to be now appropriated to the plaintiffs' demand, since the insolvency of the *Kennions*, when the justice of the case clearly is, that the payment so made to the brokers on their general account, as it seems by the evidence, should be apportioned between the respective owners of the coffee. This will cut down the plaintiffs' demand, but leave something to be recovered by them, for which they ought to have had a verdict.

The rest of the Court concurring in this view of the case, it was directed to stand over to obtain the consent of the respective parties. And, as I was informed, the matter was settled according to the apportionment recommended.

Dagnall v. Wigley and Another.

11 East, 43. April 21, 1809.

A broker agrees with the defendants to get their bills discounted, and that he shall retain out of the money so raised the exorbitant brokerage of 10*s.* per cent; but the broker was not to advance the money himself, nor was his name on the bills: held that a bill accepted by the defendants, and negotiated by the broker upon these terms, could not be avoided in the hands of an innocent indorsee, as for an usurious consideration within the stat. 12 Ann. c. 16.

TO an action by the indorsee of a bill of exchange against the acceptors,

the defence set up at the trial, before Lord *Ellenborough* C. J. at *Guildhall*, was that the bill was drawn for an usurious consideration, and was therefore void even in the hands of an innocent holder, as the plaintiff was admitted to be. It appeared that the defendants, wanting to raise money, applied to *Rimmer*, a broker, to assist them in negotiating their paper, for which he stipulated to receive 10s., instead of the usual charge of 5s. per cent., for brokerage: and several successive bill transactions had passed between them, which the defendants who accepted those bills had provided for, as each had become due, by negotiating another for the amount of the former bill with the addition of the legal discount and the brokerage agreed on; which latter *Rimmer* received, and deducted out of the money raised on each successive bill. The last bill of this description, on which this action was brought, was one which was drawn by one *Smith*, payable to his own order, for 821l. and upwards, upon the defendants, who accepted the same and put it as usual into the hands of *Rimmer* to get it discounted. *Rimmer*, whose name was not upon the bill, carried it into the market, and got cash for it, which he paid to the defendants, deducting the discount and 10s. per cent. brokerage for himself. Lord *Ellenborough* C. J. directed the jury, that there was no actual loan of money here for an usurious consideration, by the party advancing the money on the bill; and that the taking of exorbitant brokerage by *Rimmer* for getting the bill discounted by others, and which was deducted by him out of the money raised, would not avoid the security by the stat. 12 Ann. c. 16, in the hands of an innocent indorsee; and the jury thereupon found a verdict for the plaintiff.

The *Attorney General* now moved for a new trial, on the ground that the words of the statute were large enough in that branch of it which avoids the security to include this transaction; though there were no actual loan from *Rimmer*, who was to receive the usurious consideration for which the bill was drawn from the defendants; and though without an actual loan, no action for the penalty could have been maintained against *Rimmer* upon the other branch of the statute, which requires a loan by the party sued for the penalty. The words of the avoiding branch are, "that all bonds, contracts, and assurances whatsoever for payment of any principal, or money to be lent, or covenanted to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken above 5 per cent. as aforesaid, shall be utterly void." And this bill was drawn upon and accepted by the defendants upon a contract with *Rimmer* for a stipulated sum beyond what the defendants were to receive, in order to secure to him the usurious consideration agreed upon, and which he accordingly received out of the money raised on the bill. And this being agreed to be paid to him under the name of *brokerage* cannot vary the case; it being admitted to be double the amount of that usually paid to brokers for their trouble in getting bills discounted, and therefore a mere colour for usury. [*Bayley, J.* *Rimmer* was not to advance the money himself upon the bill, but to get the bill discounted by others; and the person who advanced the money upon the bill paid the full sum, deducting only the legal discount.] He was to raise the money on the bill which was drawn for the purpose of securing to him the illegal consideration agreed upon: and it was indifferent to the defendants whether he advanced the money himself, or procured it from others.

LORD ELLENBOROUGH, C. J. It does not appear that *Rimmer's* name was upon the bill at all; nor was he to advance the money. It does not therefore strike me as a security given for an usurious consideration; but *Rimmer* was to receive an exorbitant brokerage for his trouble in getting the bill discounted.

LE BLANC, J. If *Rimmer* had agreed to advance the money for which the bill was given, that would have been a different matter: but here he advanced nothing: and the person who did advance the money for the bill received no more than legal interest for discount. *Rimmer* indeed got more out of the

money when obtained; but that may be said to be for exorbitant commission or brokerage.

Per Curiam,

Rule refused.

Beeley v. Wingfield.

11 East, 46. April 21, 1809.

A security for the fair expences of the prosecution, agreed to be given, at the recommendation of the Court of Quarter Sessions, by a defendant who stood convicted before them of a misdemeanour in ill-treating his parish apprentice, for which the parish officers had been bound over by recognizance to prosecute him under the statute 32 Geo. 3. c. 57; and the giving of which security was considered by the Court in abatement of the period of imprisonment to which he would otherwise have been sentenced; is legal.

THIS was an action on a promissory note for 42*l.*, which it appeared had been given by the defendant to a parish officer under these circumstances. The defendant was indicted at the Sessions by the parish officers for a misdemeanour in ill treating his parish apprentice: and being convicted, it was suggested to him by the chairman of the court, that if he agreed to pay 40 guineas towards the expences of the prosecution, he would only be imprisoned 6 months instead of 12. The note was accordingly given, and he was sentenced to 6 months imprisonment. Objection was thereupon taken at the trial before *Bayley J.* at *Derby*, that the note given for such a consideration was illegal; which objection was over-ruled, and a verdict passed for the plaintiff, with leave to the defendant to move to set it aside, and enter a nonsuit, if the objection were well founded.

Vaughan Serjt. now moved accordingly on two grounds; 1st, that the taking of such a composition for punishment in the particular instance was in derogation of the policy of the statute 32 Geo. 3. c. 57. s. 11, which provides, in case of the ill treatment of parish apprentices by their masters in certain cases, that it shall be lawful for two justices "to compel the churchwarden and overseers, &c. to enter into a recognizance for the effectual prosecution by indictment of such master, &c. for such ill treatment of any such apprentice, &c.; and also to order the costs and expences of such prosecution to be paid and discharged or reimbursed to such persons entering into such recognizance as aforesaid; one moiety thereof out of the poor rates of the parish, &c. and the other moiety out of the county stock." 2ndly, On the more general ground, that this security was not given towards satisfaction of the party injured; which might be sanctioned by the practice of this Court where they permit an injured prosecutor and a convicted defendant to talk together before sentence, with a view to promote compensation to the party injured: but this security was given in order to save the parish and county purses. In *Cole v. Gower*, 6 East, 110, the parish officers who were authorized by the stat. 6 Geo. 2. c. 31, to take security from the putative father of a bastard child for indemnifying the parish, having taken an absolute security for a sum certain; the Court considered such absolute security to be against the policy of the law, being a different kind of security than what the law authorized. [Lord *Ellenborough*, C. J. observed, that the statute of Geo. 2, having prescribed to the parish officers the kind of security they should take, it was a breach of their trust to take a different kind of security than what the Legislature intended. But here the statute is only in aid of their general duty to protect the poor children, put out by them as apprentices, from wrong by the persons to whom they are bound. But he asked whether in this case the defendant was prepared to shew that the suggestion of the Chairman had been made use of to secure any benefit to the parish beyond their indemnity from the fair expences of the prosecution: which was answered in the negative. But it was suggested, that there

was no obligation on the plaintiff, the then overseer, to apply the money when recovered to the use of the parish. To this, however, his Lordship said, that the plaintiff would be considered as a trustee for the parish.]

LORD ELLENBOROUGH, C. J. There does not seem to be any objection to the security which has been taken, either as contrary to the provisions of the statute, or to the general principle of law. The overseers got no pecuniary benefit to themselves or to the parish by taking this security, beyond the fair amount of the expences incurred by them in bringing the defendant to justice. It did not stifle a public prosecution, or elude the public interest in bringing such an offender to justice, by way of example to others. The security in question, given with the sanction of the Court, is rather to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him. If we had seen any ground for suspecting that the authority of the Court had been used as an instrument of oppression or extortion, we should have watched the case very jealously; but nothing of that sort appears.

Per Curiam,

Rule refused.

Doe, on the Demise of Hellings and Wife, v. Bird.

11 East, 49. April 21, 1809.

One having power to appoint lands by will amongst children; and having other lands; by his will (not referring to the power) gives legacies to his several children: and then devises *all the rest, residue, and remainder of his lands, &c.* and personal estate, *after payment of his debts, legacies, and funeral expences*, to his eldest son: held that the power was not thereby executed. A demand of possession by one tenant in common, and a refusal by the other, stating that he *claimed the whole*, is evidence of an actual ouster of his companion.

UPON the marriage of the defendant's father in 1766, a settlement was made, whereby a certain estate, for an undivided portion of which this ejectment was brought, in right of one of the daughters of the marriage, was settled, after the father's life, to the use of such child or children of the marriage, and for such estates, &c. as the father by his will should appoint; and in default of appointment, to be divided amongst all the children as tenants in common. The father died in 1806, having made a will, whereby he gave to each of his daughters a legacy of 200*l.*; and then, by a residuary clause, he devised *all the rest, residue, and remainder of his messuages, lands, &c.* and personal estate, &c. *after payment of his debts, legacies, and funeral expences*, to his son John Bird, the defendant. The testator had other lands besides the settled lands, (a) to the value of 40*l.* a year: and the question was, whether the residuary clause passed the settled lands as well as the other lands; there being no reference to the power, and the devise being of lands, *after payment of debts and funeral expences*, with which the settled lands were not chargeable, and which it was contended on the part of the daughters, shewed that the father had no intention to execute the power by this residuary clause, according to *Roe d. Reade v. Reade*, 8 Term Rep. 118. And upon this ground a verdict passed for the plaintiff at the trial before *Chambre, J.* at Taunton.

Burrough now moved for a new trial, and attempted to distinguish this from the case cited, by the circumstance, that here the testator had charged the lands devised with portions for all his other children, as he had authority to do under the power with respect to the settled lands; which he might think was the best mode of executing the power. And the charge of debts and funeral expences might refer to his other property.

(a) The value of the settled estate was not stated.

The Court, however, were of opinion, that the power was not executed by the will. There was nothing in it referring in any manner to the power, nor from whence his intention to execute it could be inferred: and the charge of debts and funeral expences on the lands, &c. devised, shewed his intention to pass such lands only as were subject to those charges.

Another objection was then stated by *Burrough*, (which had also been made at the trial,) that, in default of appointment, the lessor of the plaintiff and the defendant would be tenants in common; and that the ejectment could not be maintained without proof of actual ouster, and that the defendant was not bound by the common consent rule: for which *Doe d. White v. Cuff*, 1 Campb. Ni. Pri. Cas. 173, before Lord *Ellenborough* at *Westminster*, was cited. In order to get rid of this objection, (the validity of which however was not admitted; but it was said, that the defendant ought to have entered into a special consent rule;) the plaintiff went into evidence of an actual ouster, and proved a demand of possession of the premises by letter under a power of attorney, to which demand a refusal was returned by the defendant, who stated at the time that he claimed the whole under the settlement: and this the learned Judge thought was sufficient evidence of an actual ouster. But *Burrough* contended, that it was not sufficient, without shewing that the defendant had received the whole rent, and refused to account; and he cited *Reading's* case, Salk. 392, where it was said, that between tenants in common there must be an actual disseisin, as turning him out, hindering him to enter, &c.; and that a bare perception of profits is not enough.

Per Curiam. One tenant in common in possession claiming the whole, and denying possession to the other, is beyond the mere act of receiving the whole rent, which is equivocal. This was certainly evidence of an ouster of his companion.(1)

Rule refused.

Stevens v. Whistler.

11 East, 51. April 21, 1809.

Where the plaintiff had lands abutting on one side of a public highway, called *Shepherd's Lane*, (which is *prima facie* evidence that half of the lane was his soil and freehold,) he may declare generally for a trespass in his close called *Shepherd's Lane*; and the defendant must plead soil and freehold in another, in order to drive the plaintiff to new assign the trespass complained of in the part of the lane which was his exclusive property.

IN trespass, the declaration contained two counts; one for breaking and entering the plaintiff's close called *Shepherd's Lane*, the other for breaking and entering another close of the plaintiff, by name, in the same parish: and after a general verdict for the plaintiff,

Abbott moved to set it aside, and enter a verdict for the plaintiff on the latter count only. *Shepherd's Lane*, he stated, was proved at the trial to be an open parish highway, and there was no proof of the plaintiff's exclusive possession of that, but only that he had lands on one side of the lane, which at most would only shew that he was entitled to the soil and freehold of half the lane opposite to his own inclosures, and would not justify his declaring for a trespass in the lane generally, as if he claimed an exclusive right to the whole; which might be set up on other occasions. The trespasses proved were, that the defendant had depastured his cattle all along the lane, as well in the parts opposite to the plaintiff's closes, as in other parts, and they had also broken into an inclosure of the plaintiff.

(1) [See acc. *Frederick v. Gray*, 10 S. & R. 182. *Lodge v. Patterson*, 3 W. 77. *Mahaffy v. Dobbs*, 9 do. 363. *Bolton v. Hamilton*, 2 W. & S. 294. *Law v. Patterson*, 1 do. 191.—W.]

This objection was taken at the trial before *Graham, B. at Reading*, but was overruled.

Per Curiam. The plaintiff had an exclusive right to part of *Shepherd's Lane*; and if the defendant meant to drive him to confine the trespass complained of upon the face of his declaration to that part of the lane which was his, he should have pleaded soil and freehold in another; which would have obliged the plaintiff to new assign. (1)

Rule refused.

Moore v. Pyrke.

11 East, 52. April 21, 1809.

An under-tenant, whose goods were distrained and sold by the original landlord for rent due from his immediate tenant cannot maintain an action for *money paid* to the use of the latter; for immediately on the sale under the distress, the *money paid* by the purchaser vested in the landlord in satisfaction of the rent: and never was the *money of the under-tenant*.

PYRKE rented a house of one *Aspinall*, and let out part of it to *Moore*: the rent being in arrear, *Aspinall* distrained goods, part of which belonged to *Moore*, upon the premises, and sold them there under the distress, by the intervention of an auctioneer, to third persons, who paid the money for them to the auctioneer, which was received by *Aspinall* in satisfaction of his rent. Upon which the plaintiff *Moore* brought this action to recover back 14*l.* the value of his goods sold under the distress; and failing in the proof of his special counts, resorted to the general count for money paid by him to the defendant's use: and the question was, whether these facts would support that count; the objection being that the money for which the goods sold under the distress never existed as *Moore's* money. Lord *Ellenborough* C. J. permitted the plaintiff to take a verdict at the trial at *Guildhall*; and in the last term a rule nisi was obtained for setting aside the verdict and granting a new trial, on the ground that the evidence did not support the count.

Park and *Reader* now shewed cause, and contended that the plaintiff's goods having been sold by compulsion of law to pay the defendant's debt, the money produced by the sale must be considered as the plaintiff's money until it was paid over to the landlord by the auctioneer; and the case was the same as if the plaintiff had paid so much of his own money to redeem his goods from the distress, which would clearly have entitled him by the authority of *Exall v. Partridge*, 8 Term Rep. 308, to recover in this action. And here by not redeeming his goods, the plaintiff assented to the sale of them for the purpose of raising money to pay the defendant's debt; and for this purpose he may adopt the act of the auctioneer as his own. [*Le Blanc, J.* How can a man be said to assent to a sale made in invitum?] It is the same then as if the landlord had distrained so much of the plaintiff's money in a bag.

Garrow and *Fuller*, contra, objected that this was not the plaintiff's money, nor paid by him. The goods when distrained were taken by the landlord for his own benefit: till the sale he had a special property in them. At any rate, the plaintiff had no longer an absolute property in them, and the legal possession was transferred to another. They were sold for the benefit of the landlord, and not of the tenant or owner. While the money remained in the pockets of the purchasers, it cannot be pretended that it was the money of the plaintiff; and the instant it was paid, it was paid to the landlord's agent and for his benefit, and was at no moment of time under the controul, or at the appointment, or even in the constructive possession of the plaintiff: it cannot therefore in any view be considered as his money. This is materially different

(1) Vide 1 Wms. Saund. 300, 300 a. in notis. 1 Chitty on Plead. 606, et seq.

from *Exall v. Partridge*, where the money was paid by the owner of the goods himself to redeem the distress. And, in answer to the case of *Smith and Others, Assignees, &c. Hodson*, 4 Term Rep. 211, which was mentioned to shew that a party whose goods had been wrongfully taken might waive the tort, and bring *assumpsit* for the value of them, they observed that the action there was for goods sold and delivered. They also referred to *Spurrier v. Elderton*, 5 Esp. Ni. Pri. Cas. 1.

LORD ELLENBOROUGH, C. J. Two points are to be established by the plaintiff; first, that this was *his* money; secondly, that it was paid by him to the defendant's use. Upon the latter (supposing the first to have been established) I should not have had much doubt, because the money paid to the landlord was the produce of the plaintiff's goods sold by compulsion of law under the distress to satisfy the landlord's claim of rent from the defendant for the premises, part of which were occupied by the plaintiff as under-tenant to the defendant. The difficulty is to consider this as *the plaintiff's* money. While the plaintiff's property taken under the distress was in *custodia legis*, or in the landlord's particular custody, it was *goods*, and not *money*. Up to the time of the sale, indeed, the property in the goods would be in the plaintiff; for if cattle distrained die during the distress, the loss is that of the tenant, and not of the landlord; which shews that the property remains in the tenant till the sale. But the statute 2 W. & M. st. 1. c. 5. s. 1, says, that the goods distrained shall be sold for the best price "towards satisfaction of the rent." Then does the money produced by the sale vest in the first instance in the landlord, or in the tenant? On the best consideration I can give it, I think the money does not vest in the tenant, but is an instantaneous executed satisfaction of the rent vesting to that amount in the landlord, and that the tenant has only an interest in the surplus, if any. If this be so, the money paid to the landlord could not have been the plaintiff's money paid by him for the use of the defendant; for *as money* it never was the plaintiff's at all. If the money had ever vested in the plaintiff for an instant, then this case would have been governed by that of *Exall v. Partridge*; but I cannot say that it ever did.

GROSE, J. I cannot in any manner make this out to be the plaintiff's money, when it was the produce of goods sold against his consent to satisfy the landlord's rent.

LE BLANC, J. In the case of *Exall v. Partridge*, the money paid by the plaintiff to redeem his goods from the distress was clearly *his* money: it was paid out of his pocket. But here the property of the plaintiff distrained was in *goods*, and when they were converted into money by the sale under the distress, the money paid by the purchasers became immediately the property of the landlord who distrained for the rent, and not of the tenant.

BAYLEY, J. agreed.

Rule absolute.

Doe, on the Demise of Foley and Others, v. Wilson.

11 East, 56. April 22, 1809.

1. Where copy-holder for life cut trees, though none were applied to the repair of the premises till several months after, and after ejectment brought as for a forfeiture, and most of them still remained unapplied but parts of the premises were still out of repair, it is a question for the jury whether they were cut *bona fide* for the purpose of repair, and were in a course of application for that purpose; and there being no evidence that they were to be applied to any other purpose, the Court refused to set aside a verdict for the defendant.
2. An inclosure made from the waste 12 or 13 years before, and seen by the steward of the same lord from time to time, without objection made, may be presumed by the jury to have been made by licence of the lord; and ejectment cannot be brought against the tenant as a trespasser, without previous notice to throw it up.

THIS was an ejectment brought on the part of the lord of the manor of
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Great Malvern in Worcestershire, to recover a copyhold estate of which the defendant was tenant for life, and also a small parcel of the waste which had been inclosed by the defendant. The copyhold was sought to be recovered on the ground of forfeiture for voluntary waste in cutting down 15 oak trees, two of which had never before been headed; and also for permissive waste in suffering the house and fences to be out of repair. The trees had been cut down in May 1808, without having been previously set out for repair by the lord's bailiff, (which however was admitted not to be necessary,) and in October, after the ejectment brought, a few of them only had been applied towards the repairs of some of the premises; other buildings, however, still continuing out of repair; but as it was suggested, not requiring all the timber which remained unappropriated. On this, *Wood, B.* left it to the jury to say, whether the trees had been cut down for the purpose of making repairs, and were intended to be so applied in due course: which the jury found in the affirmative. With respect to the inclosure, which was very small, it appeared to have been taken in from the waste about 12 or 13 years before by the defendant, and annexed to some other land belonging to him. But the lord's steward was proved to have seen this inclosure from time to time after it was made, (the same lord and steward continuing all the time,) and no evidence of any objection made; which the learned Judge thought was sufficient to be left to the jury to presume a licence from the lord to inclose: in which case the defendant could not be made a trespasser without first receiving notice to throw up the land again. The jury accordingly presumed a licence, and found a verdict for the defendant.

Williams, Serjt. now moved for a new trial; and after stating these facts, and the learned Judge's direction, objected to the verdict on both points, but particularly on the last; observing that the mere knowledge of the inclosure by the steward, who might have been called as a witness, was no evidence of a licence, within so short a period; for what line could be drawn within 20 years, when any presumption could begin to be made in favour of a trespasser.

Lord ELLENBOROUGH, C. J. on the first point, observed that it was a question for the jury to decide, whether the trees were cut down for the purpose of repairing the premises *bona fide*, and were in a course of application for that purpose; and there was no evidence that they were to be applied to any other purpose. On the second point, though a grant from the lord would not be presumed within 12 or 13 years; yet the continual view of the steward acting under the same lord for that period, without objection, might be sufficient for the jury to presume a licence. If the object be of sufficient importance, the lord may countermand the licence, and bring another ejectment.

Per Curiam,

Rule refused.

Goodright, on the Demise of Lamb, v. Pears.

11 East, 58. April 22, 1809.

A copy-holder surrenders "his copyhold cottage, with a croft adjoining, and a common right, &c. belonging to the same; "all which premises (as the surrender describes it) "were then in his own possession;" and on the same day, he devises "all his copyhold "cottage and premises then in his own possession;" in fact, the croft, between which and the cottage and garden there was only a gouseberry hedge, was in the actual occupation of a tenant at the time: yet held, that the whole passed under the description of "all his copyhold cottage and premises;" the words "then in his own possession" being merely a mistaken description, following the mistake of the surrender, which mentions the croft with the rest as then being in his possession.

THIS was an ejectment to recover one croft and two roods of land in *Scotter*, in the county of *Lincoln*. The premises were copyhold, holden of the manor of *Scotter*, and claimed by the lessor of the plaintiff as heir of

Benjamin Lamb, the tenant last seized. The defendant claimed under the widow of *Benjamin*, who derived title by devise from her husband, he having previously surrendered to the use of his will. That surrender was enrolled on the 28th of October 1800, and recited a surrender by *Benjamin* out of court on the 14th of July preceding of "all his copyhold cottage, with a croft adjoining and a common right and north-moor-gate belonging to the same; all which premises were then in his own possession," to the use of his will. On the same 14th of July, he devised to his wife "all his copyhold cottage and premises then in his own possession, for her life;" and after her decease, to *R. Elsom*, &c. The testator died within a few days after making his will. At the time of making his will, and the surrender out of court, he in fact only occupied the cottage and a garden behind it: the croft, which was separated only by a gooseberry hedge from the cottage and garden, was then and till the testator's death in the actual possession of the defendant as his tenant. It was contended at the trial before *Bayley*, J. at *Lincoln*, that the croft mentioned particularly in the surrender, but omitted to be so mentioned in the will and which was in fact let to and in the possession of another person, did not pass to the widow under the description of "his copyhold cottage and premises then in his own possession;" though it was admitted, that if the croft had then been in his possession, it would have passed under those words: but the learned Judge being of opinion, that the latter words were a mere misdescription, copied probably from the words of the surrender which misdescribed the fact; and that the former words, "copyhold cottage and premises," were sufficiently certain to carry the croft which formed part of those premises; nonsuited the plaintiff.

Vaughan, Serjt. now moved to set aside the nonsuit, and stated the case as before mentioned.

LORD ELLENBOROUGH, C. J. The surrender and the will are as one instrument. They were cotemporaneous acts; and that which was a mere mistake in the surrender was followed in the will, in describing all the premises as being in the copyholder's possession, when part of them was in the possession of his tenant: but it is clear by the general words, that all was meant to be passed.

LE BLANC, J. The croft was not in the testator's possession at the time of the surrender to the use of his will, though it is there described as being in his possession. And that mistake was followed in the will.

Per Curiam,

Rule refused.

Butterfield v. Forrester.

11 East, 60. April 22, 1809.

One who is injured by an obstruction in a highway against which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction.

THIS was an action on the case for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down with his horse, and injured, &c. At the trial before *Bayley*, J. at *Derby*, it appeared that the defendant, for the purpose of making some repairs to his house, which was close by the road side at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. That the plaintiff left a public house not far distant from the place in question at 8 o'clock in the evening in August, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at 100 yards distance: and the witness, who proved this, said that if the plaintiff had not been riding very hard he

might have observed and avoided it: the plaintiff, however, who was riding violently, did not observe it, but rode against it, and fell with his horse, and was much hurt in consequence of the accident; and there was no evidence of his being intoxicated at the time. On this evidence *Bayley*, J. directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant: which they accordingly did.

Vaughan, Serjt. now objected to this direction, on moving for a new trial; and referred to Buller's Nj. Pri. 26, (a) where the rule is laid down, that "if a man lay logs of wood across a highway; *though a person may with care ride safely by*, yet if by means thereof my horse stumble and fling me, I may bring an action."

BAYLEY, J. The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of *Derby*. If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault.

LORD ELLENBOROUGH, C. J. A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. (1)

Per Curiam,

Rule refused.

Lord v. Houstoun.

11 East, 62. April 25, 1809.

In debt by bill the declaration is good, though the sums demanded in the several counts amount altogether to more than the sum at first demanded in the *queritur*; for that is superfluous and may be rejected.

THE plaintiff sued by bill in debt, and declared against the defendant of a plea that he render to him the sum of 7750*l*. which he owes to and unjustly detains from him: for that whereas, &c.; and so the plaintiff proceeded to set out in his first count a certain deed for securing the payment of 1625*l*. and interest; and concluded that count by alleging, that thereby "the defendant became liable to pay to him 1625*l*. when requested, which still remains unpaid, whereby an action hath accrued to the plaintiff to demand and have of the defendant the said sum of 1625*l*. *parcel of the said sum of money above demanded*. In each of five other counts for goods sold, money paid, &c. the plaintiff respectively demanded 1625*l*. the four first of those concluding that "by reason whereof an action hath accrued to the plaintiff to have and demand from the defendant the said last-mentioned sum of money, further parcel of the said sum above demanded." And the last count stating the 1625*l*. therein demanded to be "the *residue* of the said sum of 7750*l*. above demanded." And then the declaration concluded; "yet the said defendant, although requested, hath not paid the said sum of money above demanded, or any part thereof, to the plaintiff, but hath hitherto wholly refused and still doth refuse, and the same still remains wholly due and unpaid; wherefore the plaintiff

(a) The book cites Carth. 194 and 451, in the margin, which references do not bear on the point here in question.

(1) [See *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 248. *Marriott v. Stanley*, 1 M. & G. 568. *Illidge v. Goodwin*, 5 C. & P. 190.—W.]

says, that he hath sustained damage to the value of 500*l.*, and therefore he brings suit," &c. To this there was a demurrer, stating especially (amongst other causes relating to other particulars in the several counts of the declaration not set forth here) that in the beginning of the declaration, the plaintiff has complained of the defendant in a plea that he render to him the sum of 7750*l.* only; and afterwards, by the several counts thereof, the plaintiff has claimed and declared for divers sums, amounting in the whole to a much larger sum, to wit, 9750*l.*, and that the declaration is in that respect repugnant and inconsistent. That the declaration states, that the five several sums of 1625*l.* in the five first counts are *parcels* of the said sum by the declaration demanded, and that the 1625*l.* in the last count mentioned is the *residue* of the said 7750*l.* demanded; which is impossible and repugnant. And the same objection was repeated in other different forms.

Dampier, in support of the demurrer, admitted that the plaintiff in debt might now recover less than he demanded by his declaration, though formerly it was considered otherwise; but here the plaintiff seeks to recover more by the aggregate demands of his several counts than he first demands in the *queritur*: and besides the repugnancy of stating these several larger sums in the aggregate to be parcels of a smaller sum, this mode of declaring is embarrassing to a defendant, who may have an answer to the general sum demanded, and defend the action on that ground; but may be misled, if the plaintiff can recover more under the aggregate demand of his several counts. He referred to 5 Com. Dig. 54. tit. Pleader, C. 84. "So in debt for 100*l.* if the plaintiff declare on particular sums due which exceed 100*l.* and the defendant do not demur, but there is a verdict for the plaintiff: if he release all above 100*l.*, he shall have judgment for 100*l.* R. 5 Mod. 214." From thence it must be inferred, that it is a valid objection on special demurrer; though it may be cured by verdict, and by releasing the surplus. But p. 217, of the same book, 2 W. 7, is directly in point. "If the debt be for a certain sum, and the particular contracts, whereon the plaintiff declares, amount to more, it is bad; for he has judgment for more than he demands. R. Yelv. 5." The case of *Smith v. Vowe*, Moor 298, was the reverse of that in *Yelverton*: for there the several sums in the counts in debt did not amount to the sum demanded in the *queritur*; which was assigned for error, and the judgment reversed. [Lord *Ellenborough*, C. J. All those cases were decided at a period when it was considered that the plaintiff could only recover in debt the very sum demanded: but it has been long settled that he may recover less.] But the Court are now called upon to decide that the plaintiff may recover more than he first demands in the *queritur*.

Richardson, contra, insisted that it was not necessary for the plaintiff in debt to state how much he demands at the beginning of his declaration: all the cases which have held otherwise (a) were cases where the plaintiff sued by original, except that of *Crumpton v. Smith*, Yelv. 5, which came on upon error from an inferior court. It is said in 5 Com. Dig. c. 7, which cites Co. Lit. 302. b. 17. a. that the declaration is an *exposition of the writ*, and adds time, place, and other circumstances. And that accounts for the introduction of the words "*of a plea that he render to him so much*," (b) which seem to have reference to some writ, and are introduced by assimilation to proceedings by original in C. B., but have no sensible meaning when applied to the mode of originating proceedings in this court by bill, and may therefore be rejected altogether. Each count here contains in itself a perfect demand of a certain sum, and the reference to the sum in the *queritur*, as if the sum in each count were a part of the sum in the *queritur*, is immaterial.

(a) Vide 5 Com. Dig. Pleader, 2 W. 7.

(b) In debt by original in C. B. the declaration begins by stating that the defendant was summoned to answer the plaintiff of a plea that he render to him so much, &c. whereupon, &c.

Lord ELLENBOROUGH, C. J. There is no difficulty in disposing of this case. In this court, where the proceedings are by bill, the words at the beginning, *of a plea that he render so much*, which raise the question, are themselves superfluous, and may therefore be rejected; and rejecting those words, there is in each count a perfect demand of a sum certain, without the reference to the sum first mentioned in the declaration, which would also be rejected: and then the declaration, concluding with a demand of damages for detaining the debt, will refer to the sum total of the debt demanded by the several counts. There is no occasion for our giving any opinion upon the mode of pleading in the Court of Common Pleas; but the argument of my brother Marshall in *M Quillion v. Coz*, 1 H. Blac. 249, rather shows, that if the sums declared for exceed the sum in the writ, it is more matter of a plea in abatement than in bar.

Per Curiam,

Judgment for the Plaintiff.

Chambers v. Donaldson and Others.

11 East, 65. April 25, 1809.

In trespass *quare clausum fregit*, if the defendant plead soil and freehold in another by whose command he justifies the trespass, such command may be traversed by the plaintiff.

TO trespass for breaking and entering the dwelling-house of the plaintiff in the parish of *Mary-le-bone*, &c. the defendants pleaded, that the said dwelling-house at the time when, &c. was, and still is the soil and freehold of *E. B. Portman*, Esq., and that they as his servants, *and by his command*, broke and entered the same. The plaintiff replied, admitting the said dwelling-house to be the soil and freehold of *E. B. Portman*, but stating that one *Wm. Green* before the said time when, &c. demised the said dwelling-house to the plaintiff as tenant from year to year, by virtue of which the plaintiff entered, &c. and was possessed thereof; and being so possessed, the defendants, as the servants of *Green*, and *by his command*, committed the trespass complained of; and traversed that they were the servants of *E. B. Portman*, and *by his command* committed the said trespass in manner and form as in the plea mentioned. To this replication there was a demurrer, assigning for special causes, that though the plaintiff has by his replication admitted, that the said dwelling-house was the soil and freehold of *E. B. Portman*, as alleged in the plea; yet by his replication he has stated, that *Green* demised the said dwelling-house to the plaintiff to hold as therein mentioned, without shewing any legal title in *Green* so to do. And also, for that the plaintiff by his replication has admitted the said dwelling-house to be the soil and freehold of *E. B. Portman*, but has not deduced any title from him to *Green* to enable *Green* to make the supposed demise to the plaintiff; and also for that the plaintiff has traversed and endeavoured to put in issue an immaterial fact, and no material issue can be taken on the same. In support of these objections,

Scarlet now argued, that the fact of *Portman's* command alleged in the plea was not traversable, and cited *Trevillian v. Pyne*, 1 Salk, 107, where the distinction was taken between replevin and trespass *quare clausum fregit*: in the latter, it was said, that if the defendant justify, and allege freehold in another by whose command he entered, the plaintiff cannot traverse the command, because it would admit the rest of the plea to be true, namely, that the freehold was in that other, and not in the plaintiff; which would be sufficient to bar the action, whether the defendant entered by his command or not. But that it was otherwise in replevin, which was the case in judgment; for there as none but the landlord has a right to enter for the purpose of distraining, the *command* is important. It is clear, that if soil and freehold in another

were pleaded in bar and found for the defendant, it would be a good defence to this action; and it is the same thing, if the plaintiff, by traversing the command, admits the title in another, and thereby shews that he has no right of action. Trespass being a possessory action, it is sufficient for the plaintiff to declare in the first instance on his actual possession; but if a superior title in another be pleaded, he must then shew title to his possession. If the plaintiff declared, that the soil and freehold was in *A.*, and that *B.* gave him leave to enter, and that *C.*, the defendant, entered upon him (the plaintiff) and turned him out; the plaintiff would by his own shewing appear to have no title to maintain the action: but that is the same case with the facts now appearing upon the whole record. [*Bayley, J.* Is not actual possession sufficient to maintain the action against a wrong-doer?] That must be taken in its legal sense; that the law presumes the actual possessor to be the rightful one until the contrary be shewn; but here the contrary is shewn; for when title is admitted in another, which entitles him to the possession, the plaintiff himself appears to be a trespasser and therefore cannot maintain the action on his own wrongful possession. 2dly, He objected that the plaintiff in his replication had derived title to a particular estate in the premises from *Green*, without shewing the commencement of that estate, as he ought to have done, according to the rule of pleading laid down in *Silly v. Dally*, 1 *Ld. Ray.* 334, "that the commencement of all particular estates ought to be shewn in pleas, avowries, &c." And this rule holds not only in pleas in bar, but in all the subsequent pleadings. Here it was not even averred generally, that *Green* had a right to demise to the plaintiff: [*Bayley, J.* The purpose of the replication is to identify the defendant with *Green*; for if *Green* were estopped by his demise from disputing the plaintiff's right to the possession, then the defendant, acting by the command of *Green*, would also be estopped. In that view, the plaintiff insists, that it is immaterial what was the commencement of *Green's* estate. Lord *Ellenborough, C. J.* All the cases wherein it is stated that the party pleading must shew the commencement of the particular estate are where he claims an interest out of that estate: but here no interest is claimed out of the particular estate, but it is pleaded merely to set up an estoppel against the defendant, who has pleaded *liberum tenementum* in another.] He then put the case that *Green* might be the servant of *Portman*, and have permitted the plaintiff to enter as tenant upon the premises, without authority of his master; and might afterwards have entered upon the plaintiff by such authority: then by not stating the commencement of *Green's* estate, the plaintiff would give no opportunity to the defendant to traverse the material fact.

Holroyd, contra, on the first point. The command may be traversed; and what is stated by way of inducement as to the title of *Green*, and as against *Green* and those who justify under him, cannot vitiate that traverse. The very principle laid down in *Trevilian v. Pyne* shews that the command may be traversed; for as against a wrong-doer, a plaintiff may maintain trespass whether he have title or not, as in *Graham v. Peat*. (a) No sound distinction can be shewn in that respect between trespass and replevin; which latter was the case in judgment; and there it was held traversable; and the distinction taken as to trespass was extrajudicial and mistaken. Since it has been settled that trespass will lie upon mere possession against a wrong-doer, the plaintiff, by traversing the command, and admitting *pro hac vice* the soil and freehold to be in *Portman*, does not admit that he has no cause of action; for though it were true, that *Portman* had a right to enter upon the plaintiff, yet if the defendant had no such right, the plaintiff may still maintain this action upon his actual possession against a wrong-doer. Suppose (which is the fact) that *Green* had taken a long building lease under *Portman*, and after letting to the plaintiff, had employed the defendant to enter upon him; if he could thus set

(a) 1 *East*, 244, and vide *Harker v. Birkbeck*, 3 *Burr.* 1563.

up the title of *Portman*, which is unknown to the plaintiff, he would thereby be enabled to trespass with impunity upon his own lessee. This shews the materiality of the command which is traversed. Two things must concur to constitute a defence under the plea of *liberum tenementum*, namely, superior title in another, and that the defendant entered by command of that other; both must be pleaded; then why in common sense may not both be traversed. In *Cary v. Holt*(a) the defendant in trespass made title and gave colour to the

(a) This was cited from 2 Stra. 1238, where it is very shortly reported. The following note of that case is from Mr. Ford's MS.

CARY against HOLT, M. 19 Geo. 2. Trespass for breaking and entering the plaintiff's cellar. The defendant pleads that the place where, &c. is a copyhold tenement, parcel of the manor of *Hampstead*, and demised and demiseable from time immemorial at the will of the lord, according to the custom, &c., and that the lord, at a court held 11th Nov. 1731, granted a message, of which the cellar is parcel, to the defendant; and that by virtue thereof she entered, &c. and so justifies the entry, &c. The plaintiff replies, that the defendant entered of her own wrong: and traverses that the cellar at the time when, &c. was parcel of the said customary message. Demurrer, and joinder in demurrer.

Lawson insisted that the replication was ill, because the plaintiff neither sets out a title in himself, nor traverses the defendant's in a material part. Yelv. 173, 4, *Priestly v. White*, 6 Co. 24, Read's case. Cro. Eliz. 30, *Hering v. Blacklow*, 2 Lutw. 1337, 1342. *Meritons v. Benn and Others*, 8 Co. 66, *Crogate's case*. That the plaintiff admits by his traverse that the cellar once was parcel, but not so at the time of the trespass; for by traversing that the cellar at the time when, &c. was not parcel of the customary message, he admits that it once was, and therefore ought to have shewn how seised. That the defendant's title is not put in question, but only whether the cellar is parcel, &c.; which is an immaterial issue. 1 Roll. Rep. 46, Lee's case, Cro. Car. 190, *Shepherd's case*.

Stacey, e contra, insisted that this was an action of trespass in nature of a possessory action founded entirely upon the possession, and therefore not necessary to set out a title. 18 Ed. 4. fo. 10 p. 21. Trespass; the defendant, as here, made title to the place where, &c., which the plaintiff denied, without shewing any title in himself: and it was held good and sufficient, because where the plaintiff traverses the defendant's title, it would be unnecessary to shew any title in himself; for possession is sufficient title against a wrong-doer. Vin. Abr. tit. Trespass, 281, 2. *Et per totum*. The true distinction seems to be between actions real and personal actions. As to what is objected, that the traverse was immaterial, he insisted that the traversing the *locus in quo*, &c. to be parcel, &c. was the most material part of the plea, and puts the title in question; for when the defendant makes title to the cellar as parcel of the customary tenement, what can be more material than to deny it to be parcel, &c. The cases which have been cited in support of the objections do not come up to the present case. In Yelv. 174, the plaintiff not only omitted setting out a title in himself, but likewise denying the defendant's title. The same answer to Lee's case in Roll. Rep. 46. The plaintiff traverses the command, which is perfectly immaterial, and not traversable without traversing the title. So as to *Crogate's case*; the plaintiff replied *de injuria sua propria*, &c.; but the plaintiff here likewise denies the cellar to be parcel, &c.

LEE, C. J. The exceptions to the replications are two; 1st, That the defendant has shewn title by grant from the lord, and therefore it was not sufficient for the plaintiff to traverse that, without shewing a title himself. But although that rule may be good in general in real actions, yet it is otherwise in trespass: because in that case possession is the plaintiff's title, and the material thing to traverse is the defendant's title. And so it is held expressly in Cro. Eliz. 671. *Knight v. Lodge*; and the same distinction taken between real and personal actions. Cro. El. 891, *House v. Laxton*. 2d, That the traverse is too narrow; because it only denies that the cellar at the time when, &c. was parcel, &c.; which seems to admit that it once was parcel, and yet does not shew how severed. But in this action the only material thing in question is, Whether it was parcel at the time when, &c.; for the plaintiff was only to maintain his right to the possession at that time, and if not parcel at the time when, &c., the traverse maintains the action.

WRIGHT, J. agreed with the Chief Justice, and cited Cro. El. 288, *Justice Tanner v. Fisher*; that in trespass it is sufficient to deny the defendant's title, without shewing a title in himself; and the same distinction is there taken between real and personal actions.

DENNISON, J. 10 Ed. 4. 9. Distinction between trespass and real actions. *Gosling v. William*, 5 Geo. 1.† Trespass for breaking plaintiff's close. The defendant justified under a feoffment from the Duke of *Beaufort*, and gave the plaintiff colour. The plaintiff replied, that the defendant entered, &c. of his own wrong, and traversed the feoffment.

† Fortes. Rep. 378.

plaintiff who replied *de injuria*, &c. and traversed the title set out by the defendant, without shewing any in himself; and this was held good, as laying the defendant's title out of the case: and then it stood upon the plaintiff's possession, which was enough against a wrong-doer. The only principle on which a plea of *liberum tenementum*, (a) which is anomalous, can proceed, is, that it puts the plaintiff on shewing his right to the possession; for if title be pleaded in another, and that the defendant entered by command of that other, it puts the right of possession, as well as the possession itself, out of the plaintiff by the very act for which he seeks to recover; but if the other party had no title, or the defendant who entered had no authority from him, such entry did not devert the possession of the plaintiff. Title may be given in evidence under the general issue, (b) and that the defendant entered on the plaintiff by command of the person entitled, Gilb. Evid. 258; and if so surely the command may be traversed, if pleaded; for if not traversable, it need not be proved; which is contrary to the current of authorities. The only case which bears against the plaintiff is *Witham v. Barker*, Yelv. 147; but that case has been much shaken by Lord C. J. Willes, in *Lambert v. Stroother*, Willes, 221, where the general subject was very fully discussed. Then, 2dly, if the command may be traversed, what is alleged in the replication with respect to *Green* is mere inducement and will not hurt. The plaintiff does not make title to himself; if he did, the general rule as to pleading particular estates would apply: but here it would have been sufficient to have said, that the defendant entered of his own wrong and without the cause assigned, and all the rest is surplusage; and there is no repugnancy.

Scarlett, in reply, observed of the case of *Graham v. Peat*, 1 East, 244, the latest on this subject, that it did not contradict the principle he had contended for. There the title was shewn to be in the rector, under whom the plaintiff himself claimed by lease; and though that lease were void by the statute 13 Eliz. c. 20, for non-residence; yet if the rector did not dispute the possession of the plaintiff, he was in at least by licence of the person entitled, if not tenant from year to year by the payment of rent; and therefore still had a lawful possession. But here title is shewn in another, and nothing is stated to shew a lawful possession in the plaintiff.

Lord ELLENBOROUGH, C. J. The position which is laid down in *Trevilian v. Pyne*, and which has certainly been the general opinion, that upon a plea to an action of trespass, of *liberum tenementum* in another by whose command the defendant entered, the command is not traversable, comes now for the first time that I am aware of to be questioned in a court of law. That opinion was indeed delivered extrajudicially, for the case in judgment was in replevin, and the Court decided that the command there was traversable, because the possession of the place where the goods were taken was not the material point, but the right of the party to take the goods; but certainly in trespass the possession of the place is material. Now, however, that the position comes to be judicially questioned, it is necessary to examine the foundation on which it rests. And unless the command be traversable, it will be sufficient for a mere wrong-doer, who has invaded the quiet possession of the plaintiff, to plead title in another, and an authority from him; although that other himself did not question the plaintiff's possession. Nay, the argument might be pushed further,

And upon a demurrer, the replication was held well; because the defendant's title was denied, and the plaintiff's possession sufficient. As to the 2d objection, unless the cellar is parcel of the messuage, the defendant's title is out of the case. If the lord had granted a cellar, the plaintiff must have denied it; but here he has only said that he granted the messuage with its appurtenances; and if the grant had been denied, such traverse would have tried nothing material.

So Judgment for the Plaintiff.

(a) Vide *Lambert v. Stroother*, Willes' Rep. 222.

(b) *Dodd v. Kyffin*, 7 Term Rep. 354, and *Argent v. Durrant*, 8 Term Rep. 403, and the cases there cited.

and it might be contended, that the same defence could be set up against a plaintiff who had been in possession for 20 years; and this monstrous consequence would ensue, that the wrong-doer would protect himself under a title which the party himself could not assert in any possessory action. But since it has been settled in subsequent cases, as in *Graham v. Peat*, 1 East, 244, and *Harker v. Birkbeck*, Burr. 1563, that trespass may be maintained by a person in possession against a wrong-doer, we are called upon to strip the wrong-doer of this shield. And unless such a plea can be gotten rid of by traversing the command, this absurdity will follow, that if title be given in evidence under the general issue, the command may be traversed in evidence, as in *Graham v. Peat*; when, if the command be pleaded, with title in another, it is not to be traversed. The position, then, standing upon no decided case, but only laid down extrajudicially, and having been contradicted in effect by subsequent decisions with which it is inconsistent, we are brought back to consider what the rule was before on principles of law and common sense: and if the defendant plead soil and freehold in himself, and the plaintiff cannot shew in reply any right to the possession against him; that will be sufficient: but if he plead soil and freehold in another, he must also shew that he had the authority of that other, and therefore such authority is traversable.

GROSE, J. It has always puzzled me to discover any reason why the command might not be traversed as well as the soil and freehold of another in a plea of this description; for both constitute one defence: and also, why it should not be traversed as well upon a special plea as denied under the general issue. There is no other case where the same defence may be made on the general issue and on special plea, that the same answer cannot be given to both. The good sense of the thing clearly is, that the command should be traversable in the one case as well as it may be disproved in the other. I could never reconcile the opinion in *Salkeld*, and the practice, which has certainly prevailed in conformity to that, with the rule and practice of law in cases where the same defence was set up under the general issue: and I am glad that the question has at last been judicially raised, that it may be decided according to principles of law and sense.

LE BLANC, J. The Court are called upon to determine between two contradictory rules, both of which are said to be rules of law; one of them is, that on a plea of *liberum tenementum* in another, and that the defendant entered by his command, that command is not traversable: the other is, that possession is sufficient to maintain trespass *quare clausum fregit* against a wrong-doer. Both these rules cannot stand: for if the latter be true, the plaintiff must be permitted to shew how the defendant is a wrong-doer, by shewing that notwithstanding another may have a better title than the plaintiff, yet that the defendant had no authority from that other to make the entry complained of. If it could have been shewn to be a good plea in trespass, that the freehold was in a third person, without going on to state that the defendant entered by the command of that person, there would have been weight in the argument: but both those facts are always stated in the plea, and are considered to be necessary to constitute the justification: and it would be absurd, indeed, that several facts should be stated in the plea as necessary to constitute the entire defence, if the plaintiff could not traverse any of those facts which he pleased. To shew the monstrous consequence of such a doctrine, consider what must be the situation of persons who have been long in undisturbed possession of their houses held under sub-lessees and others, through various mesne assignments, with all which they may be unacquainted: if such possessions, especially in this metropolis, where the ground landlords, whose property is of great extent, are generally well known, were trespassed upon by wrong-doers, who could protect themselves by pleading soil and freehold in the ground landlord, and that they entered by his command; if the fact of such command could not be traversed, and the possessors were obliged to derive title from the ground land-

lord, all these persons would be precluded from standing upon their possession against mere wrong-doers.

BAYLEY, J. The question is, whether a mere wrong-doer, when sued for a trespass upon the possession of another, has a right by this mode of pleading to call upon him to set out his title. If the command of the person in whom soil and freehold is pleaded may be traversed, then no other than the person who has the title to the freehold can compel the party in possession to shew his own title to that possession: but if the command be not traversable, then every wrong-doer may call on the party in possession to make that disclosure. Trespass is now understood to be a possessory action; but it must cease to be so, if every wrong-doer could in this manner oblige the party in possession to set out his title.(1)(2)

Judgment for the Plaintiff.

The King v. Gaborian.

11 East, 77. April 26, 1809.

Assuming that under the stat. 11 G. 1. c. 4, an election began at a corporate meeting, whereat the mayor presided, may be completed, in case of his absenting himself pending the proceeding, under the presidency of the next in place and order to him; yet where a question arose upon the right of a voter, on which the mayor as presiding officer decided by rejecting the vote, and thereupon the remaining votes being equal, he declared the same, and that no election could be made, and thereupon ordered the meeting to be dissolved; and no objection was made at the time, nor any notice given to the electors present that any of them intended to proceed in the election notwithstanding the decision (which turned out to be erroneous), but after suffering the mayor and many of the freemen to depart without notice, the rest who remained together proceeded to complete the election: held, that such election was void even under the statute, as a surprize and fraud on the other electors.

THIS was an information in nature of a *quo warranto*, calling upon the defendant to shew by what authority he claimed to be mayor of the borough of *Saltash* in the county of *Cornwall*. The defendant pleaded, that by charter of the 14 G. 3, the king granted to the village of *Saltash* to be and remain a free borough, and that the persons therein named should be incorporated by the name of the mayor and free burgesses of the borough of *Saltash*: that one of the aldermen should be mayor; and that six other free burgesses of the inhabitants of the borough besides the mayor, to wit, seven capital free burgesses of the inhabitants of the borough, should be the aldermen and council of the borough: that the mayor, aldermen and free burgesses, or the major part of them, should every year in *September*, on the *Saturday* next before the feast of *St. Mathew*, assemble themselves in the Guildhall, &c.; and being so assembled, the mayor and aldermen, or the major part of them, should nominate and put in election for mayor two of the aldermen, and there should continue together, or in due manner should adjourn themselves, until the mayor, aldermen and free burgesses aforesaid, or the major part of them then and there assembled, should have elected one of those two aldermen so put in election to be mayor for one year after the said feast of *St. Mathew* then next following; and that he should be sworn in yearly on the feast of *St. Mathew* before the last mayor his predecessor, or in his absence before two other aldermen, and in default of the mayor and aldermen, then before four or more free burgesses inhabitants of the borough, &c.; which charter was accepted. The plea then stated, that no election was made of a mayor on the charter day in the year 1806; nor

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was any election of such officer made upon the day next after the expiration of the time within which such election ought to have been made, or otherwise, pursuant to the direction of the statute (11 G. 1. c. 4.) And thereupon afterwards, on the 24th of *November* 1806, a writ of *mandamus* issued commanding the mayor and burgesses, on the 20th of *January* 1807, to assemble at the Guildhall within the borough, and then and there proceed to the election of a mayor for the residue of the year from the feast of *St. Mathew* then last past according to the charter, and pursuant to the statute, and to administer the oath of office, &c. to the person elected mayor: which writ was delivered to the mayor and burgesses; and public notice of the time and place of meeting given. That on the said 20th of *January*, *James Buller*, then being mayor and alderman, *John Buller*, justice and alderman, *J. Cleaveland*, *R. Hickes*, *J. Gaborian*, *S. Drew*, and *P. Spicer*, aldermen, and 13 others named free burgesses, duly assembled at the Guildhall for the purpose of proceeding to the said election, and the said *Hickes*, *Gaborian*, *Spicer*, and *Drew*, aldermen, being the major part of the said mayor and aldermen, nominated and put in election for mayor the said *Hickes* and *Gaborian*, aldermen, inhabitants and residents in the borough. That after *Gaborian* had been so nominated and put in election, the said *James Buller*, together with *John Buller* and *Cleaveland*, quitted the Guildhall, and absented themselves from the said assembly; but *Hickes*, *Gaborian*, *Drew*, and *Spicer*, aldermen, and the said 13 free burgesses continued together; and thereupon *Hickes*, who was then the nearest person present in place and office to the said *James* and *John Buller* who so absented themselves, presided at the said assembly: and such remaining aldermen and burgesses then and there proceeded in the same election, and named and elected *Gaborian* to be mayor pursuant to the statute, who then and there, in the absence of the said *James Buller*, the last mayor, and the said *John Buller*, who had so absented themselves, took the oath of office before *Hickes* and *Drew*, two of the aldermen, pursuant to the statute, and was thereupon duly admitted to the said office: by means of which premises the defendant claimed to be mayor.

The replication took several issues, 1. That *Spicer* at the time of the supposed nomination was not an alderman. 2. That the major part of the mayor and aldermen did not nominate and put in election *Hickes* and *Gaborian* to be mayor. 3. That *Hickes* was not the nearest person then present in place and office to *James* and *John Buller*. 4. That *Hickes* did not preside at the said assembly. 5. That *Hickes*, *Gaborian*, *Drew* and *Spicer*, and the 13 free burgesses named did not name and elect *Gaborian* to be mayor pursuant to the directions of the statute. And 6. That *Gaborian* did not take the oath of office, and was not duly admitted to the said office according to the statute. Upon the trial of these issues a special verdict was afterwards found, which, with respect to the first issue, stated certain facts relating to the due election of *Spicer* as an alderman, which were before stated and discussed in the case of *The King v. Hawkins*, (a) and the decision of the court having been there given upon them, no further argument was had upon that point.

With respect to the 2d, 5th, and 6th issues, the jury found, that on the 20th of *January* 1807, *James Buller*, the mayor, *John Buller*, the justice, *Cleaveland*, *Hickes*, *Gaborian*, and *Drew*, four of the aldermen, and also *Spicer* claiming to be an alderman as aforesaid, and several of the free burgesses, assembled in the Guildhall, in obedience to the writ of *mandamus* mentioned in the plea, commanding the mayor and free burgesses to proceed to the election and swearing in of a mayor for the residue of the year. That *James Buller*, the mayor, presided at such assembly, and he, together with *John Buller*, the justice, and *Cleaveland*, nominated and put in election for mayor the said *John Buller* and *Cleaveland* two of the aldermen; that *Hickes*, *Gabo-*

(a) Ante 10 East, 211.

rian, and *Drew* nominated and put in election for mayor the said *Hickes* and *Gaborian*, for whom also *Spicer* as alderman tendered his vote, but it was rejected by the presiding mayor. That the mayor then declared that the nomination being equal, no election could be come to, and directed proclamation to be made for dissolving the said assembly. That no objection was made, nor was any request made to him to stay and proceed in the election; and proclamation was accordingly made for dissolving the assembly by one of the town serjeants, and immediately afterwards the mayor, the justice, and *Cleaveland*, and several of the free burgesses, and also the town serjeants, went away and left the Guildhall; but *Hickes*, *Drew*, *Gaborian*, and *Spicer*, and several of the free burgesses remained and continued in the said hall. That after the mayor, the justice, *Cleaveland*, and part of the free burgesses had so left the hall, *Hickes*, being the nearest person then present in place and office to *James* and *John Buller*, took the chair and presided, and the several aldermen and free burgesses who so remained in the hall proceeded to the election of a mayor out of one of the persons who had been so put in nomination as aforesaid, and gave their votes for the defendant *Gaborian* to be mayor. That the town clerk then and there, before *Hickes* the presiding officer and *Drew*, administered the usual oaths of office to the defendant. That a return to the *mandamus* was made by the mayor, the justice, and *Cleaveland*, and the several free burgesses who left the hall with them, stating (in substance) that at the meeting assembled in pursuance of the writ for the nomination and election of a mayor, three of the aldermen present had nominated and put in election *John Buller* and *Cleaveland*: and the remaining three aldermen (excluding *Spicer*) had nominated and put in election *Hickes* and *Gaborian*; but that no aldermen of the borough were by the major part of the mayor and aldermen nominated or put in election for mayor. And that another return to the *mandamus* was also made by the said aldermen and free burgesses who voted for the defendant; stating (in substance) that the mayor, aldermen, and free burgesses assembled at the Guildhall on the 20th of *January* 1807, and that the mayor and aldermen having nominated and put in election for mayor *Gaborian* and *Hickes*, two of the aldermen, did then and there name and elect *Gaborian* into the office of mayor, according to the charter, and pursuant to the statute, and afterwards on the same day, by and before the said *Hickes* and *Drew* another of the aldermen, in the absence of the last mayor, did swear him into his office, pursuant to the directions of the statute. But whether or not *Spicer*, at the time of the supposed nomination in the plea mentioned, was an alderman of the borough: or whether or not the major part of the mayor and aldermen nominated and put in election for mayor the said *Hickes* and *Gaborian*: or whether or not *Hickes*, *Gaborian*, *Drew*, and *Spicer*, and the several free burgesses named, did elect *Gaborian* to be mayor, pursuant to the directions of the statute: or whether or not *Gaborian* were duly sworn into office, according to the statute; the jurors pray the advice of the Court, and find those issues accordingly. And as to the 3d issue, the jury find that *Hickes*, at the time in the plea mentioned, was the nearest person then present in the place and office to *James* and *John Buller*, the mayor and justice. And as to the 4th issue, they find that *Hickes* did preside at the said assembly, as alleged in the defendant's plea.

A. Buller for the prosecution, upon the facts found in regard to the 2d, 5th, and 6th issues, touching the nomination, election, and swearing in of *Gaborian* to the office of mayor, contended that this title was invalid, upon the authority of *The King v. Buller and Another*, 8 East, 389, where an application having been made by the present defendant, claiming to be mayor under this election, for a *mandamus* to the then late mayor and deputy mayor to deliver up to him the *insignia* of his office; the Court were of opinion, that the election having been completed after the departure of the presiding officer who formed an integral part of the elective assembly, was void. [Lord *Ellenborough*, C. J. ob-

served, that the question was not raised there upon the stat. 11 G. 1. c. 4, whether if the mayor did not preside, the next in order could not preside and make it a due election.] He then contended, that this was not a good election under the statute. The object of the statute was to prevent the dissolution of corporations, and it points out two methods of proceeding in case the charter day has been slipped without an election; either to proceed to the election on the next day, (excepting *Sunday*) or on a day appointed by a writ of *mandamus*, on motion for that purpose: and in either case, if the mayor, or other chief officer who ought regularly to preside at and hold such election, be present and preside at the same, the election is to proceed, and be made in the manner warranted by the charter or usage. But if the mayor or other chief officer be absent, then the nearest person then present in place and office to the person so absenting himself shall preside in the elective assembly, and shall have the same power and authority in all respects therein as belongs to the mayor or other chief officer, for doing any act necessary to be done in order to such election. On this occasion, the mayor did preside: the election was proceeded upon in due form before him: but the votes being in his opinion, (however erroneous,) equal for the several candidates to be put in nomination, he declared that no election could be had, and directed proclamation to be made for dissolving the assembly; which was accordingly done, no objection being then made. Then after his departure no other presiding officer could continue that election, which had been begun under the presidency of the mayor; for the statute no where authorizes two different presiding officers for the same election. The concluding words in the first clause, "or for doing any other act necessary to be done in order to such election," merely relate to the proceedings before the presiding officer, whoever he may be. The 4th section directs the oath of office to be taken "before such officer (*singulariter*) as shall *preside at such election* in pursuance of this act:" and therefore only contemplates one presiding officer at one election; and if there were two in fact, it would be difficult to say before which of them the oath was to be taken. The statute has not provided for the case of the mayor going away during the election, but left that to be corrected by the power of this Court. This case, therefore, must be governed by the rules of the common law, by which it is clear that this election could not have been supported. And for this purpose he referred to a MS. note of Mr. Justice *Clive* of what was said by *Fortescue, J.* in *Machell v. Nevinson*, (a) which was just before the statute. Supposing

(a) *MACHELL v. NEVINSON*, E. 10 G. 1. B. R. MSS. *Clive, J.* (amongst the MSS. of the late Mr. Justice *Buller*.)

Upon *non electus* returned by the same defendant (*Nevinson*) to another *mandamus* to swear in *J. S.* to the office of common councilman, the case upon evidence appeared to be thus. There being a vacancy of three common councilmen, the defendant, being mayor, proceeded to an election of three others in their room, which was accordingly done. There was a by-law in this borough, by which the day of electing a mayor was fixed, but no certain day appeared to be settled for electing any other officer of the borough, only it had been the general custom to fill up such offices in the corporation as were vacant the same day the election of the mayor was; and contrary to it, the defendant having filled up the vacancy in the common council, before the day of the election of the mayor, summoned the members of the corporation to meet and elect a mayor; and when they were assembled, one of the members told the defendant that there were vacancies in the common council, and proposed to him to fill up those vacancies before they proceeded to elect a mayor. In answer to this the defendant declared that he had only summoned them to elect a mayor, and that they could not elect any other officer, for there was no vacancy, and that he had already filled up those offices. Notwithstanding this declaration of the mayor, nine of the common councilmen, which was a majority, withdrew (as the custom was) into the common council chamber, and signed a paper, by which they declared that they elected *J. S.* into the office of common council man, and tendered this paper to the defendant, who refused to accept it. *J. S.* having brought his *mandamus* to be sworn into this office.

Upon the trial it was insisted for the defendant that this election of *J. S.* was void; for there could be no election but upon a public proposal by the mayor for that purpose, but

however there could be successive presiding officers for the election of the same officer on the same day; he contended that the proceedings should have commenced *de novo* before the second presiding officer; for the presidency of another officer made it a new elective assembly. But principally he insisted, that as no objection was made at the time to the mayor's breaking up the assembly, the whole body must be taken to have acquiesced in it: and it was a fraud upon those of the corporators who went away with the mayor, that the others who remained should proceed afterwards to make an election. In this view it makes no difference that the reason which the mayor gave for breaking up the assembly, namely, the supposed equality of votes, upon the rejection of *Spicer's* vote, turned out afterwards to be bad.^(a) This is an attempt to support an election under the statute, which had originally been made under the charter, as those who concurred in it had originally stated in their return to the mandamus.

this election was even in opposition to his direction and express declaration. It was said, that it is incident to the office of mayor to direct and regulate the proceedings, and when he gives directions to proceed to a certain election, it is in the nature of a charge to them, and they cannot undertake any other matter than what he proposes. That they are confined by his directions, and they might as well elect in the absence of the mayor as elect when he hath prohibited them. And another objection was that the election was made in another room, and not in the presence of the mayor, and therefore void. It was answered that the corporate body being lawfully assembled, and the mayor presiding, the majority might direct the proceedings. That it was usual to fill up the offices that were vacant upon that day before they began the election of a mayor; and the body being assembled for that purpose, it was not necessary to have directions from the mayor, and if that power should be allowed to mayors it might be in the power of any mayor to dissolve the corporation. This is giving the mayor a negative; and the defendant ought to have given an instance where the mayor hath refused the proposal of the common council, and where that refusal hath been acquiesced under. And as the majority concurred in this election, it made it a corporate act, and the election was good. To the other objection it was said, that it was admitted that the presence of the mayor was necessary to make a corporate assembly; and though the members withdrew into another chamber, yet as it was only a separation for that particular purpose, the corporate meeting still continued, and the mayor was virtually present, and presided as their head.

PRATT, Ch. J. This is a void election. It appears that the day of election of common councilmen is uncertain; and it appears that the mayor hath power to propose business to the members of the corporation; and it is so far from a new power in this mayor that it is a power which all the mayors in *England* have. If a mayor was not to have this power, every member would be making his own proposal, which would make the greatest confusion. It is insisted that there is a right in the common council to elect without the concurrence of the mayor, and to fill up the vacancies in their body upon the day of the election of the mayor; but no instance is given that the members ever proceeded to an election without the direction of the mayor. In this case the mayor acquainted them with the business of the day, which was to elect a mayor, and refused to proceed to other business, and gave a proper answer by saying there was no vacancy; and it doth not alter the thing by being since found that the election, which he intended, was not good. He cited *Carlisle's* case, where the election was adjudged to be void, because the members were not assembled for that purpose, and proceeded to an election not directed by the mayor. There is no inconvenience in allowing this power to mayors; for if they refuse to make elections they ought to be compelled, and upon application to this Court the party may have remedy, but cannot proceed to an election without his direction.

POWIS, J. agreed in all.

FORTESCUE, J. agreed in all, and said, that if a mayor and other members of a corporation should meet to do some corporate act, and if they should go half way in the business; yet, if the mayor leaves them; if they proceed after and make an election, it is void; for the mayor is the person who is to preside, and as the mayor has a power to refuse to meet, it is as illegal to proceed after he breaks up and leaves them, as if they should proceed without being assembled by him: and he cited *Whitehall's* case to this point.

RAYMOND, J. agreed in all, and said, if the members of a corporation are summoned to appear for one particular purpose, they cannot proceed to any other matter without the unanimous consent of the whole body. But if every member be present and consent, it is good: though they were not assembled for that very purpose.—And a verdict was found for the defendant.

(a) Vide *Rez v. Hawkins*, 10 East, 211.

Adam, junr., for the defendant, contended that the election was good within the statute, having been made at an elective assembly duly convened under the *mandamus*, and held before the next person then present in place and office to the mayor, after the mayor and his companions had absented themselves. In this view of the case, (which the Court had intimated to be the true question to be argued) it was unnecessary, he said, to endeavour to support *The King v. Norris*, 1 Barnard. 385, which he admitted had been shaken by what had fallen from the Court in *The King v. Buller*, 8 East, 392. The words of the statute are large enough to include the case of a change in the presiding officer during an election; and such a case is expressly within the mischief intended to be remedied. As in *The King v. Pool*, Rep. temp. Hard. 23. 27. Cun. 11. 15, an election began on the charter day, and continued to the next day by adjournment, was held good under the statute. Whether the mayor or chief officer absent himself altogether, or be present in the first instance when the elective assembly is formed, and then depart before the election is concluded, it is precisely within the same mischief: and if the remedy be not extended to both cases, as the words are large enough to include both, the statute may be altogether evaded: for the head officer, intending to prevent an election, will attend and hold the court, and then depart or dissolve the meeting. But the statute expressly provides, that if the mayor absent himself, (which includes as well an absence pending the proceedings as an entire absence) the person next in place and office to him shall hold the court or preside in the meeting, and have the *same power and authority in all respects therein as belongs to the mayor, &c. or for doing any other act necessary to be done in order to such election*. These latter words were intended to meet every contingency where the regular presiding officer should desert or neglect his duty, from whatever cause it may arise. Then as to the want of objection at the time to the mayor's dissolving the assembly by those who remained behind, it was not necessary to object, because the act was illegal and without any authority, and he was guilty of an offence in so doing; or at least he acted erroneously; for he was bound to know that *Spicer's* title was good, as it was afterwards determined to be in this court. [Lord *Ellenborough* observed, that it could hardly be said, that the mayor was guilty of an offence in what he did. The validity of *Spicer's* election was a point of great nicety, on which this court deliberated; and even now the matter is *sub judice* upon a writ of error. The presumption, indeed, is, that the mayor was wrong, and that this Court was right: but a court of error may ultimately think otherwise. The pinch of the case is, that those who relied at the time on the validity of *Spicer's* vote did not give notice that they meant to proceed with the election, notwithstanding the determination of the mayor. On the contrary, they appeared to acquiesce in the breaking up of the meeting, and then, when the rest of the corporators were gone away, they proceeded with the election. Supposing it then to be ever so clearly established, that an election could be completed under one presiding officer which had been begun under another; how can you get over this difficulty in the case?] It was the duty of all to remain and finish the election; and if the statute warrant and require this, it will be a good election, though the parties did not insist upon it at the time, and even though they had supposed that the election was good under the charter.

LORD ELLENBOROUGH, C. J. As the Court are of opinion with the prosecutor on the last point, it is unnecessary to hear his counsel in reply. Assuming it to be clear, (though the point has never been judicially decided) that an election begun under one presiding officer, as by the nomination of the two persons out of whom the burgesses were to choose one, could be completed by such choice made under another, after the departure of the first, and the breaking up of the meeting, as far as depended upon the act of the first presiding officer; the question still remains whether the election of the defendant, under the circumstances which took place on this occasion, can be supported.

An assembly was regularly convened for the purpose of nominating and electing a new mayor, over which the then mayor presided. He declared that the persons with whom the power of nomination rests were divided 3 and 3, and consequently that no election could be made; and thereupon he directed proclamation to be made for dissolving the assembly. Nobody objected at the time to all this; still less was any notice given, that if the mayor departed, those who chose to remain would notwithstanding proceed and complete so much of the election as still remained to be made: but they suffered the mayor to depart, and many of the freemen with him, upon a supposition that no farther proceedings would be then had. This silence and acquiescence, at the time, of those who afterwards proceeded to make an election operated as a surprize and fraud upon the other electors; and therefore the election made by them under such circumstances cannot be borne out by the statute.

GROSE, J. It is impossible to support an election which was proceeded in by a part only of the electors who remained behind after the rest were gone away, in consequence of a dissolution of the assembly to which no objection was made at the time. An election so made was in fraud of those who went away. Those who objected to the dissolution of the assembly ought to have given notice, that they should remain notwithstanding, and still proceed with the election.

LE BLANC, J. The election of the defendant cannot be supported on the facts here stated, either under the charter, without calling in aid the statute, or on the statute. For supposing that it was an election under the charter, and that the case of *The King v. Norris* could be supported in all its parts, still this would not be a valid election, because that case only shews that an assembly once lawfully constituted may proceed on the business which was begun when the mayor was present notwithstanding his subsequent departure: but here the business which began under the mayor had been ended; for the mayor as presiding officer had decided that the votes being equal no election could be had; and no objection was made to that decision: and then he directed proclamation to be made for dissolving the assembly; and no objection was made to that, nor any notice given by any persons that they meant to proceed in making an election. Then, when the mayor was gone away, and a number of the burgesses also departed, considering the assembly as dissolved, and the rest proceeded to make an election: this was not a continuation of the business begun before the mayor, but an attempt to continue that which had been concluded. Then considering the case upon the statute, and that if the mayor absent himself, the next in place and order present may preside; yet here the mayor did not absent himself, but did preside, and as presiding officer determined upon the validity of the votes, that they were equal, and that no election could be had; and then dissolved the assembly; and all this without any objection made at the time: and in consequence of such dissolution of the assembly, unobjected to, as it appeared, many of the freemen went away, and then the rest of them made the election in question: this was no election within the aid of the statute; which never meant to protect elections made by surprize and fraud.

BAXLEY, J. I do not think that the first point made by the prosecutor's counsel is clear. I think it is extremely probable, that the intention of the Legislature in this statute was, that in case of the mayor's absenting himself during the election, the next in place and order to him might preside and go on with it, and that the wrongful act of the mayor in going away pending the proceeding would not defeat an election afterwards made by the body. But here the mayor presided at the meeting, and in the course of the proceeding a fair question arose, on which the mayor, without fraud, *bona fide*, as we must presume, decided, that there was an equality of votes, so that no persons could be put in nomination for the election: and this must be taken to have been acquiesced in at the time by there being no objection then made to it. The

meeting was then declared to be dissolved; on which the mayor and two aldermen and many of the common burgesses were suffered to depart, without notice of any objection, after which the others proceeded and elected the defendant. This, I think, was a fraud upon all those who were suffered to depart, and therefore the election cannot be supported.

Judgment of ouster.

The King v. The Inhabitants of Elvet.

11 East, 93. April 26, 1809.

A person renting the tolls and residing in the turnpike house erected by order of the commissioners appointed by the 30 G. 3. c. 67, for paving, lighting, and regulating, the streets of *Durham*, and for other local objects, cannot gain a settlement in the parish by the general turnpike act 13 G. 3. c. 84. s. 56.

TWO justices by an order removed *Frances* the widow of *John Taylor*, and her five infant children, by name, from the township of *West Rainton*, to the township of *Elvet*, in the county of *Durham*. The Sessions, on appeal, confirmed the order, subject to the opinion of the Court on this case. By an act of the 30 G. 3. c. 67, intitled, "An act for paving, lighting, watching, and regulating the streets, &c. of the city of *Durham* and borough of *Framwelgate*, and the suburbs thereof and streets thereto adjoining; for removing and preventing nuisances, &c. therein: for widening and rendering more commodious several of the said streets; &c. and for regulating and improving the markets within the said city and suburbs;" certain commissioners are appointed for carrying the above purposes into effect; and to enable them so to do, the act authorises them to take certain tolls, and appoint proper persons to collect them in the streets of *Durham*. By the 32d clause it is provided, that if, instead of collecting the said tolls in this manner, it should appear to the commissioners more expedient to collect the same at toll-houses or turnpikes, it should be lawful for them to erect two turnpikes on the great north road, one to the south, the other to the north of the city, for the purpose of collecting the tolls; and that the right and property of all such turnpikes and toll-houses should be vested in the commissioners. And the 36th clause empowers the commissioners to lease the tolls. By virtue of this act the commissioners erected a turnpike gate and house for collecting the tolls at a place called *Farewell Hall*, upon the great north road within *Elvet*, and in 1796 demised the same with the tolls to one *Reather* for three years, who, on the 23d of August 1796, leased the same by indenture to *Elizabeth* and *John Taylor* alone entered into the toll-gate and house, and continued to reside there with his family, collecting the tolls for the said term. The tolls were collected and appropriated to the general purposes of the act. Neither the tolls, nor the gatehouses, nor the respective lessees were assessed to the poor's rate. The Sessions were of opinion that the said gates and toll-houses were not such turnpike gates and houses as are within the meaning of the 56th sect. of the general turnpike act 13 G. 3. c. 84: and that therefore the pauper's husband acquired a settlement in *Elvet*, by residing at the *Farewell Hall* turnpike, and renting the said tolls and gatehouses there.

By s. 56, of the general turnpike act, "no gatekeeper of any turnpike road, or persons renting the tolls thereof, and residing in any toll-house, belonging to the said trust," shall be removeable from such toll-house till actually chargeable. And no such gate-keeper, &c. shall thereby gain any settlement.

Hullock, in support of the order of Sessions, contended that the above mentioned clause in the general turnpike act was confined to tollgate-keepers, &c. appointed by the trustees of turnpike roads to collect the tolls for such turnpike roads: whereas the tolls here were collected by order of the commission-

ers appointed by a local act for various local purposes, amongst others for repairing the *streets* of the city of *Durham*, and not for the repair of turnpike roads within the meaning of the general turnpike act.

Littledale, contra, was stopped.

Per Curiam. There is no difference in effect, though the appellation of *turnpike road* does not occur in the local act: the one is a stone road, and the other a gravel road: and every character belonging to a turnpike road belongs as well to this. The commissioners are trustees for the repair of the roads: and this case is within the prohibition of the 56th clause in the general turnpike act.

Order of Sessions quashed.

The King v. The Inhabitants of Christowe.

11 East, 95. April 26, 1809.

A parish apprentice, who was bound by her original master to another master by a new indenture of apprenticeship, without reference to or recognition of the original indenture, which still subsisted in law, does not gain a settlement by serving her new master, as upon a constructive service of the original master under the first indenture; this being only evidence of the first master's consent to the service with the second under a new and distinct contract of apprenticeship.

ELIZABETH PAIN, a pauper, was removed by an order of two justices from the parish of *Moretonhampstead* to the parish of *Christowe* in the county of *Devon*. On appeal to the Sessions, the respondents proved a settlement by birth in *Christowe*. In answer to which the appellants proved, that at the age of 7 years the pauper was bound an apprentice by the parish of *Christowe* to *William Ponsford*, with whom she lived there till she was 11 years old. They then produced a written paper purporting to be an assignment of the pauper by *Ponsford* to *John Smith* then of the same parish, with whom she lived in *Christowe* for some time, and afterwards lived with him in the parish of *Hemoch* for several years till her apprenticeship expired. The following is a copy of the said written paper legally stamped: "This indenture made the 23d of *January* in the 37th G. 3, &c. 1797, between *Elizabeth Pain* and *William Ponsford* of the parish of *Christowe* in the county of *Devon*, farmer, of the one part, and *John Smith* of the parish and county aforesaid, labourer, of the other part; witnesseth, that the aforesaid *Wm. Ponsford*, together with the consent and approbation of the said *Elizabeth Pain*, doth put and bind the said *Eliz. Pain*, and by these presents hath put and bound the said *Eliz. Pain*, an apprentice unto and with the aforesaid *John Smith*, with him, after the manner of an apprentice, to dwell, serve and abide from the day of the date hereof until she be full 21 years of age. During all which term the said apprentice her master faithfully shall serve, &c. (and so it proceeded in the common form of an indenture of apprenticeship.) And the said *J. Smith* master of the said apprentice, for and in consideration of the sum of 5*l.* 10*s.* to him in hand paid, &c. and for his good will towards the said *Eliz. Pain*, his apprentice, doth by these presents for himself, his executors, &c. covenant with the said *W. Ponsford* and *Elizabeth Pain* to teach and instruct the said *Eliz. Pain* the apprentice in all manner of housewifery work; and also shall provide for her as well in sickness as in health sufficient meat, drink, and apparel, washing, and lodging, and all other necessities during the said term. In witness, &c. (Signed and sealed by *Wm. Ponsford*, *Elizabeth Pain*, and *John Smith*; and the consideration money and receipt for the duty for the same was indorsed and acknowledged on the back of the instrument by the proper officer.) The counsel for the appellants admitted, that the above instrument was not good as an assignment of an apprentice; but they offered it only as evidence of the first

master's consent to the pauper's living with the second master. It was contended, on the other hand, by the counsel for the respondents, that being void as an assignment, which on the face of it it purported to be, it could not be received in evidence at all: and the Court being of that opinion confirmed the order.

Harris and *Bray*, in support of the order of Sessions, contended, that as this instrument was not good as an assignment of the parish apprentice under the st. 32 G. 3. c. 57. s. 7, it was bad, and wholly inoperative as a new indenture of apprenticeship, which it purported to be. That branch of the statute, reciting that persons were frequently compellable to take a greater number of parish apprentices than they could maintain or employ, and were therefore forced to place out or assign them to others; and that it was proper that such assignment should be *legally* made under the inspection and controul of the magistrates, as well for the benefit of the apprentice, as that the original master may be discharged from his covenants; and that it was fit that the person to whom such assignment should be made, and also the apprentice, should be subject to the ordinary jurisdiction of justices of the peace with respect to masters and parish apprentices; requires the assignment of the apprentice to be in writing in the form or to the effect there mentioned, with the assent of two justices under their hands; by which it was evidently meant to exclude any other manner of assigning an apprentice. The parties therefore to this instrument, which follows the old form of an indenture of apprenticeship under the stat. 5 Eliz. c. 4, and not under the stat. 43 Eliz. c. 2, with the concurrence of the parish officers and magistrates, must be taken to have contemplated an entirely different apprenticeship from that under which the apprentice was bound to her first master; which cannot now be converted into an assent by him that she should serve the second master under the first indentures. And if this attempt be countenanced, it will enable masters to continue to make a traffic of their parish apprentices as before, which it was the object of the late statute to put an end to. The instrument in question was no continuation of the original apprenticeship, but formed an entirely new engagement, which neither the first master nor the apprentice was competent to enter into.

East, contra, insisted that the question must be considered the same since the act of the 32 G. 3, as it was before under the stat. 43 Eliz. c. 2. It was equally incompetent to the first master to whom a parish apprentice was bound under the stat. 43 Eliz. legally to assign such apprentice without the consent of the parish officers, parties to the binding, as it is now under the stat. of G. 3, without the concurrence of the magistrates; and without such consent and concurrence the original binding remains in full force under the one statute as well as the other: but yet it has been decided in a long train of cases, that the assignment of a parish apprentice, whether by parol or in writing, though void under the stat. of Elizabeth, as made without the concurrence of the parish officers, is yet good to confer a settlement on the apprentice serving the second master in another parish, on the ground of the particular consent of the first master to the service of the apprentice with the second; which in contemplation of law is to be considered as a virtual service of the first master. And he referred particularly to the cases of *Rex v. St. George Hanover Square*, Burr. S. C. 12; *Rex v. Tavistock*, ib. 578; *Rex v. St. Petroz*, ib. 248; *Rex v. Clapham*, ib. 266, and *Castor v. Aicles*, 1 Salk. 68, and 1 Ld. Ray. 683, all of which were cases of parish apprentices assigned in fact, but without proper authority, who nevertheless gained settlements by serving the masters to whom they were so assigned, as serving them by the consent of the original masters; notwithstanding the same objection in substance was raised in each of those cases as here. In the first of those cases, Lord *Hardwicke*, who at first was in favour of the objection, ultimately concurred in overruling it; saying that they must take the apprentice to have been serving in the other parish upon the business of the first master, *because he consented* to such ser-

vice. The same principle was acted upon, and for the same reason, in *Rez v. East Bridgeford*, Burr. S. C. 133, though that was not the case of a parish apprentice. And in *Castor v. Aicles* it was laid down most distinctly, that though the apprentice were not assignable, yet the assignment amounted to a consent between the two masters, that the child should serve the latter: "So that this assignment is good by way of covenant, though it be not an assignment to pass an interest." This mode of gaining a settlement stands upon the stat. 3 W. & M. c. 11, which enacts, that "if any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement." Now here there is a binding subsisting in point of law under the first indenture, and an inhabitation for the last 40 days of the apprentice by the consent in fact of her master in the parish of *Hennock* with *Smith*. Such consent is manifestly expressed in the instrument in question, which in its tenor is no more than the ordinary form of an indenture of apprenticeship; and its inefficiency in point of law to absolve the first master from his legal obligation to provide for his apprentice, and to transfer the obligation to the second, cannot make it less a consent in fact to the particular service, which it was the very object of the instrument to enforce in a more binding form than by mere parol.

LORD ELLENBOROUGH, C. J. This instrument purports to be a new and original binding of an apprentice by indenture by *Ponsford* to *Smith*: it does not recognize or refer to the original indenture of apprenticeship as being an assignment of the apprentice under that indenture; nor does *Ponsford* thereby assume to have any right to assent to the apprentice serving another master under any former indenture; but only to bind her *de novo*. How then can I say, that this was a consent on his part that she should serve *Smith* as a continuation of the relation of apprenticeship which she had contracted before with him, *Ponsford*. This would be to intend a consent contrary to what appears upon the face of the instrument to have been the intention of the contracting parties. I should be sorry to overturn the decided cases; but it appears to me that this is distinguishable from them; and that there is no case where the first master affected to bind his apprentice to another *de novo* by an original indenture, in which his consent to a service as under the former binding has been inferred: and therefore, without disturbing those cases, but leaving them as we find them, I do not think that this instrument proved the consent of *Ponsford* to the service with *Smith* under the original binding.

GROSE, J. assented.

LE BLANC, J. The leaning of the former decisions was to support every case of settlement by implying the assent of the first master to the service with the subsequent master; but then it must be a consent to a service with the new master under a recognition of the original binding; and there is no case where the settlement has been held to be gained under an entirely new binding by an indenture of apprenticeship: and if we were to hold this to be sufficient, it would be carrying the doctrine of constructive assent to a service under the original binding further than any of the former cases.

BAYLEY, J. In this case the apprentice never undertook to serve the second master upon the terms of the original indenture of apprenticeship to the first master, nor did the first master consent to any such service.

Orders confirmed.

Harmar v. Playne and Another.

11 East, 101. April 28, 1809.

One having obtained a patent for a certain manufacturing machine, of which he duly inrolled a specification, afterwards obtained another patent for certain *improvements in the said machine*, in which the grant of the former patent was recited; and the latter patent contained the usual condition, that it should be void if the patentee did not, within one month, inroll a specification *particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed*: held that a specification containing a full description of *the whole machine* so improved, but not distinguishing the new improved parts from the old parts, or referring to the former specification, otherwise than as the second patent recited the first, was a performance of that condition.

THE following case was stated for the opinion of this Court by the Lord Chancellor. By letters patent of the 20th of *March* 1787, the King granted to *John Harmar* (the plaintiff) for 14 years the sole privilege of making, using, and vending a certain machine by him invented for raising a shag on all sorts of woollen cloths, and cropping or shearing them, which together come under the description of dressing woollen cloths, and also for cropping and shearing of fustians; with the usual proviso or condition for avoiding the patent on failure of inrolling a specification. In pursuance of this proviso, *Harmar* duly inrolled a specification of the said invention, with drawings of the machine in the margin thereof. On the 29th of *March* 1794, his majesty granted another patent to *Harmar*, whereby, after reciting that *Harmar* had obtained letters patent of the 20th of *March* 1787, authorizing him to make, use, and vend his invention of a machine for raising a shag on all sorts of woollen cloths, &c. for 14 years; and further, that he had invented considerable improvements in the said machine, for which improvements in the said machine he prayed his majesty's letters patent for the exclusive enjoyment thereof for 14 years, pursuant to the statute; the letters patent therefore granted to him the sole privilege and authority to make, use, and vend *his said invention*, and have the whole profit thereof.

The letters patent also contained a proviso, that if *Harmar* should not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be inrolled in the Court of Chancery within one calendar month next and immediately after the date of the said letters patent, then they should become void. In pursuance of this proviso, *Harmar* did in due time inroll a specification in Chancery, with drawings of the machine in the margin thereof; the introductory part of which specification is as follows: "To all, &c. I *John Harmar* of *Sheffield*, send greeting. "Whereas his majesty, by his letters patent dated the 29th of *March*, in the "34th year of his reign, hath granted to me especial licence and sole privilege, "&c. that I, my executors, &c. and assigns, at all times during the term of "years therein expressed should and lawfully might make, use, and vend *the "machine by me invented* and found out for raising a shag on all sorts of "woollen cloths, &c. (as before) within *England*, &c.; and that I should "enjoy the whole profit and benefit, &c. of the said invention for 14 years "from the date of the said letters patent according to the statute, &c. And "whereas in the said letters patent there is a proviso or condition, that if I "*John Harmar* should not *particularly describe and ascertain the nature of "the said invention, and in what manner the same is to be performed*, by an instrument in writing under my hand and seal, and cause the same to be inrolled in Chancery within one calendar month next after the date of the said letters patent, &c. should become void.—Now know you, that in obedience "to the said letters patent, and proviso, &c. I *John Harmar* do by these pre-

"sents particularly describe and ascertain the nature of the said invention, "referring to the drawings in the margin of these presents, which I explain "as follows." The specification then proceeds under different letters of the alphabet, corresponding with similar letters on the drawing, to set forth a full description of *the whole* of the machine: and the specification ends with these words: "And I *John Harmar* do hereby declare, that my said invention is "intended to be worked in the manner hereinbefore particularly mentioned." It was admitted by the defendants, that the improvements for which the second patent was granted are included in the general description of the second or improved machine, as set forth in the specification of the second patent; and that the second specification does contain a full and proper description of *the whole machine in its improved state*. But the second specification does not in any manner point out or describe the improvements upon the former machine by any verbal description, or by any delineation or mark in the drawing; and which drawing is not a representation of the *improvements alone*, but of the *whole machine in its improved state*; nor are the improvements in any manner substantively and individually explained by the second specification; nor is the machine in the improved state contradistinguished from the state and condition of it under the former patent by any explanation whatever, nor by any delineation or mark in the drawing; but what the former machine was, and what were the said improvements thereupon, are ascertainable and appear by referring to the first specification and the drawings thereon, and comparing the second specification and the drawings thereon with the same. The defendants insisted, that the second specification was not a due performance of the condition of the second patent: and the question therefore for the opinion of the Court was, whether the proviso or condition in the letters patent of the 29th of *March* 1794, had been duly performed by the inrollment of the said specification thereof.

Holroyd, for the plaintiff, contended that the condition had been duly performed. The patent, and the specification referring to it, are to be construed together as one instrument, as in *Hornblower v. Boulton*, 8 Term Rep. 95; and the second patent recites the first, and that the patentee had invented certain improvements in the former patent machine, for which improvements another patent was prayed, which the King grants. The first patent and specification being inrolled, the public must be taken to know their contents; or at least the second patent, by referring to the first, directs the party to the source from whence that information may be obtained in the manner required by law. The very nature of the second patent, which is for *improvements* in a machine for which a former patent had been granted, points to such former patent and the specification annexed: there need not be an express reference: and by comparing the two patents and specifications together, the party seeking for information, as to what he may lawfully make without the licence of the patentee, must necessarily see for what particular parts of the improved machine the second patent was granted; and the patentee was not bound to state in his second specification that which he had before stated separately in his first, and which the subject was bound to know. A specification need not contain every thing at length relating to the subject matter, but may refer to other public instruments, or to general sources of knowledge, which every person of reasonable skill and information on the subject may fairly be presumed to know. There is a constant reference in these instruments to drawings which accompany them, and without which the description of the particular invention would not be intelligible. [Lord *Ellenborough*, C. J. asked whether it were meant to be contended that a specification might refer to such and such articles in *Chambers's* Dictionary for a description of one part of a machine, and to certain other descriptions in other books for other parts, and so on; which would lead to great inconvenience, and make the new invented parts described wholly unintelligible to those who were not furnished with

those works; when the object of requiring a specification to be inrolled seemed to be to enable persons of reasonable intelligence and skill in the subject matter to tell from the inspection of the specification itself what the invention was for which the patent was granted, and how it was to be executed.] The public must take notice at their peril of all patents on record, and the last of them to which the specification in question belongs refers to the other. No person can be misled by the specification of a patent for an *improved* machine describing the *whole* machine, *so improved*; it is even more convenient than merely stating what the improvements are; which would be a literal compliance with the condition, but far less intelligible; for such a bare method of describing the new invention would require a much higher degree of knowledge and memory of the subject matter, and of every former patent, than this which describes the whole combination of new and old parts, forming the entire improved machine. The patentee has only an exclusive right to the *whole combination* for which his patent is granted, and the use of particular parts only is no breach of his rights: the description therefore of the particular improvements, distinct from the parts in general use before, would be useless to all, and less intelligible to many. Patents were formerly considered as injurious monopolies, and were therefore construed by the Courts with great strictness; but now when a more liberal and just view of the subject prevails, they are properly considered as highly advantageous to the public, by holding out an encouragement to ingenious men to disclose their inventions; and Lord Eldon, when presiding in *C. B.* said, in a case of *Cartright v. Arnott*, in Easter term 1800, in that court, that they were to be considered as bargains between the inventors and the public, to be judged of on the principle of keeping good faith by making a fair disclosure of the invention, and to be construed as other bargains.

LORD ELLENBOROUGH, C. J. The difficulty which presses most is, whether this mode of making the specification be not calculated to mislead a person looking at it, and induce him to suppose that the term for which the patent is granted may extend to preclude the imitation of other parts of the machine than those for which the new patent is granted, when he can only tell by comparing it with some other patent what are the new and what are the old parts: and if this may be done by reference to one, why not by reference to many other patents, so as to render the investigation very complicated. It may not be necessary indeed, in stating a specification of a patent for an improvement, to state precisely all the former known parts of the machine, and then to apply to those the improvement; but on many occasions it may be sufficient to refer generally to them. As in the instance of a common watch; it may be sufficient for the patentee to say—take a common watch and add or alter such and such parts; describing them. And when Lord Mansfield said(a) that the meaning of the specification was that others might be taught to do the thing for which the patent was granted, it must be understood to enable persons of reasonably competent skill in such matters to make it; for no sort of specification would probably enable a ploughman, utterly ignorant of the whole art to make a watch.

Wetherell, contra. The proviso in the second patent is express, that the patentee shall "*particularly describe and ascertain the nature of the said invention (i. e. the improvements,) and in what manner the same was to be performed,*" &c.: if that condition be not performed, the patent is declared void. Now, it is not pretended that the improvements of the machine, for which alone the second patent was granted, are *particularly described and ascertained* in the specification, but the *whole* machine, including indeed those improvements, is so described, without ascertaining the newly invented parts. But the patent was not for the *whole machine*, but for a *part* only: so that no person looking

(a) *Liardet v. Johnson*, *Sittings at Westminster after Hilary 1778*, Bull. Ni. Pri. (76.)

only to the second specification, or to that and the patent to which it appertained, could inform himself for what parts of the machine that patent was granted : and that knowledge can only be acquired by looking to both the patents and specifications. Unless the alteration of or addition to an old machine be *bona fide* an improvement and useful (a) to the public, the crown cannot grant a patent for it; and therefore it should appear upon the face of the instrument itself what the improvement is. Mr. Justice *Buller*, in the case of *The King v. Arkwright*, (b) lays down certain rules for the construction of patents, under the 3d and 4th of which the objections to this patent range—"3dly, If the specification be in any part of it materially false or defective," the patent is void. "4thly, The patent must not be more extensive than the invention: therefore if the invention consist in an addition or *improvement* only, and the patent be for the *whole* machine or manufacture, it is void." (c) Now here the specification is materially defective, in not ascertaining how much of the whole machine described is the new invention: and though the plaintiff has not taken out this patent for the whole machine, yet having obtained his patent for the *improvement* of the machine, he has not made a specification of that improvement, as he was bound by the condition of the grant to do; but has made a specification larger than the patent, upon the face of which the particular improvements cannot be ascertained. In *Turner v. Winter*, 1 Term Rep. 602, it was held, that if the specification were ambiguous, or gave directions which tended to mislead the public, it avoided the patent. It is not enough, then, that persons of great skill and experience may be able to find out the invention from the specification; but it should be plainly stated, so that a person of reasonable knowledge and experience upon the subject may immediately be made acquainted with the invention. The specification ought to inform the public what the thing is, for which the patent is granted, and how it is to be made, and not merely inform them where else that information is to be acquired; for that is not a compliance with the condition. No person applying to the specification of one patent is bound to know that another has been granted. If inquiry be necessary to be made for facts dehors the instrument itself, it is difficult to say where the line is to be drawn: references may as well be made to dictionaries of arts and sciences, philosophical transactions, &c. as to other patents and specifications: the patentee is not to throw on the party inquiring the trouble and expence and loss of time of acquiring the knowledge of his invention by investigation and comparison. The generality of the whole description may render it as ambiguous and difficult to be understood, as the too great generality of the particular terms in *Turner v. Winter* did. The public may well imagine from this specification that the plaintiff had a patent for the *whole* machine, when in truth it was only for a

(a) Vide Bull. N. P. [77], pl. 4. Rule the 4th.

(b) *Sittings at Westminster after Trinity 1785. Ib.*

(c) For this latter is cited, (among other cases, in which it was so ruled by Lord Mansfield,) the case of *The King v. Else*, *Sittings at Westminster after Michaelmas 1785, cor. Buller, J.* The patent there was for a new invented manufacture of lace, called French, otherwise Ground Lace. The specification went generally to the invention of mixing silk and cotton thread upon the frame. On the part of the prosecution, it was clearly shewn, that prior to the patent, silk and cotton thread had been used together and intermixed upon the same frame; and the defendant's counsel acknowledged the fact; but said he could prove clearly, that the former method of using the silk and cotton thread was quite inadequate to the purpose of making lace on account of its coarseness, and that the defendant alone had invented the method of intermingling them, so as to unite strength with fineness. But per *Buller, J.* It will be to no purpose. The patent claims the exclusive liberty of making lace composed of silk and cotton thread mixed; not of any particular mode of mixing it: and therefore, as it has been clearly proved and admitted that silk and cotton thread were before mixed on the same frame for lace in some mode or other, the patent is clearly void and the jury must find for the crown. Verdict accordingly.

part of it. It may be doubtful whether a direct reference to the former specification would have sufficed; but here there is no such reference; but the two instruments are endeavoured to be connected through the intervention of the second and first patents. If there were a succession of patents for several improvements, ending at different periods, it might be extremely difficult for a person to collect from specifications of this kind the periods when the several inventions would be open to the public. But the true sense of the condition is to give the public direct and complete information of the manner of executing the invention, without further search or trouble. [*Le Blanc, J.* There lies the difficulty: for suppose the specification had merely described the improvements, such as the addition of a crank or a screw to such or such a part; must not the party still have referred to the original specification, or at least have brought a full knowledge of it with him, before he could understand truly how to adapt the new parts described to the old machine?] Admitting that there may be some difficulty in satisfying the object of the specification by a mere description of the new parts to be added to the old machine, the patentee would be bound to state so much of the original specification as would make his description of the improvement intelligible; and perhaps the better and safer way would be to state the whole, and then to mark by references the new parts: but in whatever way it be done, the public should be able to ascertain at once, without looking to any other instruments, which are the new parts for which the patent is granted; and no objection could be made to any surplusage of explanation, provided it was not given in a manner to confound the inquirer as to the new invention.

Holroyd, in reply, said, that if references to other instruments were made in such a manner as to obscure the subject and confound the inquirer, that would avoid the patent: but so far as the public are interested in having a perspicuous description of the machine in its most improved state, it cannot be done more effectually than by describing the entire improved machine; and those who are interested in discriminating between the old and new parts can have no difficulty in doing so by comparing the two specifications; the latter of which, through the medium of the patent, having express reference to the former one; and every person being bound at his peril to notice these enrolments, and being liable to an action for infringing the patent, without having personal notice of it. Admitting, therefore, that a patentee cannot refer an inquirer to books or other writings, which he may or may not be able to obtain, or can only obtain by paying for it, or by the indulgence of another; yet here he is referred to a public source of information appropriated to this express purpose, which the patentee himself has afforded, and which the other has a right to have. [*Bayley, J.* Suppose the former patent and specification to be lost by accident; how is the public to know from the specification of the second patent how much of the whole improved machine they may use?] The law presumes that all records will be properly preserved. The same difficulty, however, would occur, if a drawing annexed to the specification in question were lost: and indeed in the case put, there would be an advantage to the public in this mode of specification more than sufficient to counterbalance the loss of the particular information, as thereby the knowledge of the whole improved invention would be preserved. The greater difficulty would be thrown upon the patentee himself in shewing what the precise improvement was, in an action for the infringement of his patent: his claim of monopoly being confined to the whole combination described. As to the labour or difficulty of comparing the second with the first specification, in order to find out the invention, some labour and difficulty of this sort must always occur where drawings are referred to annexed to the specification; they must be read and compared together, and the party must bring his general scientific or mechanical knowledge, and perhaps other general information, to bear upon the subject. If the first specification had been actually recited in the second, there must have been

the same labour of comparison as in this case: the only difference here is, that the party must refer to another parchment on record.

Lord ELLENBOROUGH, C. J. I own I was disposed to think, that it was a departure from the terms of the proviso for the patentee merely to tell the inquirer, who came to consult the specification, how he might learn what the invention was, instead of giving him that information directly. But I feel impressed by the observation of my Brother *Le Blanc*, that the trouble and labour of referring to and comparing the former specification with the latter would be fully as great if the patentee only described in this the precise improvements upon the former machine. Reference must, indeed, often be necessarily made in these cases to matters of general science, or the party must carry a reasonable knowledge of the subject-matter with him, in order clearly to comprehend specifications of this nature, though fairly intended to be made. We will, however, consider of the case, and certify our opinion.

The Court afterwards certified to the Lord Chancellor, that they had heard the case argued by counsel, and were of opinion, that the proviso or condition in the letters patent, bearing date the 29th of *March* 1794, had been performed by the inrolment of the specification thereof set forth in the case. (1)

(Signed)

ELLENBOROUGH.

N. GROSE.

S. LE BLANC.

J. BAYLEY.

Esdaile and Others v. Sowerby and Meller.

11 East, 114. May 2, 1809.

Though the indorsers of a bill of exchange had full knowledge of the bankruptcy of the drawer and of the insolvency of the acceptor, before and at the time when the bill became due; and within a day after notice might (but for a mistake of the holders) in due course have reached them from the holders' communicating such their knowledge to the bankers in *Liverpool*, with whom they had before discounted the bill and who had transmitted it to the holders in *London*; yet that did not dispense with such holders' giving notice of the dishonour in due time to the indorsers.

ASSUMPSIT by the plaintiffs, as indorsees, against the defendants, as indorsers of a bill of exchange, dated the 18th of *November* 1807, drawn at three months date, by *Cheetham* upon *Hill* for 200*l.*, payable to the defendants' order, and by them indorsed to the plaintiffs, and accepted by *Hill*, payable at the banking-house of *Were, Bruce* and Co. in *London*. Plea, the general issue. At the trial at *Guildhall*, the jury found a verdict for the plaintiff, subject to the opinion of the Court on this case.

Cheetham, the drawer, being resident at *Manchester*, drew the bill in question upon *Hill* the acceptor, who was his clerk or agent resident in *London* for the purpose of selling goods for him, but carried on no business on his own account, nor had he any property of his own. The defendants got the bill discounted by *Moss, Dale* and *Rogers*, bankers in *Liverpool*, who remitted it to the plaintiffs their town bankers, who gave them credit for it in account. The bill was regularly presented for payment at the house of *Were, Bruce* and Co. on *Saturday* the 20th of *February*, when it became due, but was dishonoured. When *Cheetham* gave the bill to the defendants he owed them above 200*l.* *Hill* had effects of *Cheetham* in his hands at that time and afterwards, but not when the bill became due. *Cheetham* stopped payment on the 24th of *January*; became bankrupt before the bill was due; and was in the *Gazette* as a bankrupt on the 26th of *February*. He acquainted the defendants with his situation at the time of his stopping payment, and told them that any paper

(1) [See *Lowell v. Lewis*, 1 Mason, 182. *Sullivan v. Redfield*, 1 Paine, 441. *Davis v. Palmer*, 2 Brockenb. 298.—W.]

which became due after that time would not be paid. They also knew that *Hill* had no funds when the bill in question was running but what *Cheetham* furnished him with. *Cheetham* on the 14th of *January* gave them some other paper to cover outstanding bills, and told them at the same time that the bill in question would not be paid. The other paper which was then delivered to the defendants turned out wholly unproductive. The plaintiffs sent back the bill in question from *London* by the post on *Monday* the 22d of *February*, but by mistake sent it to the bank at *Birmingham* instead of to *Moss, Dale* and *Rogers* at *Liverpool*. The bill was returned by the *Birmingham* bank to the plaintiffs in *London* on the 25th, when they remitted it by the same post to *Moss, Dale* and *Rogers* at *Liverpool*, where it was received by them upon the 27th and immediately sent to the defendants, who refused payment. The defendant *Meller* called on *Moss, Dale* and *Rogers* on the morning of the 25th of *February*, and asked if the bill were returned; and on being told that it was not, *Meller* said, "Gentlemen I think it necessary to give you notice that I shall hold the parties responsible for this bill wherever the neglect lies." *Moss* said, "You know the drawer and acceptor are insolvent, and therefore I beg you will take such steps as if the bill had been returned regularly." And upon *Moss* asking if it were possible the bill could have been paid, and expressing his surprise that it had not been returned, *Meller* answered, "It is impossible the bill can be paid, as both the drawer and acceptor are insolvent, and bills of the same parties have been dishonoured, and therefore it is impossible the bill can be paid." If the bill had been sent back to *Moss, Dale* and *Rogers* on *Monday* the 22d of *February*, it would have reached them on *Wednesday* morning the 24th, twenty-four hours earlier than *Meller* made the above application. *Moss, Dale* and *Rogers* held the plaintiffs to be responsible for the bill to them; the neglect, if any, being in the plaintiffs, and not in the house of *Moss* and *Co.* The question for the opinion of the Court was, whether under the above circumstances the plaintiffs were entitled to recover. If so, the verdict was to stand; if not, then a nonsuit was to be entered.

Lawes, for the plaintiffs, said that the question meant to be agitated was, whether knowledge in the defendants of the insolvency of the drawer and acceptor of the bill, and that it must have been dishonoured at the time when it became due, were equivalent to actual notice given to them of such dishonour by the holders of the bill: but there were several cases^(a) upon the subject in which the want of notice was held fatal; though this, he said, went further than any of them; for not only no prejudice had arisen to the defendants from want of the usual notice; *Cheetham* the drawer having given them notice of his insolvency before the bill was due, and the acceptor being known to them to be a mere man of straw; but the defendants had declared their knowledge of all these facts to the plaintiff's agents at *Liverpool* on the day after the very earliest intelligence of the actual dishonour of the bill could have reached them by a regular notice, which was only delayed by accident: and this communication, he contended, was a dispensation of any other notice.

Park, contra, was stopped by the Court.

Lord ELLENBOROUGH, C. J. It is too late now to contend, that the insolvency of the drawer or acceptor dispenses with the necessity of a demand of payment, or of notice of the dishonour.⁽¹⁾ And as to knowledge of the dishonour by the person to be charged on the bill being equivalent to due notice of it given to him by the holder, the case of *Nicholson v. Gouthit* is so decisive an authority against that doctrine, that we cannot enter again into the discussion of it.

(a) Vide *Staples v. Okines*, 1 Esp. N. P. Cas. 334. *Nicholson v. Gouthit*, 2 H. Blac. 609. *Whitfield v. Savage*, 2 Bos. & Pull. 277, and *Clegg v. Cotton*, 3 Bos. & Pull. 239. And see *Russell v. Langstaffe*, Dougl. 515, and *Warrington v. Furber*, 8 East, 245.

(1) Vide *Whitfield v. Savage*, 2 Bos. & Pull. 279. *Jackson v. Richards*, 2 Caines 343. *Ball v. Dennison*, 4 Dal. 165.

LE BLANC, J. *Ld. Chief Justice Eyre* was much disposed in that case to have dispensed with the notice, but found himself precluded by the authorities.

BAYLEY, J. It was said in *Tindal v. Brown*, 1 Term Rep. 169, that notice means something more than *knowledge*; because it was competent to the holder to give credit to the maker, &c.

Per Curiam,

Postea to the Defendants.

Hall v. Odber.

11 East, 118. May 2, 1809.

Evidence of an account stated, whereby the defendant admitted a certain balance due to the plaintiff, is not done away, but confirmed in support of an *assumpsit*, by evidence of a foreign judgment recovered by the plaintiff for the same sum, with a stay of execution for six months to enable the defendant to prove a counter demand, if he had any: and the plaintiff not having declared till after that period, it was held no objection that the writ was sued out and the defendant arrested before.

THE plaintiff declared in *Hilary* term 1808, upon a judgment obtained by him against the defendant, in the court of King's Bench at *Quebec* in *Lower Canada*, in *February* 1807, for 8096*l.* 15*s.* 8 1-2*d.* with interest at 5*l.* per cent. from the 31st of *October* 1805. There were also counts for goods sold and delivered, for interest, for money lent, paid, had and received, and on an account stated. The defendant pleaded the general issue; and at the trial before Lord *Ellenborough*, C. J. at *Guildhall* after last *Trinity* term, a verdict was found for the plaintiff for 9193*l.* 12*s.* 8 1-2*d.*, subject to the opinion of the Court on the following case.

The plaintiff a merchant in *London*, and the defendant a merchant in *Canada*, had had various dealings together, and about the middle of 1806, the plaintiff brought an action against the defendant in the court of *King's Bench* at *Quebec*, for 8096*l.* 15*s.* 8 1-2*d.*, to which the defendant pleaded the general issue; and a cross cause, called in that court an incidental cause, was instituted there by the defendant for money alleged to be due to him. The following judgment was proved in evidence on the part of the plaintiff, entitled, "Province of *Lower Canada*, district of *Quebec*, *King's Bench*, Superior Term, *Friday* 20th *February* 1807, *C. C. Hall*, plaintiff, *v. T. T. Odber*, defendant, and *vice versa*. The court having duly examined and considered "the pleadings, proofs, &c. as well in the cause in chief, as in the incidental cause, &c.; it is considered and adjudged, that the said *C. C. Hall* do "recover from the said *T. T. Odber*, 8096*l.* 15*s.* 8 1-2*d.* sterling, with interest "thereon at five per cent. from the 31st of *October* 1805 until perfect payment, "and costs to be taxed: but *execution is hereby stayed until the further order* "of the Court. And the Court declares, that this judgment so pronounced for "the plaintiff in this cause in chief shall be hereafter defazanced and reduced "by a deduction of such sum as the said Court shall adjudge to the said incidental plaintiff upon the final hearing of the said incidental cause; reserving to the said *C. C. Hall* such recourse for the residue of his demand as "he may legally have, &c. And it is further considered by this Court, that "it be permitted to the said incidental plaintiff to sue out with all due diligence "a commission for the examination of the incidental defendant, and such "necessary witnesses on the part of the said incidental plaintiff as may be "resident in *Great Britain*, or elsewhere without this province, upon interrogatories and cross interrogatories to be duly filed, &c. And in order that "the said incidental plaintiff may have a reasonable time allowed him to prove "his demand, the Court doth grant six calendar months from the date of this "judgment for the return of such commission. And the Court doth reserve "its judgment, and all further directions upon the exceptions or demurrer filed

"by the incidental defendant in the said incidental cause, until the final hearing of such cause." The defendant having arrived in *England*; the plaintiff, on the 3d of *July* 1807, sued out a bailable writ against him for 5000*l.*: upon which the defendant was arrested on the 8th of *July* 1807, and committed to the *King's Bench* prison on the 24th of the same month, being within the six calendar months from the day of the beforementioned judgment at *Quebec*; no notice of any commission or proceeding in the incidental cause having then or since been given by either party. The plaintiff also gave in evidence an account current between him and the defendant, signed by the defendant, commencing with a balance to the defendant's debt, as due to the plaintiff on a former account up to the first of *January* 1805, of 14, 664*l.* 16*s.* 2*d.*; and after various items on each side of such account, concluding with a balance due to the plaintiff on the 31st of *October*, in the same year, of 8096*l.* 15*s.* 8 1-2*d.* And no other evidence was given at the trial. The question for the opinion of the Court was, whether the plaintiff were entitled to recover either on the before mentioned judgment, or on the other evidence, notwithstanding such judgment had been adduced in proof. If he were, the verdict was to stand; if otherwise, a nonsuit was to be entered.

Marryat for the plaintiff, in answer to the expected objection on the part of the defendant, that this was only an interlocutory judgment, said it was immaterial whether it were interlocutory or final: if final, the action is sustainable on the judgment: if not final, then at most it is only evidence of an action depending in an inferior court, and therefore is no bar, nor could it even have been pleadable in abatement,^(a) to the plaintiff's recovering upon the account stated. In fact, however, the judgment in the principal cause is final as to the debt due from the defendant to the plaintiff, on which sum interest is to be calculated; and only execution is stayed until a certain time, to give the *incidental plaintiff* (the defendant in this and in the original action) an opportunity of establishing his counter demand; which if he had succeeded in doing, it may be supposed that the provincial court would only have allowed execution to be sued out for the balance. But no such counter demand appears now to exist; and if it had, it would have been competent for the defendant to have set it off in this action. With respect to this action having been commenced before the six calendar months allowed to the defendant to prove his counter demand in the incidental cause, it is no objection; for even in the superior courts here, where the allowance of a writ of error is a stay of execution upon a judgment recovered, yet an action may be brought in the mean time upon the judgment either against the principal, or against his bail on their recognizance; and it is a common motion in the Court to stay proceedings pending a writ of error. But though the simple contract debt were merged in the judgment, and the plaintiff were concluded from suing upon the judgment before the six months, yet the process and arrest being before the day is no objection, as the declaration was not filed till afterwards.^(b) 2dly, Supposing this were only an interlocutory judgment, then it would not stand in the way of this action on the original simple contract debt. Nor indeed is any foreign judgment more than evidence of a simple contract debt;^(c) for the defendant may impeach the regularity of the proceeding, or shew that it was not well founded; as by shewing that it was obtained in his absence.^(d) The pendency of another suit for the same cause of action even in one of the superior courts here is only pleadable in abatement; and the pending of such action in an inferior court (and every foreign court is to be taken as such) is not pleadable at all.

(a) Vide *Sperry's case*, 5 Rep. 62.

(b) *Best v. Wilding*, 7 Term Rep. 4, and *Swancott v. Westgarth*, 4 East, 76.

(c) Vide *Walker v. Witter*, Dougl. 1, and the cases there cited.

(d) Vide *Buchanan v. Rucker*, 9 East, 192.

Copley, contra. There having been a judgment by a court of competent jurisdiction between these parties, the plaintiff cannot now revert to his original cause of action, but must shape his demand in conformity with that judgment. In this respect there can be no difference between a foreign judgment or any other, whatever there may be in the form of action: the plaintiff who sued in the foreign court cannot be allowed to dispute the validity of the judgment obtained there by himself. Then by the terms of the judgment the plaintiff was prohibited from suing for his debt till a certain time allowed for the defendant to establish his counter demand, (which was in the nature of a set-off to the original action,) and till that was ascertained, it could not be told whether any thing, or how much, were really due to the plaintiff. The plaintiff therefore had no right to anticipate that period; which might afterwards be extended by the provincial court on application and reasonable ground shewn for further delay. In *Sadler v. Robins*, 1 Campb. N. P. Cas. 253, it was held by Lord *Ellenborough* *à nisi prius*, and afterwards by this Court on motion for a new trial, that *assumpsit* would not lie on a decree of a foreign court, whereby the defendant was ordered to pay a certain sum to the plaintiff on a particular day, *first deducting thereout the defendant's costs to be taxed by the proper officer*, without shewing that the defendant's costs had been taxed, so as to ascertain what was the sum really due. [Lord *Ellenborough*, C. J. That was not a complete judgment as to what was due till the costs were taxed. But this is a complete judgment as to the debt due from the defendant to the plaintiff, and whatever might ultimately be deducted as a counter demand was to be ascertained in a collateral proceeding, which the defendant was at liberty to prosecute within a given time. I thought at first, that the two cases were more alike than I find they are.] At any rate, the evidence shews that there is still an unliquidated account subsisting between these parties, which will preclude the plaintiff's recovering upon the account stated. The parties have met to state their account under the sanction of a court of competent jurisdiction abroad, chosen by the plaintiff himself; the items have been ascertained on the one side, but not on the other: and till that is done, or the proceeding there is closed, it cannot be told how much is due to the plaintiff. And as to the other evidence given of an account stated between these parties in 1805, that is done away by the evidence of the judgment, which shews that that account was again opened and in controversy in 1807. This is different from the case of a judgment recovered here, and a stay of execution on allowance of a writ of error; for this is the case of a *judgment suspended*, in order to ascertain what is the sum really due.

LORD ELLENBOROUGH, C. J. There are two counts in the declaration: the one upon a foreign judgment, which is said to be suspended; the other upon an account stated. The judgment is for a sum certain found to be due from the defendant to the plaintiff, with interest thereon from a certain day past; but with a stay of execution till the further order of the Court: and this at first struck me as an incomplete judgment, on which no action could be maintained here. But we have been pressed with the course of proceedings in our own courts, where upon judgment recovered and a stay of execution upon the allowance of a writ of error, an action lies nevertheless upon such judgment in the mean time; and applications are continually made to the equitable jurisdiction of the court to stay proceedings in such actions pending the writ of error. (a) No application of that sort was attempted to be made in the present instance, in analogy to such practice of the court in common cases. Can we then say, that, taking this to be a final judgment, the plaintiff is not entitled to his action on the judgment, notwithstanding a stay of execution? But supposing this not to be considered as a final judgment, it would not stay the plaintiff's action on the simple contract upon the account stated, and still the plain-

(a) Vide 1 Tidd. ch. 20.

tiff would be entitled to recover upon the evidence on the account stated. In either view, strictly speaking, judgments in foreign courts are not to be considered upon the same footing as judgments in our own courts of record; they are but evidence of the debt; they do not bar or stay an action on simple contract; but *assumpsit* lies on them, and it is open to the parties to enter into the question of their regularity; as in the instance mentioned. If then the plaintiff's demand did not pass *in rem judicatum*, so as to become matter of record, and no objection can be made on that ground to the form of this action of *assumpsit*, the judgment was clearly evidence of his demand. And on the other ground, *assumpsit* lies to recover a liquidated balance. But then it is objected, that there was a stay of execution for six months, and that the plaintiff could not sue for his demand before: but that time was gone by long before the filing of his declaration in this action: and if we were to advert to the purpose for which the stay of execution was granted, it appears that the time had elapsed without any step taken by the defendant to sustain his counter demand: and if there had been any equitable ground for staying proceedings in this action, he ought to have applied to this court. Therefore, neither on legal, nor on equitable grounds is there any objection to this action, either on the ground of the foreign judgment, or on the account stated.

GROSS, J. It is stated that the plaintiff gave in evidence an account current between him and the defendant, signed by the defendant, in which he acknowledged the balance due to the plaintiff which he has recovered: that is decisive to shew an account stated between them, and a certain sum due to the plaintiff; and there is nothing to shake this evidence; for a foreign judgment is only evidence of the debt due; and taking that judgment in every possible way, no objection can be raised upon it to the plaintiff's recovery in this action.

LE BLANC, J. It was long ago determined that a judgment in a foreign court has only the force of a simple contract between the parties: it is evidence of the debt. This judgment therefore only went to shew what demand the plaintiff had against the defendant, and it ascertains the amount: but then it goes on to stay execution for a certain time, in order to enable the defendant to establish a cross demand, if he had any: and that distinguishes this from the former case of *Sadler v. Robins*: for there the defendant's costs were first to be taxed, and deducted from the sum which had been found due to the plaintiff upon his original demand: *something*, therefore, was clearly due to the defendant; and that was first to be ascertained before the plaintiff was entitled to the fruits of his judgment; and till that was done his demand was not ascertained. But here the sum due to the plaintiff is ascertained by the judgment, and that is evidence of the debt due to him: and then *assumpsit* may well be brought to recover it, as it is clear that a foreign judgment is no merger of a simple contract debt. But this, it may be said, is evidence of the debt, with a stay of execution for a certain time. If, however, the defendant had had any real cross demand, to establish which the bringing of this action prevented him from doing, he should have applied to this Court to stay the proceedings upon the ground that the Court abroad had reserved to him a certain time for that purpose; and if he had shewn any merits, the Court would have staid the proceedings in order to give him the fair benefit of that reservation: but no ground of that sort was laid before the Court; and therefore no answer has been given to the plaintiff's demand.

BAYLEY, J. The plaintiff proved a settled account here between him and the defendant, by which the latter acknowledged to be indebted to him so much on the balance. He also proved a judgment recovered in a foreign court for this sum against the defendant: that was a confirmation of the account settled. But it appeared, that the defendant in that suit had made a counter demand; and the court there suspended the execution of the judgment given for the plaintiff for a certain time to give the defendant an opportunity of establishing, if he could, his cross demand. But this being only a foreign judgment

did not extinguish or merge the plaintiff's simple contract debt, which can only be done by converting it into a debt of a higher nature: it is only evidence of the debt; (1) and no answer has been given to it on the part of the defendant.

Postea to the Plaintiff.

Harwood and Another, Assignees of Odell, a Bankrupt, v. Lomas.

11 East, 127. May 2, 1809.

The assignees of a bankrupt are entitled to recover back money paid by the bankrupt to the defendant after a secret act of bankruptcy committed by the bankrupt (though before the date of the commission) which money the defendant had before recovered by judgment against the bankrupt in an action on a promissory note, reserving interest half yearly, given for the balance of an account, consisting, amongst other articles, of money lent by the defendant to the bankrupt; such note not being given in the usual and ordinary course of trade and dealing, so as to be protected by the stat. 19 G. 2. c. 32, even supposing a promissory note to be within that statute, which only mentions bills of exchange.

THE plaintiffs declared for money had and received by the defendant to their use, as assignees of the bankrupt: and on the general issue pleaded, a verdict was found at the trial for the plaintiff's for 398*l.*, subject to the opinion of this Court on the following case.

On the third of August 1805, *Odell*, being indebted to the defendant in 400*l.*, gave him a promissory note for that sum, payable at 12 months, with interest half-yearly; and as a further security left a lease in his hands. A part only of the money having been paid, the defendant, in 1806, arrested *Odell* for the remainder, and in *Hilary* term 1807, obtained final judgment for 346*l.* damages, and 19*l.* 10*s.* costs; which judgment, on error brought, was affirmed on the 5th of February, 1808. And on the next day *Odell* paid 398*l.* the amount of the judgment, with the subsequent interest and costs, to the defendant's attorney, who paid it over to the defendant; and in a day or two afterwards, the defendant delivered back to *Odell* the lease which had been so left with him. The commission of bankrupt against *Odell* was dated the 19th of February 1808, and the trading, petitioning creditors' debt, and assignment from the commissioners to the plaintiffs, were regularly proved, with an act of bankruptcy committed by *Odell* on the 27th of January 1808. When the 398*l.* was paid to the defendant as aforesaid, he did not know, understand, nor had any notice that *Odell* had become a bankrupt, or was in insolvent circumstances. And the question reserved for the opinion of the Court was, whether the payment of that sum by the bankrupt to the defendant was protected by the stat. 19 Geo. 2. c. 32? If it were not, then the verdict was to stand; if otherwise, a nonsuit was to be entered.

Marryat for the plaintiffs. Supposing a promissory note to be a bill of exchange within the statute, at any rate the bill or note can only come within the protection of the statute if given and paid in the usual course of trade and dealing. First, it must be so given: the original consideration for the note is not stated in the case; but the defendant who seeks to protect himself from the general operation of the bankrupt laws by the exception in the statute, ought to have shewn that it was given in the usual course of trade. But here are circumstances which rather negative that this bill was given in the usual course of trade. It was given for an antecedent debt, is drawn at an unusually long date, and reserves interest; which seems more in the nature of a loan: but the Court have before decided that the permitting a bill to remain over as

(1) As to the effect of a foreign judgment, see *Taylor v. Bryden*, 8 Johns. 173, and *Sinclair v. Fraser*, therein cited p. 178.

a loan on interest is not in the usual and ordinary *course of trade and dealing*. (a) 2dly, The money must be *received*, as well as the bill negotiated, *in the usual and ordinary course of trade and dealing*; for these words are twice repeated in the statute. (b) Now here the money was not paid when the note was due, but long afterwards, together with additional interest and costs incurred in the litigation. A payment under compulsion of legal process, and in order to avoid an execution, can in no sense of the words be deemed to be made "in the usual and ordinary course of trade and dealing;" but may rather be contrasted with that description in the statute. Such a compulsory payment is in contrast also with the preamble of the statute, which speaks of traders appearing publicly after secret acts of bankruptcy, and carrying on their trade and dealings, by buying and selling of goods, negotiating bills, and paying and receiving money on account thereof, in the usual way of trade, and in the same open and public manner as if solvent and not bankrupts. And *Bradley v. Clark*, 5 Term Rep. 197, shews how strictly the statute has been construed, where money paid by a trader after a secret act of bankruptcy to a carrier for the carriage of goods was held not to be protected. He then noticed the judgment of the two Judges in *Coz and Others, Assignees of Emmott v. Morgan*, 2 Bos. & Pull. 398, against him; that payment to a creditor of a bill of exchange by a bankrupt under an arrest was protected by the statute; but relied on the arguments used by the dissenting Judge against the validity of that decision; and also mentioned *Southey v. Butler*, 3 Bos. & Pull. 237, and *Hovil v. Browning*, 7 East, 160, 162, as throwing great doubt upon it. But here the payment was not even made under the compulsion of an actual arrest, but under the apprehension only of process. With respect to the deposit of the lease, supposing the defendant to have had an equitable lien upon it to the extent of its value, the case is silent as to that value, or whether it ever came to the hands of the assignees: if they had received value for it, a court of equity, or perhaps a court of law, might have obliged them to allow such value in reduction of this demand; but nothing of that kind appears.

Reader, contra, admitted that to entitle the defendant to retain, it was necessary for him to shew, as well that the note was drawn in the usual and ordinary course of trade and dealing, as that the payment was so made. 1st, As to the objection that the note does not appear to have been drawn in the ordinary course of trade and dealing, it must be taken to be so, being in its nature a commercial instrument, unless the contrary appear: and that cannot be inferred from the mere circumstance of its having been drawn at a twelve months' date with interest. The word *dealing* is very large. But if it were doubtful whether the note were drawn "in the usual and ordinary course of trade or dealing," that was a question for the jury at the trial.

The Court, however, seemed strongly inclined to think, that it was incumbent on the party seeking the protection of the statute to bring his case within the terms of it. And Lord *Ellenborough*, C. J. suggested, that it should either be stated as a fact in the case, if the truth would warrant it, that the note was drawn in the usual and ordinary course of trade and dealing; or at least, such facts should be stated as would warrant the Court in concluding that it was so drawn, in order to raise the other general question. But stated as it was thus generally, the Court could not say, that a note given, reserving inter-

(a) *Vernon and Others, Assignees of Tyler v. Hall*, 2 Term Rep. 648.

(b) 19 Geo. 2. c. 32. s. 1. "No person who is really and *bona fide* a creditor of any bankrupt for or in respect of *goods* really and *bona fide* sold to such bankrupt, or for or in respect to any *bill or bills of exchange* really and *bona fide* drawn, negotiated, or accepted by such bankrupt in the usual or ordinary course of trade and dealing, shall be liable to repay to the assignees, &c. any money, which, before the suing forth of such commission, was really and *bona fide*, and in the usual and ordinary course of trade and dealing, received by such person of any such bankrupt before such time as the person receiving the same shall know, understand, or have notice that he is become a bankrupt, or that he is in insolvent circumstances."

est half-yearly on the principal sum, which, for aught appears, might have been to secure a loan of money, was drawn in the usual and ordinary course of trade.

The Attorney General, who was also of counsel with the defendant, said, that if such were the opinion of the Court; it would be useless to send the case back to be restated, as the note had in fact been given for a balance of an account, consisting, amongst other articles, of money lent by the defendant to the bankrupt.

On this ground, therefore, *The Court* gave judgment for the plaintiffs, without entering into the consideration of the other general point: Lord *Ellenborough*, C. J. saying, that even considering a promissory note to be within the statute, (on which, however, no opinion was given,) the note in question having been originally given on the account now stated, could not be said to have been given in the ordinary course of trade and dealing.

Per Curiam,

Postea to the Plaintiffs.

The King v. The Inhabitants of Kea.

11 East, 132. May 3, 1809.

A woman cannot give evidence of the non-access of her husband to bastardize her issue though he be dead at the time of her examination as a witness; and therefore an order of Sessions, stated by that Court to be founded in part upon credence given to her testimony of that fact, was quashed.

UPON an appeal to the Sessions from an order of two justices, removing *Thomas Pope*, son of *Mary Davey*, now the wife of *James Davey*, by her former husband *M. Pope*, deceased, aged 7 years and 6 months, from the parish of *Kea* to *St. Eval*, both in the county of *Cornwall*; it appeared, that *Martin Pope* married *Mary Davey* in 1793, who, during such their marriage, was delivered of the pauper in the parish of *Kenwyn* in said county. That *Martin Pope* was, at the time of the birth of the pauper, and up to the time of his own death, in 1806, legally settled in *St. Eval*. That the pauper, being of the age of 7 years and upwards, had not gained any settlement in his own right. That on the 6th of *January* 1800, a marriage in fact took place between *Mary Davey* (by her maiden name of *Hitchens*) and *James Davey*, and at the time of the conception of the pauper, they were living together in *Kenwyn* as man and wife; and that *Mary Davey* was re-married to *James Davey* in the beginning of the present year. And after other witnesses had been examined for the purpose of proving, that *Martin Pope* had not had access to *Mary Davey* at the time of the conception of the pauper, not for many months before; and after *Mary Davey* (objection having been first made to her competence to prove this fact, and over-ruled,) was examined, and it appeared from her evidence that *Martin Pope* had not access to her during the period aforesaid; the Sessions, as well on the testimony of the said other witnesses as to the non-access of *Martin Pope*, as on the evidence so given by *Mary Davey* as aforesaid, and not exclusively on either, reversed the order of removal, subject to the opinion of this Court on the question, Whether the evidence of *Mary Davey*, in proof of such non-access of the said *Martin Pope*, her late husband, ought to have been received?

Lord *ELLENBOROUGH*, C. J., when this case was called on, said, that to hold this evidence receivable would be in direct contradiction to *The King v. Reading*, Cas. Temp. Hard. 79, and other cases; (a) which were not meant to be over-ruled in *The King v. Luffe*, 8 East, 193: the Court in that case intending that the wife had been examined only to those facts which she might legally prove, and not to the non-access of the husband; the principle of pub-

(a) These are collected in *The King v. Luffe*.

lic policy precluding her from being a witness to that fact. And the rest of the Court signifying their concurrence in this opinion;

Burrough and *Casberd*, who were to have supported the order of Sessions, said, that this case was distinguishable from others, because the husband was dead at the time when the wife was examined; and therefore, if the rule had stood merely on the ground that the giving of such testimony was calculated to promote dissention between husband and wife, it would have ceased to apply in this instance, where one of the parties was dead: but if the Court considered, that the rule stood on the broad ground of general public policy, affecting the children born during the marriage as well as the parties themselves, they could not pretend to argue in support of the order.

The Court unanimously assented to this. And *Le Blanc*, J. added, that they were bound on the statement of this case to notice the objection taken to the competency of the wife to prove the fact of non-access: for the Sessions, after hearing her evidence to that point, had declared that they found the fact as well on her evidence as on the testimony of the other witnesses, and not exclusively on either. And this ought to be noticed as an ingredient in the decision of the Court.

The Attorney-General and *Dampier* were to have argued against the order.
Order of Sessions quashed.

Denne v. Dupuis.

11 East, 134. May 4, 1809.

Where a party gave a bond to secure an annuity, whereby he bound himself, his *heirs*, executors, &c., a memorial describing such security generally as a *bond*, from *A.* to *B.* in such a sum, &c. is defective and void under the annuity act, 17 G. 3. c. 26. But the Court only set aside the judgment entered up by warrant of attorney on such bond, and directed the warrant of attorney which was in court to be deposited with the proper officer of the court.

A RULE was obtained on a former day by *Marryat* for setting aside a judgment on bond entered up upon a warrant of attorney given to secure an annuity, and for directing such warrant of attorney to be delivered up to be cancelled. The objection was, that the annuity was secured by a bond whereby the defendant bound himself, his *heirs*, executors, &c.; and the memorial enrolled under the annuity act 17 Geo. 3. c. 26, only stated it to be "*bond* from *C. Dupuis* to *J. Denne* in the sum of 1050*l.*, with a condition," &c.; which was contended to be void, on the authority of *Horwood v. Underhill*, 10 East, 123.

The Attorney-General and *Garrow*, on shewing cause, attempted to distinguish this from the case cited, because the memorial there, stating that *the parties* themselves had become bound, might be taken to be in exclusion of their *heirs*: whereas here the security was stated generally to be a *bond* from the one to the other, without stating who were bound by the security. But

The Court said, that this was in effect the same as the former case, and must be governed by the same rule. But they only made the rule absolute to the extent of setting aside the judgment: and when pressed by *Marryat* to direct the warrant of attorney to be delivered up to be cancelled, they said that there was no necessity for doing that; but the warrant of attorney being produced in court, they ordered it to be delivered into the custody of the proper officer in court.

Atkinson v. Abbott.

11 East, 135. May 4, 1809.

Insurance on provisions "from *London to Helsingberg, the Sound, Copenhagen, all or either,*" which provisions were intended for the supply of the *British* fleet and army then engaged in the expedition against *Copenhagen*, (of which they were then in possession, but were about to evacuate it,) and were consigned to merchants there, and at *Elseneur*; held good; although in consequence of expected hostilities with *Denmark*, an order of the king in council had issued, prohibiting the clearing out of any *British* ships to a *Danish* port, and a clearance was in consequence taken out for *Helsingberg*, a *Swedish* and neutral port in the neighbourhood of *Denmark*; the adventure being legal, and not contravening the spirit of the order of council.

THIS was an action on a policy of insurance made on the 20th of *October* 1807, on goods on board a certain ship "from *London to Helsingberg, the Sound, Copenhagen, all or either.*" It appeared, that previous to such insurance a great naval and military force had been sent from this country to *Copenhagen* for the purpose of taking possession of the *Danish* capital and fleet, and that the *British* armament had effected this purpose, and had possessed themselves of *Copenhagen* after a bombardment which ended in a capitulation, by which it was agreed to be evacuated by the *British* forces on the 19th of *October*, though in fact, owing to some unavoidable delay, the evacuation did not take place till the 20th: but the fact of such evacuation was of course unknown at the time of the policy effected: and though intelligence of it had reached this country before the vessel sailed from the *Nore*, and the captain admitted, on his cross-examination at the trial, that he had heard the report; yet he swore that he did not believe it. The government, however, having anticipated the probability of hostilities with *Denmark*, consequent upon the expedition and seizure of the *Danish* fleet, an order of the king in council issued on the 2d of *September* 1807, prohibiting the clearing of any *British* ship from this country for any port in the dominion of the King of *Denmark*: in consequence of which no clearance could have been obtained by this vessel for any such port. And therefore, though the true object of the adventure was to carry out provisions for the use of the *British* armament then supposed to be at *Copenhagen* or *Elseneur*, yet the captain, on the 15th of *October*, took a custom-house clearance for *Helsingberg*, a *Swedish* and neutral port, to which he had no intention at that time to go; his consignees being *British* merchants at *Copenhagen* and *Elseneur*, and his bills of lading being for the *Sound* and *Copenhagen*. It appeared to be the usual practice at the custom-house to take out a clearance for one only of the ports to which the ship was destined. The ship sailed from the *Nore* on the 22d of *October*, and was captured by a *Danish* vessel on the 11th of *November*, at the entrance of the *Sound* in her way to *Copenhagen*, where the captain still expected to meet the *British* armament, and Mr. *Blairrock*, his consignee, on board a ship of that port. The jury were satisfied of the honest intention of the assured and of the captain in this adventure, to supply the *British* armament with the provisions which were the subject of the insurance; and being directed by Lord *Ellenborough*, C. J. that the insurance was not avoided by the custom-house clearance having been taken out under these circumstances for *Helsingberg*, to which place there was no contemplation at the time of proceeding, unless any circumstances should occur in the prosecution of the adventure to render it necessary; they found a verdict for the plaintiff. Whereupon a rule was applied for in the last term for setting aside the verdict and granting a new trial, on the ground that the taking out of a custom-house clearance for a place to which there was no intention of going in the course of the voyage was such a fraud as avoided the policy.

Garrow, Park, Taddy, and *W. Adam*, now shewed cause against the rule,

and denied that there was any fraud either in fact or in law in the captain having taken out his custom-house clearance for *Helsingberg*: it was rendered necessary by the situation of public affairs at the time, and made no difference whatever in the contract made with the underwriters; the true object of the adventure being to carry provisions to the *British* armament at a place to which by the terms of the policy the assured had an option to go. And they relied on *Planche v. Fletcher*, Dougl. 251, where the taking out of a false custom-house clearance, for the purpose of evading the laws of a foreign country, was held to be no fraud on the underwriter; the real object and destination of the ship being legal by the laws of this country, and within the terms of the policy. Then as to the order in council of the 2d of *September*, this adventure was not within the true meaning of it; the object not being to carry on trade with the *Danes*, or to go to any port of the King of *Denmark* other than such as was *British* at the time, for *British* purposes. Though in the case of *Sands v. Child*, 4 Mod. 176, the breach of an order in council was considered not to avoid a policy.

The Attorney-General, Best, Serjt., and *Lawes*, in support of the rule, said, that they did not mean to insist that the policy was avoided by reason of any disobedience to the order of council in this particular case; though they denied the generality of the position, that disobedience to an order of council might not avoid a policy of insurance by making the forbidden adventure illegal, as the King by his prerogative, in regulating general matters of navigation between this and foreign countries, might for public purposes well do. But they relied on the false clearance which had been taken out for a place to which there was no intention at all of proceeding; which they said was very different from the practice referred to of not mentioning in that document *all* the ports of destination of the vessel on her intended voyage. And this they argued was a fraud upon the navigation laws of the kingdom, and particularly upon the stat. 13 & 14 Car. 2. c. 11. s. 3, by which every ship before her departure from any port of this kingdom is required to take out a custom-house clearance for the port to which she is destined. Now, if it would be illegal, as cannot be denied, for a vessel to sail without any clearance at all, it follows necessarily that it must be illegal to take out a false clearance, which is the same in effect as none at all, and is a fraud upon the law. And they urged, that the bearing of this law upon such a practice was not brought before the Court in *Planche v. Fletcher*, which could not, therefore, be considered as an authority against the objection. They also pressed the consideration, that however the principal object of the adventure might have been the supply of the *British* armament, if it were still, against all reasonable probability, as it appeared from the dates of the several transactions connected with that expedition, to be found at *Copenhagen*; yet there was strong reason to believe that a secondary object of it was at all events to carry the provisions to *Copenhagen* or *Elsineur*, where alone the consignees resided, and where it might well have been expected under the existing circumstances to meet with a good market: but a voyage to *Helsingberg* was quite out of contemplation at the time.

Lord ELLENBOROUGH, C. J. I am perfectly satisfied, and so were the jury on the trial, that the voyage was not illegal either in intention or in act; but that the adventure was undertaken for the meritorious purpose of supplying the *British* fleet and forces, then understood to be in possession of *Copenhagen*. And though an order of the king in council, contemplating that this kingdom might be placed in a state of warfare with *Denmark*, in consequence of the measures then meditated or in execution, had issued on the 2d of *September* preceding the policy in question; and though intelligence of the capitulation had been received in this country before the policy was effected, and the evacuation of *Copenhagen* was then contemplated to take place on the 19th of *October*; yet that will not affect the honesty or legality of the transaction. The adventure may be said to have begun on the 16th of *October*, when the vessel

left her moorings in the river; the object of it was to supply the *British* fleet and forces engaged in the expedition to *Copenhagen* with provisions; and though the evacuation of the place was contemplated to take place on the 19th, yet circumstances might intervene to delay the departure of our forces; and their provisions might be expected to be at a low ebb. The consignment was made, not to the subjects of *Denmark*, but to a *British* merchant at *Copenhagen*, who, if the evacuation had taken place at the time of the ship's arrival, was expected to be found on board a *British* ship off that port. There could then be no objection to the legality of the adventure, if the avowed object of it had been disclosed, and the ship had cleared out at once for *Copenhagen* at this period: but the order of council stood in the way of getting a clearance for *Copenhagen*, which order had been issued, as a precautionary measure, to prevent the vessels of this country from being detained in the *Danish* ports in the event of hostilities; and to obviate this difficulty the clearance was taken out for *Helsingberg*, a *Swedish* port, without any purpose of defeating the order of council or trading with an enemy. This is continually done upon adventures for supplying the *British* armies and fleets on foreign service. Nor is it to be taken for granted that in no event whatever was the ship intended to go into *Helsingberg* in the prosecution of the adventure: the captain had certainly no immediate intention of going there; but if he found that the *British* armament had left the *Danish* territories before his arrival, he might have found it expedient to proceed to the neighbouring *Swedish* port, which he was entitled to do within the terms of the policy. But I am not satisfied that it would have made the insurance illegal if the captain had never meditated to go into *Helsingberg* at all. There is nothing illegal, so as to avoid a policy, in the mere circumstance of a ship taking out a clearance for a place named in the policy to which there is no intention of going. The stat. of Car. 2, only gives a penalty of 100*l.* for taking out a false clearance: but there is nothing in that to make the voyage illegal. That was determined in *Blanche v. Fletcher*; and though the particular statute is not referred to in the report of the case, yet the provision of it was probably in the contemplation of the Court. Here the object of the voyage was not illegal, but meritorious: the assured never meant to go to a *Danish* port, as such, but merely for the supply of the *British* fleet and army then supposed to be lying off *Copenhagen*; and the jury were quite satisfied of that fact.

GROSE, J. declared himself of the same opinion.

LE BLANC, J. If it had been made out in evidence that this was a voyage intended to supply the enemy with provisions, that would at once have avoided the policy: but the defendant failed in his attempt to do that; and the jury were satisfied that that was not the object of the adventure. The obvious intention of it, and so it was understood by the jury, was to supply our own fleet and army off *Copenhagen*; and if on his approach to that place the captain had not found the fleet there he would probably have gone to *Helsingberg*. It has been determined, however, that the mere circumstance of taking a clearance to a place where a ship does not intend to go does not make the voyage illegal so as to vacate the policy: but I am not satisfied that the captain had determined not to go to *Helsingberg* in any event.

BAYLEY, J. The whole of the evidence shews that the object of the voyage was to supply our fleet engaged upon the expedition to *Copenhagen*, with provisions, and not to run into an enemy's port, where the vessel would be sure to be captured. (1)

Rule discharged.

(1) [See, upon the same principle, *Warren v. Manufacturers' Ins. Co.*, 13 Pick. 518. *Ward v. Wood*, 13 Mass. 539. *Ocean Ins. Co. v. Polleys*, 13 Peters, 157.—W.]

Boydell v. Drummond.

11 East, 142. May 26, 1809.

If it appear to have been the understanding of the parties to a contract at the time, that it was not to be *completed* within a year, though it might and was in fact in part performed within that time, it is within the 4th clause of the statute of frauds 29 Car. 2. c. 3; and if not in writing, signed by the party to be charged, &c. it cannot be enforced against him. And his signature in a book intitled "Shakespeare subscribers, their signatures," not referring to a printed prospectus which contained the terms of the contract, and which was delivered at the time to the subscribers to the *Boydell Shakespeare*, cannot be connected together, so as to take the case out of the statute, as such connection could only be established by parol evidence.

THE declaration stated that the plaintiff and his deceased partner (the late Mr. Alerman *Boydell*) had proposed to publish by a subscription a series of large prints from some of the scenes in *Shakespeare's* plays, after pictures to be painted for that purpose, under certain conditions, viz. 72 scenes were to be painted, at the rate of two to each play, and the whole were to be published in numbers, each containing 4 large prints, at the price of 3 guineas a number, 2 of which were to be paid at the time of subscribing, and the remaining guinea on the delivery of each successive number; and on the delivery of each number, 2 guineas were to be advanced by the subscribers towards the succeeding number; and that one number at least should be *annually* published after the delivery of the first. And then the declaration stated, that on the 7th of *April* 1790, the defendant became a subscriber for one set of prints, and paid his 2 guineas; and that in consideration that the plaintiff and his late partner had promised to perform the conditions on their part as such publishers, the defendant promised to perform the conditions on his part as such subscriber: and then it alleged, that although the publishers had performed and were ready to perform the conditions and promises on their part in all respects, and although one set of the prints had been long since published and ready for delivery to the defendant, according to the form and effect of the said conditions, of which he had notice on the 10th of *December* 1804; and though the defendant was duly requested to accept the said prints, and to pay for the same according to the said conditions and his promise, and he did accept two numbers, and paid the plaintiff a further sum of 3 guineas on the delivery of each of those numbers, according to the said conditions; yet he refused when so requested to accept the residue of the prints or pay for the same. There were other counts laying the contract more generally, and the common money counts. To all which the defendant pleaded *non-assumpsit*, and that the cause of action did not accrue within six years.

It appeared at the trial, that the first prospectus of the work was published in 1786, and a second prospectus in 1787. On the first of *May* 1789, the *Shakespeare* gallery was opened in *Pall-Mall*, with an exhibition of 34 large pictures then finished, and in *March* 1790, an additional number were exhibited, amounting in all to 56: and also specimens of several of the prints in a state nearly ready for publication. In *April* 1790, the defendant became a subscriber to the large prints; (a splendid edition of the letter-press of the plays, and a series of small prints to bind up with it, forming a distinct part of the proposed plan of publication.) The defendant's subscription was No. 1103, the whole number of subscribers at the close having been 1384. At the time of his subscription the defendant paid his two guineas in advance, and had a receipt given him for the same. The delivery of the first number was made in *June* 1791, (a) when it was delivered to the defendant's order, who

(a) It was offered to be proved at the trial, that the delivery of the numbers was advertised in some of the public newspapers to give notice to the subscribers, that they might send for them: but Lord *Ellenborough*, C. J. would not receive the evidence, un-

thereupon paid the third guinea and two more in advance for the next number. The second number was delivered to the defendant on the 29th of *March* 1792, was advertised as before, and the defendant also sent for that, and paid his 3 guineas, two of them in advance for the 3d number as before. These numbers were delivered out at the gallery in *Pall-Mall*, being the place where the defendant had subscribed. Others were delivered out to other subscribers at Messrs. *Boydell's* shop in the city. After this time, at least one number was delivered to the subscribers in general in every year, sometimes two, and in two instances three within a year, until the whole were completed; but the defendant never sent for any more of the numbers, though he never gave notice of his intention to discontinue taking them in. Nor did the plaintiff ever make any particular demand on the defendant to take the remaining numbers and pay for them till 1807, after the whole work was completed and published; but the rest of the numbers as they came out were regularly laid by for him according to the order of time of his subscription. The last number was published in 1803, and the number of prints finally delivered to the subscribers who sent for them was 12 more than the stipulated number. This was the general nature of the case and of the evidence, which branched out into several questions: but as the judgment of the Court ultimately turned solely on the application of the statute of frauds to this case, it is only necessary to state the evidence with particularity as to that point.

The first prospectus of the work, in *December* 1786, stated the intention of Messrs. *Boydell* "to publish by subscription, (as an accompaniment to the letter-press,) a series of large prints, after pictures to be *immediately painted*," by certain artists named, from the most striking scenes of *Shakespeare*. And that as soon as the pictures were engraved, they would be hung up in the *Shakespeare* gallery. It then stated certain conditions in substance the same as those set out in the declaration, together with others calculated to shew the magnitude and difficulty of the undertaking, the great number of artists necessary to be engaged in its performance, and that the completion of it would unavoidably take a considerable time. The expence of it was therein estimated at above 50,000*l.*, (a) and it was "hoped that the public would be forward in their *subscriptions*, and *thereby incite* the various artists engaged in the present arduous design to exert their utmost abilities in the execution of it." One of the conditions was, "that one number at least should be published *annually*; and the proprietors were confident they should be enabled to produce *two numbers* within the course of *every year*." The other prospectus, published in *January* 1807, gave an account of the progress of the work so far as it was then published, and of the preparations for its continuance, with observations on the means employed and the delays and difficulties which might occur in its execution. Printed copies of the two prospectus were lying about the shop for public inspection at the time of the defendant's subscription, and the general practice was to deliver them to subscribers at the time of their subscription. But the book in which he subscribed his name had only for its title "*Shakespeare* Subscribers, their signatures," without any reference to either prospectus in the terms of it. After the whole work was completed and published, an application was made to the defendant, in *August* 1806, and again in *March* 1807, to take and pay for the remaining numbers of his subscription: to which latter he returned an answer in writing, dated 1st of *April* 1807, in which he stated that he ceased taking in the numbers of the *Boydell Shakespeare* many years ago, in consequence of the engagement not being ful-

less it were also shewn that the defendant was in the habit of taking in one of such newspapers, which the plaintiff was not prepared to prove: this part of the cause therefore rested on the fact of the delivery of the two first numbers to the defendant's order; but the point was ultimately saved with the rest: and when it was mentioned again in Court, his Lordship still thought the evidence of notice deficient for the reason before stated.

(a) The work was afterwards stated to have cost considerably above 100,000*l.*

filled on the part of the proprietors; and not having been applied to from that time till very lately, he did not consider himself called upon to complete the set. (Signed by the defendant.) The receipt for the defendant's subscription was in this form: "Received from *J. Drummond, Esq.* one guinea as the second subscription to the first number of the *Shakespeare* with large plates; and at the same time received two guineas as the first subscription to the second number, *agreeably to the original proposals.*" (Signed for the plaintiff.)

Several objections were taken to the action; 1st, that this was an agreement partly evidenced by writing; and not coming within the exception of the stat. 23 G. 3. c. 50. s. 4, as a contract for the sale of goods, required to be stamped. 2dly, That it was not a contract to be performed within a year, and was therefore void within the statute of frauds 29 Car. 2. c. 3. s. 4, the whole contract not having been reduced to writing, and signed by the parties, &c. 3dly, The defendant insisted, that by the nature of a contract of this sort, he was entitled to abandon it whenever he pleased, on forfeiture of the two guineas advanced for the number succeeding that which was last delivered to and accepted by him. 4thly, That there having been no acceptance of any number on the one hand, nor tender on the other, for 16 years prior to the tender of the remaining numbers in 1807, this was evidence of a mutual abandonment of the contract before the action brought: even though the case, taking this to be one continuing contract, which was not completed till 1803, might not be strictly and entirely within the statute of limitations. The plaintiff was nonsuited at the trial, and all these points were reserved. And, 5thly, it was contended, that the statute of limitations would cover the demand for every number except the last.

Park, Holroyd, and Dampier shewed cause against a rule for setting aside the nonsuit. 1st, As to the want of a stamp; every contract which is to be evidenced by writing requires a stamp, unless it come within the exception of the statute 23 G. 3. c. 58. s. 4, as a contract for the sale of *goods*; which this does not; as the exception is confined to contracts for the sale of *goods in esse*, in the state in which they are to be delivered: for which they cited *Buxton v. Bedall*, 3 East, 303, and *Waddington v. Bristow*, 2 Bos. & Pull. 452. And here the whole contract was clearly executory. 2dly, It was morally certain from the subject matter of this agreement that it could not be executed within a year, and it provided in the very terms of it for the *annual* performance of certain portions of the work: it is therefore void by the statute of frauds for want of being reduced to writing and signed by the parties. It was indeed proved that the defendant had subscribed his name in a book with the title of "*Shakespeare subscribers, their signatures,*" and that printed copies of the prospectus were lying about the shop, one of which it was the general practice to deliver to each subscriber at the time of his subscription; but there was nothing to connect the prospectus with the signature in the book except by parol testimony; and it was the very object of this branch of the statute to exclude the intervention of parol testimony where parties were to be bound by contracts that were not to be completely performed within a year. No copy of the prospectus was ever affixed to the book. (a) Where a parol contract is to be performed at an indefinite period, it lies on the party insisting on performance of it to shew at least that it might have been performed within the year. [*Le Blanc, J.* Supposing all the prints could have been completed within a year, would the subscribers have been compellable to take and pay for them within that time under the terms of the agreement? Lord *Ellenborough, C. J.* Was it in the contemplation of the subscribers to be called upon to make so large a payment, as the whole would have amounted to, within so short a period? It seems not within the fair meaning of such an agreement, one object

(a) On this head, the defendant's counsel afterwards referred, at the conclusion of the argument, to *Hinds v. Whitehouse*, 7 East, 558.

of which is to diminish the pressure of the expence by dividing it into moderate annual instalments. 3dly, This is the first instance of an action brought for the non-performance of a contract of this nature; and no person can hereafter venture with prudence to subscribe to works published in numbers, (a method of publication which is now become very common in respect of all large and expensive works,) if it were not generally understood that every subscriber is at liberty to withdraw his subscription whenever he pleases. The publisher in fixing his price calculates upon such an eventual partial loss; and in this, as in most other instances of the kind, it is endeavoured to be guarded against or compensated by the forfeiture of the advance paid on the delivery of one number towards the payment of the next. This is the complied condition of release from the engagement. It is a contract from number to number; and that is also shewn by the form of the receipts. It must be admitted that this power to retract will be mutual; and it is reasonable that it should be so; for if there had only been 100 subscribers to the work, *Messrs. Boydells* would not have been bound to go on with a publication which must have ended in certain ruin to them. The facility of retraction is even advantageous to the publishers of popular works in numbers, by engaging many more subscribers than could be obtained, if each were bound to continue his subscription to the end, however inconvenient or burthensome it might afterwards become; an obligation which would extend also to executors, when their ability to bear it might be essentially impaired. 4thly, At all events there was evidence of a mutual abandonment of the contract by the parties, after 16 years intermission of taking in the numbers on the one hand, and no tender of the prints and demand of payment for them on the other. On the numbers being published, if the plaintiff meant to enforce the contract, he ought to have made an actual tender of them to the defendant, according to *Calomel v. Briggs*, 1 Salk. 112, unless discharged by the latter saying that he would not receive or pay for them if sent: and this ought to have been done within a reasonable time after each publication; otherwise it shews that the contract was meant to be abandoned; and if once abandoned as to any prior number, the defendant could not be compelled to take the subsequent numbers, the value of which would be materially diminished by the chasm in the set; and no person can be bound to take part only of a work. In this view the statute of limitations would be a bar even with respect to the last number, which was published within six years before the action commenced. But, 5thly, at any rate it must operate in bar of any claim for the numbers published more than six years ago, on which the money became due immediately, if at all.

The Attorney-General, Garrow, Marryat, and Bolland, in support of the rule, on the 1st point contended that no stamp was necessary within the exception of the stat. 23 G. 3. c. 58. s. 4, which covers not only contracts for the sale of goods but such as relate to the sale of goods; which latter words were held in *Warrington v. Furber*, 8 East, 242, to extend to a contract for the payment of goods thereafter to be purchased by a third person, and which goods therefore might not exist in specie at the time of the contract made. [Lord *Ellenborough*, C. J. It is rather to be implied from that case, that the goods which were the subject of the contract were in existence at the time; for the parties contemplated an immediate delivery; and the delay arose only from the want of a guarantee; and as soon as a guarantee was obtained, the delivery took place. It was therefore a contract for goods which had a present capacity of being delivered.] The indulgence meant to be granted to mercantile contracts would be rendered almost nugatory by a different construction; for it can seldom happen that goods which are contracted for on a large scale, are all complete at the time of the order given; it is sufficient to bring the case within the words of the exception if the contract be for the delivery of goods. [Lord *Ellenborough*. Is it meant then to be contended that a contract for the supply of goods to another for 20 years to come would not require

a stamp?] It would not, if the contract were simply for that which would be goods when delivered; and not for work and labor. *Buxton v. Bedall*, 3 East, 303, was of the latter description; and *Waddington v. Bristow*, 2 Bos. & Pull. 452, went partly on the contract affecting the realty. The second, they said, was a new and important question. It is not necessary, in order to take an executory contract out of the 4th section of the statute of frauds, to make it appear by the terms of the contract that it must be executed within a year: on the contrary it was said by *Dennison, J.* in *Fenton v. Emblers*, 3 Burr. 1281, and 1 Blac. Rep. 353, that "the statute plainly meant an agreement not to be performed within a year, and *expressly and specifically so agreed*. A contingency is not within it, nor any case that depends upon contingency. It does not extend to cases where the thing only may not be performed within a year; and the act cannot be extended further than the words of it. And with this agrees *Smith v. Westhall*.^(a) It is sufficient that it may be; and if the question depended upon the possibility or impossibility of performance within the year, the jury must decide upon it. Before the defendant subscribed, the *Shakespeare* gallery had been opened with an exhibition of 56 pictures, with specimens of several of the prints nearly ready for publication; and in fact the first number was published in little more than a twelve month after his subscription. Then when the defendant accepted the first number, he entered into a new contract for the second and subsequent numbers, and he confirmed that contract by the acceptance of the second. Such acceptance, therefore, took the case out of the statute, by the partial, execution of the contract. If this were otherwise, one who contracted with another for the building of a house, if not in writing, would be absolved from his contract, unless the house were to be finished within a year. Suppose goods sold and delivered for a certain price, at 13 months credit, without writing; the terms of payment would be a part of the contract, and if no evidence could be given of that by the statute, the vendor would not be bound by the stipulated price, and the jury could only give a verdict for the value of the goods. [Lord *Ellenborough*. In that case the delivery of the goods, which is supposed to be made within the year, would be a complete execution of the contract on the one part: and the question of consideration only would be reserved to a future period.] The policy of the statute does not apply to contracts which are to be in part executed, though not completed, within the year; because a partial execution of itself furnishes evidence of the reality of the contract; and the danger meant to be guarded against was the setting up, by perjured testimony, of supposed contracts, which were not evidenced by any acts of the parties within a year; which period was taken as the limit of reasonable time, within which it was probable that the execution of a mere parol contract, not evidenced by any acts of the parties, would be postponed, and which was therefore required to be evidenced by writing. And as a delivery of part of the goods at the time, by way of earnest to bind the bargain, will take a case out of the statute, so will part-performance within the year, which is analogous to earnest. But supposing it to be necessary to prove the contract by writing, signed, &c. they contended that there was such evidence of it in this case: for the terms of the contract were stated in the printed prospectus, to which there was sufficient reference by the title of the book in which the subscribers' names were entered, viz. "*Shakespeare* Subscribers, their Signatures." [Lord *Ellenborough*, C. J. The prospectus cannot be connected with the book of subscriptions without parol testimony. What is there in the title to refer to the particular prospectus rather than to any other? If it had referred to the particular prospectus then published, it would have helped the plaintiff over the difficulty.] It is not pretended that there was any other prospectus to which it could re-

(a) 3 Salk. 9, and 1 Ld. Ray. 316. All the cases were stated to be collected in Roberts on the Statute of Frauds.

fer; and the defendant's letter recognizes this *engagement* with the proprietors of the *Boydell Shakespeare*; and no other engagement than that contained in the prospectus was shewn. On this head they cited *Welford v. Beazely*, 3 Atk. 503, and *Tawney v. Crowther*, 3 Bro. Chan. Cas. 161, and *ib.* 319. 3dly, As to the defendant's right to abandon the contract on forfeiture of his two guineas advanced for the next number; it is contrary to the nature of every contract that one of the parties should be at liberty to abandon it without the consent of the other, while it is in progress towards execution. The argument would be the same, if instead of the series of prints, the defendant had subscribed to the letter-press. The plaintiff would have been answerable for a breach of his contract, if after delivery and receiving payment for half a book, he had refused to proceed with the work, which would have rendered that half altogether useless and of no value to the defendant: the latter therefore must in like manner be answerable for not performing his part of the contract. The parties would not be put upon equal terms by extending the liberty of abandonment to each; for a great part of the expence of many successive numbers was incurred before the delivery of the second, upon a scale of expence adapted to the existing number of subscribers; and the defendant, by having taken two of the numbers and discontinuing the rest, puts the plaintiff in a worse situation than if he had not taken any; for the set is spoiled, and all the succeeding numbers, which were in a state of preparation before notice of abandonment, would be so much loss incurred. If one subscriber could abandon, all might; and the publishers must necessarily have incurred a loss of many thousand pounds. The very nature of the thing, therefore, requires that every subscription should be considered as one entire and absolute contract for the whole work. If so, then, 4thly, there is no evidence of its having been abandoned by the plaintiff. It was not necessary for the plaintiff to give notice to each subscriber as the numbers came out: it could not be told where they were to be met with; they were dispersed all over the kingdom, and many in foreign countries. The subscribers invariably sent for their numbers, and the defendant did the same as to the two numbers which he took in. The defendant's numbers were regularly set apart for him as they were published; and he ought at least to have given express notice of his intention to discontinue the work, before any presumption of the plaintiff's consent to such discontinuance could be inferred from the mere act of not calling upon him to take the numbers. 5thly, If the contract were entire, and not abandoned, the statute of limitations would not run upon any part of it, as the demand was made and the action was brought within six years after the last number was published: and of course it could not affect the demand for that number.

Lord ELLENBOROUGH, C. J. On conference with my brothers, finding that we are all of opinion that the action is not maintainable on one of the grounds of objection taken to it, it is not necessary to discuss the others. We are all clearly of opinion that this was not a contract which was to be performed within a year, and ought therefore to have been evidenced by writing signed, as required by the statute of frauds. The whole scope of the undertaking shews that it was not to be performed within a year: and if, contrary to all physical probability, it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole subscription from them within a year. It has been argued that an inchoate performance within a year is sufficient to take the case out of the statute; but the word used in the clause of the statute is *performed*, which *ex vi termini* must mean the *complete* performance or consummation of the work: and that is confirmed by another part of the statute, requiring only part-performance of an agreement to supersede the necessity of reducing it to writing: which shews that when the legislature used the word *performed*, they meant a complete and not a partial performance. If this were not the true construction of the statute,

great inconvenience would ensue in the execution of contracts for large works, which must necessarily require a long time for their completion; as in the instance of *Somerset* house, which occupied many years in the building. If one stone were laid within a year from the making of the contract by parol, it would, according to the argument, have taken the case out of the statute, leaving the terms on which the great mass of it was to be built to fallacious memory alone, to be exercised at some distant period; which would let in the very mischief which the statute meant to guard against. Therefore to exclude perjury, and to perpetuate the true terms of contracts which were not to be performed within a year, there is no doubt that the statute meant a consummate performance within that time. Now here by the very terms of the contract, and clearly in the contemplation of the parties from the whole scope of it, it was not to be performed within a year; for the agreement was to publish at least one number *annually* after the delivery of the first, and according to the number of pictures to be published, at the rate of two from each play, the work would consist of many numbers. On this ground the case appears to be clearly within the statute, and the objection taken to the action to be well founded. Without considering therefore the question as to the stamp, though I have not much doubt on that or on other questions which have been raised, it is sufficient to say that the nonsuit ought to stand. I should add, that I cannot connect the subscription of the plaintiff's name in the book with the prospectus; nor does the defendant's letter refer to the prospectus produced at the trial. It speaks indeed of his *engagement* with the proprietors of the *Boydell Shakespeare*; but it cannot be shewn to be the engagement contained in the particular prospectus without parol evidence, which the statute excludes. If there had been a plain reference to the particular prospectus, that might have helped the plaintiff; but there is nothing of that kind.

GROSE, J. Considering the nature of the work, and the whole of the two prospectus, it is impossible to say that the parties contemplated that the work was to be performed within a year; for it was to be published *annually* in numbers, and it was clear that it would take many years to complete it. This therefore is one of those cases which the statute of frauds contemplated, and in which it is eminently useful and necessary: and it is clear that the contract ought to have been in writing.

LE BLANC, J. Looking at the two prospectus, it appears by the very terms of the contract, as it is to be collected from them, that it was to be performed at a period beyond the space of one year: for the publishers considered it possible that two numbers might be produced in every year, but not more; and at that rate it would necessarily require many years to complete the work. And if it had been possible to complete the whole in one year, few subscribers would have been found who would have engaged to pay the whole money within that time. The contract, therefore, not being contemplated to be performed within a year, is required by the statute of frauds to be in writing and signed by or on behalf of the party to be charged. Then can we say that this was in writing and so signed? The evidence is, that the defendant subscribed a book intitled, "*Shakespeare subscribers, their signatures.*" If there had been any thing in that book which had referred to the particular prospectus, that would have been sufficient: if the title to the book had been the same with that of the prospectus, it might perhaps have done: but as the signature now stands, without reference of any sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus, and saying that it was the prospectus exhibited in his shop at the time, to which the signature related: the case therefore falls directly within this branch of the statute of frauds. And then the only question is, whether the case can be taken out of the statute, because there was a *part* performance of the contract within the year: but no case goes the length of deciding that; and such a construction would leave the whole mischief intended to be remedied by the act still sub-

sisting. For such part performance does not shew that it was the particular prospectus produced at the trial which the defendant's signature referred to; and if that can only be established by parol evidence, which is necessary to connect the signature with the two papers, it still leaves the case within the mischief meant to be provided against. I am sorry therefore for the justice of the case, that the objection, which goes on a ground beside the merits of the question, must prevail.

BAYLEY, J. It was clearly the understanding of all parties that the contract was not to be performed within a year: and if the publishers could by possibility have *completed* the work within that time, they could not have compelled the defendant to have taken and paid for it immediately. I use the word *completed*, because I think that it is the true meaning of the word *performed* used in the statute. The cases have decided that in order to bring a contract within this branch of the statute, it must either have been expressly stipulated, or it must appear to have been the understanding of the parties, that it was not to be performed within a year. That does appear in the present case: and I cannot say that a contract is *performed*, when a great part of it remains *unperformed* within the year; or in other words, that *part performance* is *performance*. The mischief meant to be prevented by the statute, was the leaving to memory the terms of a contract for longer time than a year. The persons might die who were to prove it; or they might lose their faithful recollection of the terms of it. If part performance were to supply the want of writing, a party might be fixed with a contract for supplying goods for 20 years together, at the price which was paid for them in the first year, although the price might have risen considerably; for it would be said that the price paid for those delivered immediately was evidence of the rate agreed upon for the delivery in subsequent years. But here it is argued that the book of signatures may be connected with the two prospectus which were published at the time and delivered to the subscribers: but that cannot be done without the intervention of parol evidence, and that opens a door to perjury, which it was the object of the statute to prevent. Besides, it would still be left uncertain upon the face of the papers to what the defendant's subscription applied; for there were subscribers to the whole work, and subscribers to the prints only; and it would not appear to which of these the defendant's signature was meant to apply.

Rule discharged.

Bebb and Another v. T. S. Penoyre, Elizabeth Ann Castell, C. Littledale, and Catherine Louisa his Wife, R. Cook, Clerk, and Anna Maria his Wife, and J. Drummond and Harriett his Wife.

11 East, 160. May 5, 1809.

Two being seised of undivided moieties as tenants in common in fee, *quære* whether a devise by the one of *his half part* to the other will carry the fee? But at any rate, the fee did not pass by a residuary clause, whereby the testator, after several pecuniary bequests, ordered the lease of his house, with his furniture, to be sold, and *all the rest and residue to be divided amongst other persons*; and appointed executors: for such division of the *rest and residue* must be intended to be made by the *executors* as such, and therefore confined to personal property.

THE plaintiffs, as surviving assignees of *Samuel Castell* and *Walter Powell*, bankrupts, filed their bill in Chancery against the defendant *Penoyre*, as the purchaser at an auction of a certain freehold estate put up to sale by the assignees, and against the other defendants as claiming some interest therein, to compel the completion of the purchase by the one, and the discovery of title against the rest. The defendants in their answer stated the will of *John Cas-*

tell deceased, brother to the bankrupt *S. Castell*, and contended that under it the bankrupt was entitled only to an estate for life in an undivided moiety of the premises, with remainder in fee to the defendants (excepting *Penoyre*) by virtue of the residuary clause in the will. And on the hearing of the cause his Honour directed this case to be made for the opinion of the Court.

John and *Samuel Castell*, being seised in fee each of one undivided moiety of the premises in question, *John Castell* on the 2d day of *February* 1802, by his will duly executed, devised (inter alia) as follows: "I give to my brother *Samuel Castell* my half part of the five freehold houses which I hold with him in *Leadenhall-Street*, opposite to *Cree* church. I give 4000*l.* Bank stock, and 4000*l.* 3 per Cent. Cons. amongst the four daughters of my brother *Samuel Castell*, to be divided equally between them, share and share alike." Then after two several bequests of stock to other persons, the will proceeds: "I give to *T. Ryder Esq.* and to his heirs for ever, my "two freehold houses in *Sherborne-lane*," &c. Then after several other bequests of other stock, and of pecuniary legacies, the will concludes as follows: "I order the lease of my house with all the furniture (except the eight worked chairs) to be sold, and all the rest and residue to be divided amongst the four daughters of my brother *Samuel Castell*, share and share alike. I appoint *J. S.* and *J. S.* executors," &c. The deviser died seised in *November* 1804, leaving his brother *Samuel* his heir at law. He was also at the time of making his will, and at the time of his death, seised in fee of the freehold houses in *Sherborne-lane*, but not of any other freehold estate. The defendants *Elizabeth*, *Catherine Louisa*, *Anna Maria*, and *Harriett*, are the four daughters of the testator's brother *Samuel*. The question was, what estate *Samuel Castell* took under the will, or as heir at law, in *John Castell's* moiety of the five messuages.

Burrough, for the plaintiffs, contended that *Samuel Castell* took a fee under his brother's will by the devise of "*my half part*," &c. The two brothers being seised in fee of undivided moieties, the devise by *John* of his half part to *Samuel* must be understood to mean his whole interest in the one moiety, such *Samuel* already had in the other; especially in the case of a devise to an heir at law. But at any rate, if those words carried only a life estate, for want of words of limitation, the fee descended to *Samuel* as heir at law, not being included in the residuary clause to the daughters, which is confined to personality. The devise of "*all the rest and residue*" follows pecuniary and chattel bequests. The testator orders the rest and residue to be divided amongst the daughters; and whom but his executors can he order to make such division? The words *share and share alike* was before applied by the testator to the bequest of stock amongst the daughters.

Littledale, contra. There are no words of limitation or necessary implication to extend the devise to *Samuel* beyond a life estate. In *Pettywood v. Cook*, Cro. Eliz. 52. 2 Leon. 129. 193, and 3 Leon. 180, a devise of *totam illam partem* was held not to carry a fee, but only expressed the thing devised. So a devise of a man's share in the new river only carries a life estate; as in *Middleton v. Swaine*, Skin. 339, and Comb. 201. It cannot make any difference that the two brothers held undivided moieties as tenants in common in fee; for their estates were entirely separate and distinct, and the words must be construed in the same manner as if the devise were to a stranger. It appears by the devise to *Ryder* and his heirs, that the testator knew how to pass a fee. Then the fee passed by the devise of "*all the rest and residue*" to his nieces. The testator had before devised real as well as personal property; the presumption therefore is that he meant the rest and residue of both; and there is nothing to confine it to personality. The words "*share and share alike*" are as often applied to realty as to personality. The executors are not directed to make the division, but the law will make it, as it makes tenants in common by the words *share and share alike*.

Burrough, in reply, questioned the case of *Pettywood v. Cook*, where by the words "*totam illam partem*" the testator seemed rather to have meant all the interest that had been before devised to the first taker, which was the whole fee. And as to the case of *Middleton v. Swaine*, the word *share*, as applied to property in the New-River water, was in common appellation merely descriptive of the thing. But he relied principally on the fee being undisposed of by the residuary clause.

LORD ELLENBOROUGH, C. J. If there be any doubt on the devise of the testator's *half part* to his brother, whether it will carry the fee for want of words of limitation, it is not important to the decision of this case, if it be not taken from him by the residuary clause; as the fee, if undisposed of by the will, descended to *Samuel* as heir at law. Though if it had been necessary to decide upon the import of the words "*my half part*," as at present advised, I should rather be disposed to think that they were sufficient to carry the fee; and I am not prepared to say that I should have come to the same conclusion as the Court did in the case of *Pettywood v. Cook*, upon the words there stated. (a) But it is not necessary to decide the case on that point; for upon the meaning of the residuary clause there can be no doubt. After giving several pecuniary bequests, the words are, "I order the lease of my house, &c. to be sold, and *all the rest and residue* to be divided," &c. Order whom? He must have meant his executors immediately afterwards named, by whom the lease of his house, &c. was to be sold. The words *rest and residue*, therefore, in the place in which they stand in this will, and so accompanied, must mean property of a similar nature to the lease of the house and furniture before mentioned, that is, his personal estate.

The rest of the Court agreed in this construction, and afterwards the following certificate was sent to his Honour:

THIS case has been argued before us by counsel: we have considered it, and are of opinion, that the said *Samuel Castell* took, under the said will, or as heir at law of the said *John Castell*, an estate in fee in the moiety of the said five messuages or dwelling-houses, whereof the said *John Castell* was so seised as aforesaid.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAXLEY.

Gaskell v. King.

11 East, 165. May 5, 1809.

A distinct covenant in a lease, whereby the tenant bound himself to pay the property-tax, and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by the stat. 46 G. 3. c. 65. s. 115, will not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, &c. generally; for such general words will be understood of such taxes as the tenant might lawfully engage to defray.

THE plaintiff declared in covenant upon an indenture of the 2d of March 1807, whereby he demised to the defendant a messuage for 12 years, at a certain rent, payable quarterly, *clear of all and all manner of parliamentary, parochial, and other taxes, rates, assessments, and deductions whatsoever*. And the defendant covenanted to pay to the plaintiff the *said rent in manner the same as is therein before made payable*. The plaintiff then alleged a breach of the covenant by the non-payment of 26l. 5s. for a quarter's rent, due on the 25th December, 1808. The defendant cravedoyer of the indenture, in which

(a) Vide *Denn v. Balderston*, Cowp. 257.

the covenants were stated in the manner and order before mentioned; and then followed immediately after the words, *in manner the same as is hereinbefore made payable*, these words: "And also shall well and truly pay the land-tax, *property-tax*, and all and all manner of other taxes, &c. whatsoever, parliamentary, parochial, or otherwise however, which now are, or which shall at any time during the continuance of the said term hereby demised, be rated, taxed, assessed, or imposed on the said demised premises, or any part thereof, or on the said plaintiff, his executors, &c. on account thereof, and save harmless and indemnified the plaintiff therefrom, and from all costs and charges which may happen on account thereof." And then it set out a covenant by the defendant to keep the premises in repair, and other covenants, amongst others, a covenant for re-entry of the plaintiff in case of the breach of any of the covenants by the defendant, including the non-payment by the defendant of the property-tax and other taxes covenanted to be paid by him; concluding with a covenant by the plaintiff, that the defendant, paying the said yearly rent thereby reserved in manner aforesaid, and performing his covenants aforesaid, shall quietly enjoy the premises during the term. And then the defendant demurred generally. And the question was, Whether the covenant for payment by the lessee of the property-tax rendered the whole lease void by the act of the 46 Geo. 3. c. 65. s. 115, and 195, which avoids such a covenant?(a)

LAWES, for the defendant, contended in the affirmative. The covenant in question is interwoven in effect with the covenant for payment of the rent, and is in fraud and against the policy of the law. If the tenant had paid the property-tax upon this covenant, he could not have recovered back the money from the landlord.

LORD ELLENBOROUGH, C. J. The covenant by the lessee for payment of the property-tax, and for indemnifying the landlord from it, is void by the statute; but that will not avoid other independent covenants in the lease which are good, such as that for payment of rent. The covenants are entirely distinct.

LE BLANC, J. If the subsequent covenant for payment of the property-tax had not been inserted in the lease, it could not have been pretended that the lease would be void because it reserved the rent clear of all parliamentary taxes; for that must be understood of taxes which the tenant might lawfully covenant to pay in exoneration of his landlord.

BAXLEY, J. In the construction of the general words stipulating for the payment by the tenant of all parliamentary taxes, the law would imply an exception of such taxes as could not legally be defrayed by him; and the subsequent illegal covenant by the tenant for indemnifying his landlord from the payment of the property-tax will not avoid the former general and good covenant for the payment of rent clear of all parliamentary taxes, &c.: and if the tenant had paid the property-tax for his landlord, he might, notwithstanding

(a) 46 Geo. 3. c. 65.—By sect. 115. If any person shall refuse to allow any deduction authorized to be made by this act out of any rent or other annual payment mentioned in the 9th and 10th rules of No. 4, schedule (A), or out of any annuity or annual payment mentioned in schedule (C) or (E), or in the next preceding clause, save such annual interest as aforesaid, every such person shall forfeit the sum of 50*l.*; and all contracts, covenants, and agreements, made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid, *IN FULL, without ALLOWING such deduction as aforesaid*, shall be utterly void.

Sect. 195. Provided that no contract, covenant, or agreement between landlord and tenant, or any other persons, touching the payment of taxes or assessments to be charged on their respective premises, shall be deemed or construed to extend to the duties charged thereon as aforesaid, nor to be binding contrary to the intent and meaning of this act; but that all such duties shall be charged upon and paid by the respective occupiers, subject to such deductions and repayments as are by this act authorized and allowed; and all such deductions and repayments shall be made and allowed accordingly, notwithstanding such contracts, covenants, or agreements.

such covenants, have produced the collector's receipt to the landlord in discharge of so much of the rent.(a)

Per Curiam,

Judgment for the plaintiff.

Weatherhead v. Drewry, Hope, and Horrocks.

11 East, 168. May 5, 1809.

A high constable may be appointed, and a rate in the nature of a county rate levied, for a town corporate having an exclusive commission of the peace, though not a county of itself, by virtue of the stat. 13 Geo. 2. c. 18; though no such officer had been appointed, or such rate levied before; the corporation having defrayed the expences out of their own funds. And in an action of trespass for distraining goods in satisfaction of such rate, the Court would not inquire into the necessity of making such a rate, nor as to the application of the corporate funds for the same purposes.

AN action of trespass was brought against the defendants, of whom *Drewry* and *Hope* were justices of the peace for the borough of *Derby*, and *Horrocks*, high constable of the same, acting under the appointment aforementioned, for taking the plaintiff's goods under a warrant of distress for a rate. The defendants pleaded the general issue, and at the trial before *Grose, J.* at *Derby*, a verdict was found for the plaintiff for 71l. 10s. 9d. subject to the opinion of the Court on this case.

At the Quarter Sessions of the borough of *Derby*, held on the 13th of *October*, 1806, before the defendant *Drewry*, the mayor, and several other justices of peace for the borough, including *Hope*, an order was made, appointing *Horrocks* to be high constable, and *Crompton* to be treasurer of the borough. And it was further ordered, "that 250l. be rated and assessed upon the borough, as a general rate or assessment for the same, in the nature of a county rate, for such purpose as it is applicable to according to law." And further, that the said sum of 250l. should be rated and assessed upon the five several parishes within the borough in certain proportions, of which the proportion for the parish of *All Saints* was 71l. 8s. 9d. And further, that *Horrocks* the high constable should demand of the respective overseers, &c. of the several parishes the sum assessed on each; and should pay over the several sums, when received, to the treasurer, to be by him paid to such persons as the justices in sessions should by their orders from time to time appoint, "for such uses and purposes as the public stock of the said borough is or may be applicable to by law." Accordingly, on the 14th of *October* 1806, the defendant *Horrocks* served a precept on the plaintiff, then one of the overseers of the poor of the parish of *All Saints* in the borough, requiring him to pay out of the money collected by him for the relief of the poor of that parish, 71l. 8s. 9d. as the proportion of the parish for the said assessment for the borough in the nature of a county rate: and upon the non-payment thereof, and after a summons issued to the plaintiff and the other parish officers, under the hands and seals of the defendants *Drewry* and *Hope*, to shew cause, &c. the latter issued a warrant of distress to *Horrocks*, which was executed by him on the goods of the plaintiff for 71l. 10s. 9d. the amount of the rate, and the charges of the distress. The case then set out a charter of the 34th of *Charles 2*; by which, reciting that the borough of *Derby* had been immemorially a corporate town, and that all former charters had been surrendered, the king incorporated the burgesses by the name of the mayor and burgesses, &c. giving them a mayor, 9 aldermen, and other officers; of whom the mayor and certain other officers named should be "justices of the king, &c. as well to keep the peace in the same borough and the liberties and precincts thereof, as to keep the statutes of vagabonds, artificers, and labourers, weights and mea-

(a) See Art. 9, of No. 4, Schedule (A.) sect. 74, of the Property act.

suers within the borough, &c.: with power to any three or more of them, whereof the mayor and recorder to be two, to inquire hear and determine within the borough, &c. all murders, felonies, misprisions, riots, routs, oppressions, extortions, forestallings, regratings, trespasses, offences, things, matters, and articles, whatsoever; and to hold sessions, to commit and discharge prisoners, and also to do and execute all other things within the borough aforesaid, and the liberties of the same, in as ample a manner as the justices of the peace in the county of *Derby*, or elsewhere within the kingdom of *England* might do. After which followed a *non intromittant* clause as to the justices of the county. The king also granted to the mayor and burgesses the goods of felons, waifs and deodands within the borough, &c. "And further, for the melioration of the state of the borough, and *that all common charges there might be better and more easily supported*," the king granted to them all issues, fines, amerciaments, redemptions, and penalties, of all the inhabitants or residents within the borough, &c. and also 7 fairs yearly, and a free market weekly with the tolls, &c. and he confirmed all former grants of franchises, immunities, and lands before enjoyed by the mayor and burgesses, or their predecessors, &c. The case also set out a charter of the 1st of queen *Mary*, whereby the queen, as well in consideration that the bailiffs and burgesses of the town of *Derby* the charges of the said town might be the better able to support, as for other considerations there mentioned, granted to them certain lands, subject to certain small charges. And the case stated, that the corporation of *Derby* were possessed of estates of the present annual value of nearly 1400*l.*; and that the charitable and other charges to which they were subject amounted to 300*l.* a year, and upwards. That in the year 1800, the corporation contributed 500*l.* for the public service under the voluntary aid and contribution act: and 500*l.* about four years afterwards towards the expences of the volunteers of the town; and since then a further sum of 500*l.* towards the county infirmary, and 100*l.* towards an organ for the parish church of *All Saints*. That the borough of *Derby* has never contributed towards a county rate: neither has a rate in the nature of a county rate, or any other rate upon the inhabitants, ever before been made by the magistrates of the borough. That those expences which in the county, without the limits of the borough, are paid by a county rate, have always within the borough of *Derby* been defrayed from the funds of the corporation, except only the expences occasioned by the militia, which have been always discharged by the respective parishes. That no appointment of high constable has, except in the present instance, ever been made. That at the time of making the above order there were no presentments of any thing within the borough, to which a county rate, or a rate in the nature of a county rate, was applicable: but that there are from time to time occurring within the borough various expences, which in the county, without the limits of the borough, are defrayed by a county rate; such as the expences of passing vagrants, the expences incident to the gaol and house of correction, and transporting felons; all which expences, however, have hitherto been defrayed from the funds of the corporation. If the plaintiff were entitled to recover, the verdict was to be entered for 71*l.* 10*s.* 9*d.* If otherwise, a verdict was to be entered for the defendants.

Copley, for the plaintiff, endeavoured to distinguish this from the case of *James v. Green*, 6 Term Rep. 228, where for the first time the right of appointing a high constable and making and levying a county rate *de novo* were established by this court in the instance of the town corporate of *Nottingham*: but *Nottingham* had been erected by charter into a county of itself; and on that ground he accounted for the case not having been argued with reference to the words of the stat. 13 Geo. 2. c. 18, on which he contended that the case now in question solely turned. But if the cases were not distinguishable in principle; then he denied the former decision to be law, which, he said, had been made without any consideration of the statute. It is unnecessary to

advert to the terms of the stat. 12 Geo. 2. c. 29, intituled, "An act for the more easy assessing, collecting, and levying of county rates," the 5th section of which provides, that the act "shall not extend to make any persons, liberties, divisions, or places liable to pay to any rate to be made in pursuance of that act, to which such person, liberty, &c. did not, or was not liable to contribute before the passing thereof," &c. But the stat. 13 Geo. 2. c. 18, reciting that by the former act "several powers and authorities were given to the justices of the peace in *England* within the respective limits of their commissions, at their general or quarter sessions, from time to time to make one general rate for such sums as they in their discretion shall think sufficient to answer all the purposes of the acts therein recited:" And reciting the beforementioned proviso; and that "some doubts had arisen whether the said act "extended to *liberties* and *franchises* which are not within the jurisdiction of the *commissions of the peace* for the counties in which such liberties and franchises lie, and so never did nor were liable to contribute to the said county rates: to the end, therefore, that such liberties and franchises may not be wholly deprived of the benefit of the recited act, it is declared and enacted, that where any *liberties* or *franchises* within *England* have *commissions of the peace* within themselves, and are not subject to the jurisdiction of the commissions of the peace for the counties in which such liberties or franchises lie, and do not, nor did, before the making of the recited act, contribute to the several rates made for the said counties, it shall and may be lawful for the justices of the peace of such liberties and franchises, within the respective limits of their commissions, to have, use, and exercise all and singular the powers, authorities, and methods, given or prescribed by the recited act; and all such liberties and franchises are declared to be subject thereto in the same manner, to all intents and purposes, as counties at large are," &c. This, he contended, only extended to exclusive liberties and franchises having commissions of the peace immediately from the crown, and not to towns corporate, like *Derby*, having only *charter* justices: and that *Lambert*, *Fitzherbert*, and *Dalton*,^(a) pointed in their treatises, to the distinction between justices of the peace by charter and those by commission; 1st, in the mode of their appointment, the one being by commission from the king, the other by election made by those to whom the king had granted the power. 2dly, In their powers; for justices by charter have not all the powers given to those acting under commission. 3dly, In their qualifications, as required by stats. 18 H. 6. c. 11, and 18 Geo. 2. c. 20. 4thly, In the duration of their authority; those by commission being revocable at the will of the crown; but not those by charter. The words *liberties* and *franchises* in the statute were meant to apply to districts or places within the bodies of counties having separate commissions of the peace from the crown; such as the city and liberty of *Westminster*, the hundred of *Cashio* or liberty of *St. Albans* in *Hertfordshire*, the *Isle of Ely*, the *Tower Hamlets*, the *Soke of Southwell*, in the county of *Nottingham*, the *Soke of Peterborough*, and other places. Where the legislature have intended to include the magistrates of cities, boroughs, and towns corporate, they have named them; as in the statute of bridges and highways, 22 H. 8. c. 5; of vagrants, 17 Geo. 2. c. 5. s. 5; of coroners, 25 G. 2. c. 29. s. 5; of houses of correction, 22 Geo. 3. c. 64. s. 1. He also contended, that the corporation having estates granted to them for public purposes, and having always hitherto sustained the burthens which this rate was made to defray, were bound to apply their revenues to the same purposes as far as they would go: and therefore that there appeared to be no necessity for making such a rate. [Lord *Ellenborough*, C. J. If the justices had the power of making the rate, we cannot inquire in this case whether they have exercised that power unnecessarily. *Bayley*, J. There is nothing stated in the case to

(a) Vide *Dalton's Justice*, ch. 3. p. 11.

shew that there may not be sums necessary to be raised now for the purpose of such a rate more than the corporate funds are able to bear after defraying all other charges, even supposing them applicable to these purposes.] The surplus of the corporation revenues, after defraying the specific charges upon them, appear to be more than sufficient to cover the amount of the present rate. *Lord Ellenborough, C. J.* It lies on those who insist on the particular application of the corporate estates to shew that the corporation are compellable to apply their revenue to these purposes. If estates have been granted to them, have they not a right to apply the produce in what manner they please, as other persons may do, unless they are restricted by the terms of the grant to apply it to a particular purpose?] The corporation are required by the grants to pay *all the charges of the town*; and those must be taken to comprize all such public charges upon the town as may arise from time to time, and which the inhabitants may become liable to bear. The corporation cannot have the benefit of the grant, and discharge themselves from the burthen.

Reader, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. We cannot enter in this form upon the question of irregularity or want of necessity in making the rate: the only question is, whether the justices in sessions had power to make such a rate, upon the true construction of the act of parliament? And upon that I am clearly of opinion that the words, "liberties and franchises, having commissions of the peace within themselves," are sufficient to include charter justices. Is not this corporate jurisdiction a franchise; and do not the justices who are appointed under the charter act under the king's commission? A general commission of the peace gives a temporary authority to those who act under it until revoked by the crown; and the charter gives a permanent authority from the crown for the same purposes; and is a permanent instead of a temporary commission of the peace. It would be mutilating the act of parliament to give it the confined construction contended for.

LE BLANC, J. I do not think that any difference was intended to be made by the legislature between charter justices, and justices under a general commission; but the act of 13 G. 2, was meant to apply to places with separate commissions of the peace, which were not counties of themselves, nor liable to the county rates, and therefore not within the general provision of the former act of the 12 Geo. 2.

GROSE and BAYLEY, Justices, concurred.

Postea to the Defendants.

The King v. The Inhabitants of Stratford-Upon-Avon.

11 East, 176. May 6, 1809.

An apprentice who went to lodge at his mother's in an adjoining parish to that of his master, for the purpose of getting cured of a disorder, but who continued to serve his master all the time, by going of errands for him, and attending when wanted, gains a settlement by such service in the parish where he lodged.

TWO justices by their order removed *Thomas Barnett*, his wife and children by name, from the borough of *Stratford-upon-Avon* to *Old Stratford*, both in the county of *Warwick*. The Sessions, on appeal, quashed the order, and stated the following case for the opinion of this Court.

T. Barnett was bound apprentice by the parish officers of *Old Stratford* to *H. Heming of Stratford-upon-Avon*, cordwainer; and, among other covenants in the indenture, the pauper engaged "faithfully to serve his master in all lawful business." He lived with his master about twelve months, when his thumb became affected with scrofula, and he left his master, and went to his mother's in the adjoining parish of *Old Stratford*, to have his thumb cured,

where he continued till the time his master went away from *Stratford-upon-Avon*, which was about two months afterwards. He slept at his mother's house more than 40 days, and he never afterwards slept in *Stratford-upon-Avon*, nor in any other place for 40 days during the continuance of his apprenticeship. During the whole time he so slept at his mother's, he went almost every day to his master's, and was on some days employed for 3 or 4 hours in each day by his master in going of errands, and was always ready at his master's house whenever wanted by him, but was unable to work at his trade in consequence of the complaint in his thumb. The Sessions were of opinion that the paupers were legally settled in *Stratford-upon-Avon*.

Reader, in support of the order of Sessions, contended, that no settlement was gained in *Old Stratford* by the lodging of the pauper there with his mother; his residence there being casual, on account of sickness, and not a residence under the indenture. For though the general rule be that the settlement is in the parish where an apprentice or servant lodges, and not where the service is performed; yet it must be a lodging in the prosecution of the master's service, and not merely casual. In *Rex v. Alton*,^(a) a pauper going with his master to a watering place (*Scarborough*) and staying there above 40 days, was held not to gain a settlement; the residence of the master there being merely casual. [Lord *Ellenborough*, C. J. I am really at a loss to conceive what distinction there is between a residence at a watering place and at any other place, so as to make the one to be considered as casual, when it would not be so considered at the other. That doctrine was overruled in the case of *The King v. Bath Easton*, Burr. S. C. 774, and common sense is with the last case.] But here the residence in *Old-Stratford* was occasioned entirely by sickness, which must be admitted to be casual; and though the apprentice was not thereby disabled from going of errands for his master, the distance from his mother's to his master's being short; yet it prevented him from working at his trade, which was the principal object of the binding, and he was therefore substantially withdrawn from his master's service. The master was bound to provide for his apprentice in sickness as well as in health, and when he abandoned his duty and sent him to his mother's he had no right to require from him any sort of service, and what the apprentice did must be considered as voluntary. He referred to the cases of *Titchfield v. Milford*, Burr. S. C. 511; *Rex v. Sutton*, 5 Term Rep. 657, and *Rex v. Barnby-in-the-Marsh*, 7 East, 381, the two last having overruled the intermediate case of *Charles v. Knowstone*, Burr. S. C. 706. [*Le Blanc*, J. It was not considered in that case, that the pauper went to his grandmother's in the parish of *Knowstone* for the purpose of cure; but that the original master, who lived in the same parish and was bound to receive him, did receive and place him there.]

Morice, contra, said that if this residence of the apprentice, would not gain him a settlement, it was difficult to say that any settlement could be gained by an apprentice residing in a different parish from his master. He continued serving his master the whole time, though not in the way of his trade, and he was placed with his mother merely to have the benefit of her care. The Court then stopped him and *Reynolds*, who was to have argued on the same side, thinking it unnecessary to hear any further argument.

LORD ELLENBOROUGH, C. J. The facts stated leave no doubt that there was a service of the master by the apprentice while he lodged at his mother's in the adjoining parish. He went to lodge there indeed in order to get cured, in consequence of an arrangement between the master and the mother; but he continued to serve his master every day; and though he could not work at the trade himself, yet he performed other service, and he might attend the work and learn the trade of his master: he must therefore be considered as still in the service of his master as an apprentice while he lodged with his mother. If the

(a) Burr. S. C. 418, and Burn's Just. tit. Poor—Settlement by Service.

mother had lived more remote from the master's house, so that he could not have served his master while he resided at his mother's for the purpose of cure, that would have altered the case, and likened it to *The King v. Barnby-in-the-Marsh*: there there was no service of the master; but here the service to the master continued, and therefore the apprentice gained a settlement by the last 40 days residence in the parish where he lodged with his mother.

GROSE, J. There is no pretence for saying that the apprentice was serving any other person than his master, and the case shews that he was serving him during the time he lodged at his mother's. If the Sessions had considered that there was any fraud in the master's sending him to his mother's, they would have stated it. But though the boy went to his mother's for the purpose of having his thumb cured, yet he continued to serve his master every day; and then, according to all the cases, he gained a settlement by such service in the parish where he lodged.

LE BLANC, J. The question is, Whether during the last 40 days that the boy lodged at his mother's he was resident there *as an apprentice*? and the facts stated put an end to the argument: for it is found that during all that time he was serving his master, not indeed to the full extent of the service required by the indenture, but to the full extent of his ability to perform it. In the other cases, where it has been held that the apprentice gained no settlement while resident in a different parish from the master's for the purpose of cure, he was not serving his master during such residence. But while an apprentice continues serving under the indenture, all the cases agree that his settlement is in the parish where he lodges, and not in that where the service is performed. Here he was serving his master all the time, and I cannot say that the service was not of such a nature as was proper for an apprentice.

BAYLEY, J. was of the same opinion.

Order of Sessions quashed.

Johnson and Others v. Hudson.

11 East, 180. May 6, 1809.

A factor selling a parcel of prize manufactured tobacco, consigned to him from his correspondent at *Guernsey*, of which a regular entry was made on importation, but without having entered himself with the excise office as a dealer in tobacco, nor having any licence as such, may yet maintain an action against the vendee for the value of the goods sold and delivered: and this, though the tobacco were sent to the defendant without a permit, at his desire; there being no fraud upon the revenue, but at most a breach of revenue regulations protected by penalties: even if such factor could, upon this single and accidental instance, be considered as a *dealer* in tobacco within the meaning of the stat. 29 Geo. 3. c. 68. s. 70, which requires every person who shall *deal* in tobacco first to take out a licence under a penalty.

THIS was an action to recover 60*l.* 7*s.* the value of 21*lbs.* of tobacco-segars sold and delivered by the plaintiff to the defendant in *November* 1806. The tobacco appeared to be partly manufactured; and the principal question made at the trial, at *Guildhall*, was, Whether the plaintiffs, who had never before dealt in tobacco, but had had the tobacco in question, parcel of a larger quantity, consigned to them from *Guernsey*, to be disposed of, and who had made a regular entry of it on importation, but had *not entered themselves with the excise office as dealers in tobacco, nor had any licence as such*, and who had sent out to the defendant, at his desire, the tobacco in question, *without a permit*, were entitled to maintain this action against him for the value of it? Lord *Ellenborough*, C. J. thought that the plaintiffs were entitled to recover, and they obtained a verdict accordingly. But an objection having been made to the action on the ground of the requisites of certain acts of parliament not having been complied with by the plaintiffs to entitle them to sell this commo-

dity, leave was given to the defendant's counsel to move to set aside the verdict and enter a nonsuit, if, upon further examination of the acts, the objection should appear to be well-founded.

Wigley accordingly moved to that purpose in the last term, and stated the several provisions of the acts, on which he relied. The stat. 29 Geo. 3. c. 68, for granting the duties on tobacco, enacts, (s. 70,) that every person who shall deal in tobacco, shall, before he shall deal therein, take out a licence; which by s. 72, is to be renewed yearly, under a penalty of 50*l*. The stat. 30 Geo. 3. c. 40. s. 4, enacts, that no tobacco (except *Spanish* or *Portuguese*) shall be imported either wholly or in part manufactured, on pain of forfeiting all such tobacco, with the packages, and also the ship in which it was imported. And by stat. 43 Geo. 3. c. 134. s. 5, prize tobacco is made subject to the regulations and forfeitures of the former acts. Upon these acts he contended that none but a licensed dealer could legally deal in this commodity; and the dealing in it by every other person being made illegal, no action could be maintained upon any such contract of sale by the plaintiff, on the same principle which prohibits a recovery upon a smuggling contract.^(a) The goods were also seizable in their transit without a permit, and afterwards in the stock of the vendee, which would have been by so much increased without any permit to cover and protect that increase. And he referred to *Gallini v. Laborie*^(b) where it was held that no action could be maintained for breach of an agreement to dance at an unlicensed theatre, the stat. 10 G. 2. c. 28, prohibiting all theatrical representations without licence.

The Court, in the absence of Lord *Ellenborough*, reluctantly granted a rule to shew cause; observing that here there was no fraud upon the revenue, on which ground the smuggling cases had been decided; nor any clause making the contract of sale illegal; but at most it was the breach of a mere revenue regulation, which was protected by a specific penalty: and they also doubted whether this plaintiff could be said to be a dealer in tobacco within the meaning of the act. And when in this term, the Court being full, it was moved to make the rule absolute; no counsel appearing on the part of the defendant to shew cause when the cause was called on in the paper of new trials; Lord *Ellenborough*, C. J. said, that the Court had considered the question since the rule was granted, and were all satisfied that no objection lay to the action; therefore they discharged the rule.

Edwards v. Dunch.

11 East, 183. May 8, 1809.

The rule to declare in replevin may be served at any day before the time in the rule is expired, and the plaintiff must declare within four days after such service.

A RULE was given to declare in replevin within 14 days after the end of *Hilary* term^(c) which ended on the 12th of *February*, but it was not served till the 23d; and no notice being taken of it, judgment was signed for want of a declaration. Whereupon *Wigley* on a former day moved to set aside the judgment for irregularity; and contended that the rule must be served at least 4 days before the expiration of it; (which had not been done here:) otherwise it might as well be served at any time, even after the time mentioned in the rule was out. *Marryat* now resisted the alleged irregularity, upon the ground that it was sufficient to serve the rule to declare in replevin at any time before it expired, and the plaintiff was bound to declare within 4 days after such ser-

(a) *Clugas v. Peneluna*, 4 Term Rep. 466. *Waymell v. Reed*, 5 Term Rep. 599.

(b) Vide 5 Term Rep. 242, and vide *Ribbary v. Crickett*, 1 Bos. & Pull. 264, and *Blatchford v. Preston*, 8 Term Rep. 89.

(c) These rules are entered as of the last day of the term.

vice. And on reference to the Master by the Court, he reported the practice to be as last stated; and the judgment was therefore held to be regular, and the rule for setting it aside was discharged.

Flint v. Hill.

11 East, 184. May 8, 1809.

The plaintiff in trespass for breaking his close, who recovers less than 40s. is not entitled to costs of increase merely because a view was granted, before the trial, though upon the application of the defendant.

IN trespass for breaking and entering the plaintiff's close, to which the general issue was pleaded, the defendant applied for a view, which was had accordingly; and at the trial the plaintiff obtained a verdict for 10s.: but the Judge did not certify that the title came in question. And on a former day in this term a rule was obtained by *The Attorney-General* for the defendant to shew cause why the plaintiff should not be allowed his costs of increase, and that the Master should tax such costs upon the postea: and he relied upon the case of *Kempster v. Deacon*, 1 Ld. Ray. 76, and Salk. 665, where upon a view granted in trespass, the plaintiff had his full costs allowed, though the jury gave under 40s., and there was no certificate that the title came in question.

Clarke and *Hullock* opposed the rule, and answered the case cited by shewing that it was before the statute 4 Ann. c. 16. s. 8, allowing the Court on motion to direct a view. Before that statute (a) there could be no view till after the cause had been brought to trial, when, if the Judge thought proper, the cause was adjourned to enable the jurors to have a view; and this was entered upon the record, as was done in the case referred to: and then the Court inferred that the title must have come in question. But no such inference can now be made, when a view is granted of course upon the previous motion of either party. And it matters not that it was had upon the motion of the defendant in this case; for if the fact of a view having been had is to carry the costs, though the verdict be under 40s., and there be no certificate of the Judge, every plaintiff in trespass will move for a view, which will operate as a repeal of the stat. 22 & 23 Car. 2. c. 9, restraining the costs where the verdict is under 40s., unless the Judge certify that the title was in question; or under the stat. 8 & 9 W. 3. c. 11. s. 4, that the trespass was wilful and malicious.

Lord ELLENBOROUGH, C. J. There seems to be no reason for allowing costs of increase because a view was had, for that may be granted where the title is not in question.

Per Curiam,

Rule discharged.

Doe, on the several Demises of Susan Blacksell, Joseph Palmer, Wm. Clarke, and Sarah his Wife, Joseph Cooke, Benjamin White, and Jane his Wife, and Mary Harris, v. Tomkins and Wife.

11 East, 185. May 9, 1809.

Devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; nor will such a surrender operate by estoppel against the parties or their heirs.

THIS was an ejectment to recover possession of certain copyhold lands and

(a) Vide 2 Tidd, 716.

buildings held of the manor of *Thorpe-in-the-Soken*, in *Essex*; the demises were laid on the 12th of *January* 1808; and at the trial a verdict was taken for the plaintiff, subject to the opinion of the Court on this case.

John Blacksell being seised to him and his heirs of the premises above described, and having duly surrendered them to the use of his will, by his will dated the 3d of *January* 1761, devised them to his brother *Thomas Blacksell* for life: remainder to his nephew *T. B.* junior, son of his said brother, "for life; and after his decease, unto such of my nieces, daughters of my said brother *Thomas*, which he had by *Elizabeth* his late wife deceased, as shall be then living, to be equally divided amongst them, share and share alike," as tenants in common in fee. The testator died in 1769: whereupon *Thomas Blacksell* sen. was admitted to the premises for life; and at a court baron held in *July* 1774, *T. B.* jun. was admitted for his life in reversion, expectant on the estate for life in his father. At the same court *Sarah* the wife of *R. Hackney*, *Elizabeth* the wife of *J. Burnby*, *Martha* the wife of *R. Wallis*, and *Mary*, *Jane* and *Susan Blacksell*, spinsters, the testator's six nieces, daughters of his brother *Thomas* by *Elizabeth* his wife, were severally admitted in fee to an undivided sixth part each, in reversion expectant on the two former life estates of their father and brother, and immediately surrendered to their brother *Thomas*; *Sarah Hackney*, *Elizabeth Burnby*, and *Martha Wallis*, being first severally and secretly examined apart from their respective husbands by the steward, according to the custom of the manor, and freely consenting; and *T. Blacksell* the testator's nephew was thereupon admitted in fee. The husbands of the three married sisters were no parties to their admissions; or to the surrenders by them to their brother *Thomas*. *Thomas Blacksell* sen. and jun. at the same court mortgaged the premises for 500*l.* to *J. Ratford*, who afterwards made a further advance, and in 1784 had a surrender of the equity of redemption from the son; the father being then dead; and *Ratford* was thereupon admitted in fee, and surrendered to the use of his will. *Ratford* devised to trustees for the defendant *Ann Tomkins* his only child; which trustees have been admitted as the devisees under his will: and she and her husband are in possession of the premises in question. *Thomas Blacksell*, jun. died 7th *June* 1801; at which time only four of the testator's nieces were living; namely, *Susan*, the first named lessor of the plaintiff, *Sarah* then the widow of *R. Hackney*, *Martha* then the wife of *R. Wallis*, and *Mary* then the wife of *J. Harris*. *Martha*, *Sarah*, and *Mary*, all died before the date of the demises in this ejectment. *Joseph Palmer*, the second lessor, is the grandson of *Sarah Hackney* by a deceased daughter, who with *Sarah* the wife of *W. Clarke*, the third lessors, were her coheiresses. *Joseph Cooke* the fourth lessor is the heir of *Martha Wallis*, and *Jane* the wife of *Benjamin White*, and *Mary Harris* spinster, the remaining lessors, are the daughters and coheiresses of *Mary* the wife of *J. Harris*. *Elizabeth Burnby* and *Jane Blacksell*, the only two other nieces of the testator, died in the lifetime of their brother *Thomas Blacksell*, jun. The lessors of the plaintiff were duly admitted at the lord's court to their several proportions claimed in the premises on the 23d of *February* 1808. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover?

Marryat, for the plaintiffs, began by arguing that the testator's nieces had only contingent remainders at the time of the surrenders made by them, which surrenders were therefore incapable of being made, and could not operate by way of estoppel. And that the surrenders by the feme coverts, without their husbands, was clearly void, according to *Stevens v. Tyrell*, 2 Wils. 1.

The Court, however, thought it unnecessary to hear him; it being clear that the remainders to the nieces were contingent: and being of opinion that a party who was not in the seisin could not surrender a copyhold; and that a surrender could not operate by way of estoppel, but could only pass what the party then had. And *Lowe*, who was to have argued for the defendants,

admitting that he could not support their title on these grounds; the Court gave judgment for the *postea* to be delivered to the plaintiff.(a)

Fisher v. Pimbley.

11 East, 188. May 9, 1809.

Debt on bond, which was conditioned to perform an award; plea no award; replication setting out an award; rejoinder stating the whole award, (in which were recited the bonds of submission, whereby it appeared that the award was not warranted by the submission :) and then demurring. Held that the rejoinder was not inconsistent with, nor a departure from the plea. Under a submission of all matters in difference between *A.* and *B.*, an award on matters in difference between *A.* and *B.*, *C.* and *D.* jointly, directing *A.* to pay *B.* a certain sum as a compensation for coals gotten by *A.* belonging to *B.* or to *B.* and others, and directing *B.* to give *A.* a bond to indemnify him against the claims of *C.* and *D.* is bad.

TO debt on bond, dated 12th of *March* 1807, for 300*l.*, the defendant craved oyer of the bond and of the condition, by which it appeared that the bond was given for the performance of an award of certain arbitrators to whom it was referred to arbitrate and determine concerning all causes of action, controversies, and demands whatsoever between the plaintiff and defendant, so as the award in writing under their hands should be ready to be delivered on or before the 12th of *June* 1807: and then he pleaded that the arbitrators in the condition named *did not make any award* under their hands ready to be delivered, &c. on or before the said 12th of *June*, and this he is ready to verify, &c. The plaintiff replied that the arbitrators in the condition named, within the time limited, &c. *duly made their award* in writing under their hands of and concerning the premises in the condition mentioned, ready to be delivered, &c. by which they awarded that the defendant should pay to the plaintiff 124*l.* 5*s.* 2*d.* on the 8th of *July* 1807, as a compensation for all the coal by him gotten in such manner as was therein before mentioned: and they thereby further awarded mutual releases up to the date of the bonds of reference: and that the plaintiff should also execute and deliver to the defendant at his expence a bond in the penalty of 40*l.* conditioned to indemnify the defendant from all actions, &c. and demands by *J. Rothwell* (and two others by name) on account of the defendant having worked or gotten any coal out of a certain estate called *Shaw Place*, and a certain lane adjoining, or either of them, before the date of the bonds of reference, &c. And then the plaintiff alleged that the defendant had notice of this award, but did not pay the 124*l.* 5*s.* 2*d.*, the sum awarded. The defendant rejoined, that the said supposed award is in the words following, to wit, &c. and then he set out the whole award verbatim, wherein the arbitrators stated the bonds of reference, by which it appeared that *the subject of reference* was of all actions, controversies, &c. and demands *between the plaintiff and defendant*, as before set forth, and that the arbitrators found "that the defendant had at the date of the said bonds worked and gotten divers quantities of coal belonging to the plaintiff, *or to him and some other person or persons*, in and under a certain estate called *Shaw Place*, &c. and under a certain lane adjoining, &c. and that the plaintiff demands from the defendant a compensation for all the coals so gotten by the defendant." And they awarded the defendant to pay to the plaintiff 124*l.* 5*s.* 2*d.* on the 8th of *July* then next "as and for a compensation for all the coal gotten by him as aforesaid:" and then they awarded the mutual releases and the bond of indemnity from the plaintiff to the defendant as mentioned in the replication. To this rejoinder the plaintiff demurred, and alleged for special cause, that such rejoinder was a departure from the plea, and neither confessed and avoided, nor denied, the matters pleaded in the replication, &c.

(a) Vide 1 Watk. 210. *Taylor v. Philips*, 1 Ves. 230, and *Goodtitle v. Morse*, 3 Term Rep. 365.

The grounds of objection to the award were, 1st, its having directed the money to be paid to the plaintiff for coals stated to have been gotten by the defendant belonging to the plaintiff, *or* to him and some *other person or persons*; when the submission was confined to matters in difference between the plaintiff and defendant only. 2dly, That it directed a bond of indemnity to be given to the defendant at his expence against future claims and actions by three several persons, upon matters not submitted to the arbitrators, and was therefore uncertain and not final. And the validity of the first of these objections was very faintly questioned by *Scarlett* on behalf of the plaintiff, (supposing the rejoinder to be good.) But against the second, he relied on *Philips v. Knightsley*, (a) where an award that the defendant should execute a covenant to indemnify the plaintiff against all costs damages and expences which should happen by means of any further proceedings in an action begun at the instance of the defendant, and at issue in C. B., wherein *Marshall qui tam* was plaintiff, and the then plaintiff defendant, was held good. And he urged that at any rate, if the award of the bond of indemnity were void, the award would only be void for that excess. (b)

The principal question, however, argued was, whether the rejoinder, setting out the award in fact, according to the truth, which award had been defectively set out by the plaintiff in his replication, were a departure from the defendant's plea, wherein he had before stated that the arbitrators had made no award?

Scarlett contended that it was a departure; for a plea of *no award* means no award in fact; and cited *Farrer v. Gate*, Palm. 511; *Skinner v. Andrews*, 1 Lev. 245; *House v. Lander*, ib. 85; *Harding v. Holmes*, 1 Wils. 122, wherein several other cases in point were referred to, and *Praed v. The Duchess of Cumberland*, 4 Term Rep. 585, and 2 H. Blac. 280. The defendant ought to have rejoined *no such award* as set out in the replication: and if issue had been taken on that, and any material variance had appeared between the award set out in the replication, and the award proved, the issue must have been found for the defendant.

Yates, contra, was stopped by the Court.

Lord ELLENBOROUGH, C. J. The last is the only point which was arguable. The award is clearly bad, inasmuch as it awards compensation to the plaintiff for coal gotten by the defendant belonging to the plaintiff, *or* to him and some *other person or persons*; and though it directs a bond of indemnity to be given by the plaintiff to the defendant against any demands by three certain persons; *non liquet* that those were the persons interested with the plaintiff in the coals which had been gotten by the defendant, and for which the compensation was awarded. The compensation therefore has been awarded to the one party, without any equivalent appearing on the other side. Then the award being bad, the only question is, whether the defendant can shew such bad award in his rejoinder, consistently with his former allegation in the plea, that there was no award? The plaintiff in his replication sets out an award; and if he had set it out truly, it is clear that the defendant might have demurred to it: but not having set it out truly, where is the inconsistency, or departure from

(a) Stra. 903. *Page*, J. there held the award bad; the other three Judges held it good. According to Mr. Ford's MS. the majority said "that the poor being interested in the suit as well as the plaintiff, he could not release: nor would the award bind the poor, they not being parties to the submission. And though it were objected that the covenant might be a foundation for a fresh suit, so might a bond or any other security, without which, no possible end could be made of the matter: and therefore the court held it good for the necessity of the case. As to the other part of the objection, that the costs were uncertain; these might be ascertained by the party himself, if he thought proper to proceed. And *Lee*, J. cited *Beale v. Beale*, Cro. Car. 383, where an award to pay the charges of a suit was held good, because they would be ascertained by the attorney's bringing in his bill. And so judgment was given for the plaintiff; *Page*, J. still dissenting. Note—They all agreed that if the suit could not possibly have been released, or otherwise immediately discharged, the award would have been void."

(b) Vide *Ingram v. Milnes*, 8 East, 445.

the plea, in the defendant's doing that which the plaintiff ought to have done, setting out the award in fact, and then demurring to the true award so set out? He thereby still maintained his former allegation, that there was no award; in other words that there was no legal and valid award under the submission, which is the same as no award. There is no inconsistency in this, and therefore no departure.

LE BLANC, J.(a) The award cannot be maintained, as it was made of matters not submitted to the arbitrators; for the submission was only of matters in difference between the plaintiff and the defendant; and the award is of matters between the defendant and the plaintiff *and other persons*. If the matters submitted between these parties had comprehended matters in difference between the defendant and the plaintiff together with others, then an award of compensation to the plaintiff for the whole value of the coals taken, with an indemnity from him to the defendant against the claims of those others for their proportions, might have done: but the submission was not so extended. Then as to the departure, the defendant by his rejoinder only puts the plaintiff's case in the same state on this record as it would have been if he had set out the award truly; and it only shews that the award in fact made is not a good award in point of law.

BAYLEY, J. A submission of matters in difference between A. and B. does not include matters in difference between A. and B. *and others jointly*: the award, therefore, was bad. Then a plea of no award means no award according to the submission; that is the plain meaning of it. I do not agree with the argument, that the defendant might have defended himself by taking issue upon the award as stated in the replication; for there was such an award as is there stated; but it was not an award made conformably to the submission, which would have appeared to be the case if the whole had been truly set out in the replication. Then the rejoinder first setting out the true award, and then demurring to it, is no more in effect than saying that there was no award conformable to the submission, and therefore no award; which maintains the plea.(1)

Judgment for the Defendant.

Sir Henry Strachey, Bart., and Giles v. Turley, Burt, and Others.

11 East, 194. May 9, 1809.

Where an election committee had, under the stat. 23 Geo. 3. c. 52, reported to the House of Commons that *two several* petitions against the return of members to serve in Parliament for *East Grimstead* were frivolous and vexatious, whereupon the then Speaker, on application of the parties grieved, had referred the costs to be taxed on both petitions *jointly*, and had first granted a certificate of the amount of such *joint* taxation, and afterwards another amended certificate, referring to the former, and apportioning how much of the costs were incurred in opposing each petition *separately*, and how much *jointly*: held that both these certificates being invalid, by reason that the act only authorizes the costs to be taxed *separately* on each, distinct petition, a new and valid certificate, ascertaining the separate costs incurred on each petition, might be granted by the Speaker of a new Parliament; the act mentioning *the Speaker* generally.

IN consequence of the former decision of the Court in the cause between these parties, which is reported in my 7th volume, 507, nonsuits were entered in the three several actions of debt which had been brought by these plaintiffs, the first upon the Speaker's original certificate for costs against *Frost* and these defendants *jointly*, on account of their frivolous and vexatious petition against the return of the plaintiffs as burgesses for the borough of *East-Grimstead* to

(a) *Grose, J.* was absent from indisposition.

(1) Vide *Kyd* on Awards 300. *Fowler v. Clark*, 3 Day 231.

the parliament which met in 1802; the second, upon the Speaker's amended certificate against *Frost alone*, for his *separate* proportion of the costs given to the plaintiff; and the third upon the same amended certificate against these defendants *alone*, for *their separate* proportion of the costs. These nonsuits were entered in *Trinity term*, 1806. On the 24th of *October*, in the same year, that parliament was dissolved, without any further proceedings having been had by the plaintiffs for the recovery of their costs; and a new parliament was assembled on the 22d of *June* 1807. On the 17th of *March* 1808, the Speaker made the two following certificates, which were produced in evidence. Whereas *J. H. Ley*, Esq. clerk assistant of the House of Commons, and *Nicholas Smith*, Esq. one of the masters of the High Court of Chancery, who were duly authorized and directed by me according to the act of the 28th G. 3. c. 52, to examine and tax the costs and expences of Sir. *H. Strackey Bart.* and *D. Giles*, Esq. incurred by them in opposing the petition of several persons whose names are thereunto subscribed, on behalf of themselves and others stiling themselves the electors of the town and borough of *East-Grimstead*, presented to the House of Commons upon the 1st of *December* 1802, complaining of the undue election and return of them the said Sir. *H. S.* and *D. G.* as burgesses to serve in parliament for the said borough of *East-Grimstead*, have reported to me the amount of such costs and expences; now I do hereby certify, that the said costs and expences allowed in the said report amounted to the sum of 361*l.* 14*s.* 2*d.* Given under my hand, this 17th of *March* 1808. *Cha. Abbot*, Speaker.—There was a similar certificate of the Speaker, certifying the amount of the plaintiff's costs in opposing the petition of Mr. *Frost*, at 361*l.* 0*s.* 10*d.* On the 18th of *April* 1808, a copy of the first of these certificates was served on the defendants, and payments of the costs therein mentioned demanded of and refused by them: and a copy of the last stated certificate was served on Mr. *Frost*, and payment of the costs therein mentioned was demanded of and refused by him. Thereupon this action of debt was brought, wherein the plaintiffs declared that the defendants were indebted to them in 361*l.* 14*s.* 2*d.* by virtue of the stat. 28 Geo. 3. c. 52; to which the defendants pleaded the general issue; and at the trial at *Westminster* a verdict was given for the plaintiffs, subject to the opinion of the Court on a case reserved; in which all the facts of the former case were stated, with the addition of those above-mentioned: and if upon the whole the Court were of opinion that the plaintiffs were entitled to recover, the verdict was to stand: if not, a nonsuit was to be entered.

Burrough, for the plaintiffs. 1st, It is no objection to the present certificate of the Speaker, on which the action is brought, that he had before granted certificates, which were inefficient: for the authority given to him for this purpose by the stat. 28 Geo. 3. c. 52, is special; and it is a clear principle of law that every special authority ought to be pursued in substance and effect, Co. Lit. 303. b, and if not well executed in the first instance, may afterwards be executed properly, 3 Vin. Abr. tit. Authority, 423. B. pl. 42: and here it appears from the former decision, 7 East, 507, that the Speaker's authority was not well executed before; for the first certificate was bad, because it did not assess the costs on each petition separately; and the second certificate was of course avoided, because it was founded upon the first. 2dly, It is no objection that the Speaker who has granted the present certificate was chosen by a different House of Commons from that out of which the committee who reported the petition to be frivolous and vexatious was nominated. The act of the 28 Geo. 3. does not confine the power to be exercised by the Speaker of that parliament, but refers to him by the name of *the Speaker*, as a known officer, whenever a parliament is in being. The words of the 19th sect. are, that wherever any petition shall have been reported by a committee to be frivolous or vexatious, "the party or parties, if any, who shall have appeared before the committee in opposition to such petition, shall be entitled to recover, &c. the

"full costs and expenses," &c. This vests the right to the costs in the party grieved: and then the clause proceeds, "such costs and expenses to be ascertained in the manner hereinafter directed." Then by s. 22, for ascertaining the costs, *the Speaker*, on application, is to direct the same to be taxed by certain officers, who are required to report the amount to *the Speaker*, and he is to sign and deliver to the parties a *certificate* of the same signed by himself. The Speaker therefore acts throughout as a mere ministerial officer, without exercising any judgment of his own either upon the propriety of giving costs at all, or upon the amount of them. It never could have been the intention of the legislature that the party's right to costs once vested should be afterwards defeated by the dissolution of the parliament, any more than by the death or resignation of the individual Speaker, before his signature of the certificate. This is not like parliamentary proceedings *in fieri* in the House of Commons, which fall to the ground of course on the political death of the House. The resolutions of election committees are all entered on the Journals, which are the records of the nation, and a copy of which, by the 23d clause, is to furnish evidence of the debt.

Clifford, contra, admitting that a special authority not well executed at first may be executed afterwards; and that the Speaker in certifying the amount of the costs, had only a ministerial duty to perform; contended, 1st, that authority was only given to the Speaker to sign one certificate; and that authority having been once exercised by him, in certifying the separate costs on the two petitions, could not be resumed again even in the same parliament. The power of awarding costs rests altogether upon the stat. 28 Geo. 3. c. 52, and the wording of the 22d clause, with reference to the other provisions of the law, evidently applies to the grant of one certificate by the Speaker of the then existing House of Commons. The certificate is to be granted on application (singulariter) to the Speaker, and the officers appointed to tax the costs are to report the amount to the Speaker of the said House. And by s. 23, the costs *so certified as above* are given to the party entitled, and *the certificate* (which can only extend to *one* certificate) of the Speaker, and a copy of the Journals of the House of the resolutions of the committee, are to be the evidence of the debt. If a new action were now brought upon the former certificate, a recovery in this action upon the subsequent certificate would be no bar to the other. This Court exercising its discretionary power may direct the Master to review his taxation of costs, if faulty, and may amend what is wrong; but the Speaker, having a bare authority in this respect, and having once exercised it, however defectively, is *functus officio*, like an arbitrator^(a) and cannot resume the authority again. The parties having made a wrong application before to the Speaker will not authorize them to make other applications to him for the same purpose; and without their application the Speaker has no power to direct the taxation. The 22d section directs fees to be paid to the officers for taxing the costs; but it never could have been meant that those fees should be paid more than once because of the blunder of the persons applying. By s. 24, the whole amount of the taxed costs may be recovered from any of the persons liable, and the one who pays may recover over a proportionable share from the rest; but if a taxation once made could be rescinded at any subsequent time, and a new certificate issue, it would lead to great difficulty. But, 2dly, whatever the case might be of a second certificate issued during the same parliament, at all events the Speaker's authority was at an end upon the dissolution of that parliament. The party entitled must suffer by his laches. The general law and usage of parliament is clear, that, except where otherwise specially provided by statute, all proceedings pending in the House of Commons expire with the dissolution of the representative body, and therefore the power of their Speaker must necessarily expire at the same time.

(a) *Henfree v. Bromley*, 6 East, 309, was cited.

It cannot make any difference that the same individual happened to fill the chair of the House in successive parliaments. The report of the taxed costs is to be made to *the Speaker* of the *said* House, which confines the authority to the Speaker of the then existing House of Commons in which the proceedings originated. Suppose after the vote of the committee that the petition was frivolous and vexatious, the parliament had been dissolved, no proceedings could have been had upon that vote, because there could have been nobody to make or receive the report upon it; and if the political existence of those who had a judgment to exercise upon the matter were expired, of course the authority of their ministerial officer must also have expired. It was even necessary to make legislative provision by the 33d section of the act, that an election committee should not be dissolved by a prorogation of parliament.

Burrough in reply, admitting that if the parliament were dissolved before the report of the committee to the House, the proceedings might fall to the ground, contended that after such report, which would be placed on the Journals, the decision was conclusive, and all the consequences would follow, there being nothing but mere ministerial acts to be done.

LORD ELLENBOROUGH, C. J. There is no doubt upon either ground but that the last certificate of the Speaker is valid. It is objected, that the Speaker having granted one certificate could not grant another; and I admit that if he had before granted an effective certificate, he would have been *functus officio*, and could not have granted another; as in the case referred to of the arbitrator who had once made a valid award. But if he had before only granted void certificates, and the costs had been taxed in a manner which the legislature did not intend, and for which there was no authority, the first and second certificates were mere nullities, and the last, which alone pursued the authority given by the act, is valid. The act directs, sect. 18, that every committee, when they report to the House their final determination on the merits of *the petition* which they were sworn to try, shall also report whether *such petition* were frivolous or vexatious: and, sect. 19, whenever they report *such petition* to be frivolous or vexatious, the party opposing "*such petition* shall be entitled to recover from the person or persons who shall have signed *such petition* the full costs and expences," &c. The other clauses follow in the same terms. This, therefore, is a direction applying specifically to *one* petition, and not to several, and therefore the remedy must be applied severally to each petition; and the costs and expences of opposing several petitions cannot be consolidated together in one certificate, as was done in the first certificate granted upon this occasion. Then the second certificate was also bad, which apportioned part of the costs separately as to the two petitions, but still certified the great bulk of the costs jointly against the two sets of petitioners. Both these certificates were considered by the Court in the former case in 7 East, 507, to be void. With respect to the next question, as to the authority of the Speaker, by whom the present certificate was granted, to make it; his ministerial function, as it is rightly called in this respect, is described in section 22, which mentions him in general terms as *The Speaker*; it does not say, "the Speaker at the time of making the report of the committee," or the *same* Speaker, or use any words to that effect, so as to confine the power to the identical individual who then happened to be Speaker. If it had been so confined, I do not say that we should violate the plain letter of the act, in order to relieve a party grieved who is only entitled to the relief given by the act: but we would not confine the relief in the manner contended for, if the words of the act and the sense and reason of the thing do not enforce such a construction. The clause says, that "on application made to the Speaker of the House of Commons by any such petitioner, &c. for ascertaining such costs, he shall direct the same to be taxed by two persons out of a certain description of officers. Now, suppose the Speaker had died after the report of the committee, and before such a direction to those officers could have been made; or suppose

after such direction, the particular officers charged with the taxation had died; can it be contended that the succeeding Speaker in the one case could not have directed the costs to be taxed: or in the other, that the same Speaker would have had no power to direct the taxation to be made by other officers in the place of those who had died. Such a construction would be most manifestly against the sense of the act; and yet the argument would still apply that the authority was only given to the same Speaker, and that he could only once refer the costs to be taxed. The words of the act are, *The Speaker*, that is, whosoever shall be Speaker when the certificate is to be granted: there is nothing in the act to narrow the description to the identical person who was Speaker at the time of the report. All the words and the sense of the act will be answered by reading it "the Speaker for the time being." And no difficulty can arise from supposing that different certificates might be granted by different Speakers; for as soon as any Speaker has legally exercised his function, no other certificate could be granted by himself or any other Speaker. The Speaker's authority, qua Speaker, does certainly end with the parliament: but this is a statutable authority given to be exercised by the Speaker for the time being, whoever he may be: and if it be not well executed by one, it may be executed by another.

LE BLANC, J.(a) There is no dispute as to the principles upon which this case is to be decided. It is a special authority given to *the Speaker* of the House of Commons, and if it be not well executed by him by granting a valid certificate, it may be executed again, until there be a valid execution of the authority. The first question then is, whether the Speaker has made more than one *valid* certificate? And I think, for the reasons before given, he has only made *one valid* certificate; and there has therefore been only one certificate, and one taxation pursuant to the act, because the others were invalid, not being conformable to the act, and no action could have been maintained upon them. Then it is objected that the last certificate was granted by the Speaker of another parliament, or not granted by the same Speaker who had been applied to and had directed the taxation. I agree that nothing turns on the fact of the same individual having been chosen Speaker in the different parliaments, and I think the question would have been exactly the same if the direction to tax had been given by one Speaker in one parliament, and the certificate had been signed by another Speaker in the next parliament: such a certificate would have been good. And so, if after the Speaker's direction to one master in Chancery and one clerk of the House to tax the costs, either had died or been removed before the taxation made, the Speaker might have directed another clerk and another master to tax the costs. Or suppose after those officers had reported the taxation to the Speaker, and before he had made his certificate, the Speaker had died, or a new parliament had been assembled, the new Speaker might have made the required certificate: for though the individual Speaker may be different, yet it is the same *officer*, and this is an authority given to the *officer*, and not to the *person*; and it must be executed according to the directions of the act. The certificate in question is the first and only certificate which has been legally and validly granted, and therefore is good, though the Speaker by whom it is signed was not the Speaker of the same House of Commons in which the report of the committee was made, and in which the direction to tax the costs was given. And this is not like the case cited of the award, because the arbitrator there had made a valid award in the first instance, and therefore a second award was an excess of his authority. The 24th section does not extend to distinct petitioners in different petitions, but only to joint petitioners in the same petition.

BAXLEY, J. This is a remedial legislative provision, and therefore there ought to be such a construction put upon the words as will make the remedy effectual

(a) *Gross, J. was absent, indisposed.*

for the purpose to which it was meant to be applied. I consider the taxation and certificate on which the action is brought as the first valid taxation and the first valid certificate of the costs. If there were separate petitions against the same return, the act meant that there should be a separate taxation upon each; and so the Court have decided; and therefore the first and second certificates were void, because the costs in the different petitions were taxed jointly in both of them. How then, upon the construction of a remedial act can it be said, that a separate and valid taxation or certificate is not good, because former taxations and certificates made were invalid. It is next objected that the authority does not extend to the Speaker of another parliament: but it is agreed that the act to be done is merely ministerial, and may as well be performed in respect of the object by one Speaker as by another. The act mentions *the Speaker* generally; and though it do not add *for the time being*, yet if such a construction be necessary to advance the remedy, we must so construe the general words. No injustice can ensue from such a construction; but great injustice would ensue from a narrower one: for immediately after a report made of a frivolous and vexatious petition, parliament might be dissolved before any taxation could be made, of which I remember an instance: and then if the Speaker in the next parliament could not direct the taxation and grant a certificate, the remedy would altogether fail.

Postea to the Plaintiffs.

Forster and Others v. Christie.

11 East, 205. May 9, 1809.

A British ship insured from Hull to St. Petersburg, having sailed under convoy to the Sound, was afterwards estopped in her course by a king's ship in the Baltic from an apprehension of hostilities for 11 days, and then proceeded to a point of rendezvous for convoy, where she waited 7 days longer, and then sailed under convoy till the king's officer received intelligence that a hostile embargo was laid on British ships at St. Petersburg, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to Hull: Held that this loss of the voyage was not attributable to the arrest or detainment of kings, &c. but immediately to the fear of the hostile embargo in the port of destination, and therefore not within the policy; though if the ship had not been detained in the first instance, by the king's officer, she would have arrived in time at St. Petersburg to have delivered her cargo before the embargo.

THIS was an action on a policy of insurance in the usual form, effected on the 8th of October 1807, by the plaintiffs, and subscribed by the defendant for 400l. on woollens, on board the ship *Volga*, upon a voyage at and from Hull to the Sound and St. Petersburg, at a premium of ten guineas per cent., to return 2l. per cent. for convoy to the Sound or Belts, and 2l. per cent. more for any convoy in the Baltic and arrival. In the margin of the policy was a memorandum, that in case of partial loss or damage the neat proceeds were to be the basis of contribution. The interest was stated by the declaration to be in Dawson, Burrell, and Co., and the loss was averred in different counts to have happened of the goods and of the voyage by the perils of enemies, and by the arrest, restraint, and detainment of kings, princes, and people, and was also specially described according to the facts hereinafter stated. There were also counts for money had and received, and upon an account stated. The goods in question belonged to Dawson, Burrell, and Co., merchants of Wakefield, and were shipped by them on board the *Volga*, a British ship at Hull, in October 1807; on the 10th of which month she sailed with convoy to the Sound, where she arrived on the 16th. She proceeded on her voyage, and was at anchor off the town of Drago on the 20th, when she was boarded by the crew of a boat from his majesty's brig *Muscata*, with orders for the *Volga* to put herself under the protection of the king's ships in Copenhagen Roads;

and the boat's crew remained on board to enforce obedience to the orders. The *Volga* weighed anchor accordingly, and came back to *Copenhagen Roads*, where she remained until the 31st, when she went to *Helsingberg Roads* for convoy, and remained there waiting for convoy until the 7th of *November*, when she sailed on her voyage under convoy of his majesty's sloop of war the *Ganet*. The *Volga* proceeded on her voyage in the *Baltic* until the 16th of *November*, when the commander of the *Ganet* informed the captain of the *Volga* that an embargo was laid on the 15th on all *British* ships in the *Russian* ports, and ordered the *Volga* to proceed no further on her voyage, but to keep close by him, and that the *Volga* should receive orders from the commander in chief in *Copenhagen Roads* as to her future destination. When the *Volga* arrived off *Copenhagen* she was ordered by the king's officers to proceed down to *Helsingberg Roads*; and afterwards the captain, under all the circumstances of the case, thought it best to proceed to *England*, which he did accordingly under convoy of his majesty's brig the *Providence*, and arrived at *Hull* on the 11th of *December* 1807. An embargo was in fact laid in the ports of *Russia* upon all *British* ships on the 15th of *November* 1807, and war was declared and hostilities commenced by *Russia* against *Great Britain* on the 18th of *December* 1807, and continued from that time to the present. If the *Volga*, however, had not been detained by the king's officers she would have arrived according to the usual course of the voyage at *St. Petersburg*, and delivered her cargo there, previous to the laying on of the embargo. Upon the ship's arrival in the *Humber*, the goods insured were safely landed and deposited in the same state as when first put on board in the warehouses of the plaintiff's agents, where they remained when the action was brought. On the 28th of *December*, the plaintiffs abandoned the goods to the defendant and the other underwriters. A verdict was taken at the trial for the plaintiffs, subject to the opinion of this Court on the facts above stated: and if the plaintiffs were entitled to recover, the verdict was to stand: otherwise, a nonsuit was to be entered.

Taddy, for the plaintiffs, contended that the voyage had been lost by a peril insured against, and therefore the assured were entitled to abandon. The voyage might have been performed but for the detention of the king's officers; and such a detention is within the terms of the insurance against "arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever." The general word *capture* has indeed been held (a) not to extend to *British* capture; but that is on the ground of public policy, because it tends to throw the loss on *British* subjects instead of upon the enemy, and so to paralyze the warfare of the state; but nothing of state policy intervenes in this case; for where the contract of insurance is between two subjects of the realm, and the question is on whom a certain loss is to fall which must take place, the state has no interest in the decision, unless it be that the burden should be divided as much as possible, which it is the object of such a contract to effect. Where a loss may fall upon some one or other of innocent subjects, in order to promote the general welfare against the acts of an enemy, there can be no reason why one subject should not contract to indemnify another against the risk; in like manner as landlord and tenant often contract to indemnify each other against certain taxes; which, as between themselves, if not specially directed otherwise by law, is good. Suppose it had been necessary for the public service to have taken the ship altogether in order to employ her against the enemy, by whom she had been captured or damaged, on what principle could it have been contended that the underwriters would not have been liable. (b) In *Green v. Young*, (c) where a *British* ship

(a) Vide *Kellner v. Le Mesurier*, 4 East, 396, 402, and *Lubbock v. Potts*, 7 East, 451.

(b) Vide *Park on Insurance*, chap. 4, 6th edit. p. 106, &c. where several late cases are mentioned.

(c) 2 Ld. Ray. 840, and 2 Salk. 444.

was seized by the government and converted into a fire ship, Lord *Holt* at nisi prius considered that the underwriters would be liable: and this opinion was approved of by Lord *Kenyon* in *Rotch v. Edie*, 6 Term Rep. 422, 3. And in *Goss v. Withers*, 2 Burr. 696, Lord *Mansfield* says, that by the general law the assured may abandon in the case merely of an arrest on an embargo by a prince not an enemy. The opinions of foreign jurists are strong to this effect; as in 2 Val. 134. If after the voyage commenced the ship put into a harbour, be it into the same or any other, and be there stopped by order of the king, the assurance shall have effect, so that the assured may abandon in the same manner as if it were the act of a foreign prince. [Lord *Ellenborough*, C. J. asked, on which act of detention the plaintiff's counsel relied, as the act occasioning the loss of the voyage, which entitled him to abandon? To which it was answered, the first principally.]

Carr, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. This is no more than a detention by the convoy for a certain period, till by the laying of a hostile embargo in the destined port, the further prosecution of the adventure became impracticable, and the voyage was lost; which according to *Hadkinson v. Robinson* is not a loss within the policy. There was indeed a detention by the king's ship, but there was no loss on that detention. Suppose there had been fair weather to a certain point of the voyage, and then bad weather and adverse winds, which had prevented the vessel from entering her port of destination till she had received advice of the embargo which obliged her to put back; could that have been declared upon as a loss by the perils of the sea? and yet that might as well be said to be the *causa remota* of the loss of the voyage, as the detention in this case: but that will not do; the risk insured against must be the effective cause of the loss, in order to charge the underwriters. But here there was the concurrence of another overbearing cause, namely, the hostile embargo in the destined port, which was the immediate cause of the ship's return and of the loss of the voyage: and the king's officer only prevented the ship from going into the enemy's port, and incurring a loss by capture; and such detention is not within the meaning of the clause against "the arrest and detainment of king's," &c. Lord *Alvanley*, in the case of *Hadkinson v. Robinson*, 3 Bos. & Pull. 383, said, that in order to bring the loss within the policy, the peril insured against which occasions it must act directly, and not collaterally, upon the thing insured.

The rest of the Court agreed; and *Bayley*, J. added, If the port of *St. Petersburg* had continued open, and there had been no embargo, and no war between this country and *Russia*, it could not have been pretended that the prior detention by the king's ship would have been a loss within the policy. (1)

Per Curiam,

Postea to the Defendant.

Rugg and Others v. Minett and Others.

11 East, 210. May 9, 1809.

Where turpentine in casks was sold by auction at so much per cwt. and the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest before they were delivered to the purchasers; on which account the two last casks were to be sold at uncertain quantities; and a deposit was to be paid by the buyers at the time of the sale, and the remainder within 30 days on the goods being delivered; and the buyers had the option of keeping the goods in the warehouse at the charge of the sellers for those 30 days, after which they were to pay the rent, and the buyers having employed the warehouseman of the seller as their agent, he filled up some of the casks out of the two last, and left the bungs out in order to enable the

(1) [The American cases have generally held a contrary doctrine. See them collected in 1 Phill. on Ins. p. 650 to 676, and the author's remarks thereon.—W.]

custom-house officer to gauge them; but before he could fill up the rest a fire consumed the whole in the warehouse within the 30 days: Held, that the property passed to the buyers in all the casks which were filled up, because nothing further remained to be done to them by the seller; for it was the business of the buyers to get them gauged, without which they could not have been removed; and the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the gauging, must be taken to have been done as agent for the buyers, whose concern the gauging was. But the property in the casks not filled up remained in the seller, at whose risk they continued.

IN an action for money had and received by the defendants to the use of the plaintiffs, a verdict was found for the plaintiffs for 1415*l.*, subject to the opinion of the Court upon the following case.

On the 28th of *April* 1808, the defendants, as prize agents to the commissioners for the care and disposal of *Danish* property, put up to public sale by auction, at *Dover*, the cargo of a *Danish* ship in lots, and the lots No. 28 to 54 inclusive consisted of turpentine in casks. The quantity contained in each lot being marked on the catalogue thus—10 cwt. 3 qrs. 26*lbs.*, the mode of bidding was this; each lot (except the two last, which were sold at uncertain quantities) was to be taken at the weight at which it was marked, and the bidding was to be at so much per hundred weight on that quantity. The plaintiffs employed one *Acres*, the warehouseman of the defendants, to bid for them, and all the lots of turpentine, (with the exception of 3 lots, which were sold to other bidders,) were knocked down to *Acres* so acting for the plaintiffs. No conditions of sale were distributed prior to the sale; but the auctioneer, before the bidding commenced, read aloud the following conditions: 1st, The highest bidder to be the buyer; but if any dispute should arise, the lot to be put up again, 2d, 25*l.* per cent. is to be paid to the auctioneer as a deposit immediately after the sale, and the remainder in 30 days. The remainder of the purchase-money is to be paid on the goods being delivered. Should the goods remain after the limited time, the warehouse rent from that time to be paid at the rate of 2*s.* per ton per month, by the purchaser. 3d, The goods to be taken at the neat weight printed in the catalogue. 4th, The goods to be taken away in 12 months, or resold to pay the warehouse rent. Upon failure of complying with these conditions, the deposit-money is to be forfeited, and the commissioners to be at liberty to resell any lots belonging to defaulters, by whom all charges attending the same shall be made good. 1*s.* per lot under 10*l.*—1*s.* 6*d.* from 10*l.* to 25*l.* and 2*s.* above 25*l.* lot-money to be paid by the buyer to the auctioneer. Tare allowed for turpentine 1*s.* 5*d.* Upon the turpentine being put up to sale, the auctioneer, by the direction of one of the defendants present, announced to the bidders that the casks of turpentine were to be filled up before they were delivered to the purchasers; and that in order to effect this, the two last lots would be sold at uncertain quantities, and the preceding lots would be filled from them. The whole of the turpentine, with the exception of the 3 lots before mentioned, were sold to the plaintiffs; and they also were the purchasers of the two last lots, from which all the lots without exception were to be filled up: and those two last lots were accordingly marked by the auctioneer in his catalogue with the words "more or less." Immediately after the sale 200*l.* was paid by the plaintiffs to the auctioneer, as their deposit; and on the 9th of *May* 1808, the plaintiffs paid to the defendants 1715*l.* upon account of the turpentine, and the duties payable thereon. The turpentine remained in the warehouses of the defendants as before the sale, but was entered at the custom-house at *Dover*, in the name of the plaintiffs, on the morning of the 10th of *May* 1808, before the fire, by *Acres* who paid on behalf of the plaintiffs 450*l.* as a deposit for the duties. On the same morning, the cooper, who had been employed by the defendants to make up all the casks previous to the sale of the 28th of *April*, was sent for by *Acres*, who was warehouseman to the defendants, and who acted as agent for the plaintiffs, to fill up the casks of turpentine, and he had filled all of them except 8 or 10;

leaving them with the bungs out to enable the custom-house officer, who was expected every minute, to take his guage in order to ascertain the duties. The two last lots, which were sold at uncertain quantities, and marked "more or less," contained more turpentine than was sufficient to fill up all those bought by the plaintiffs, and also those bought by the buyers of the three lots. In filling the casks sold to the plaintiffs one of the two last lots was used, and instead of the other of the two last lots, a preceding cask in point of number, which had been found to be an ullage cask, was substituted by the cooper, and from one of the two last lots the lots sold to the other buyers had been previously filled up. All the lots sold to the other buyers had been taken away before the cooper came on the 10th; and while the cooper was employed in filling up the plaintiffs' lots, and placing them ready, with the bungs of the casks out for the custom-house officer to guage, but before he had filled up all the casks, or bunged any of them, a fire took place in the defendants' warehouse, which consumed the whole of the turpentine knocked down to the plaintiffs; the casks not having been weighed again by the plaintiffs, or guaged by the custom-house officer. While the money paid by the plaintiffs to the defendants on account of the turpentine remained in their hands, they received notice from the plaintiffs not to pay it over; and the present verdict is composed of that sum, deducting the 450*l.* paid on account of the duty, which has been restored to the plaintiffs by the commissioners of customs. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover back the money so paid to the defendants? If they were, the verdict was to stand: if not, a nonsuit was to be entered.

Fuller, for the plaintiffs, contended that the contract for the sale was still executory, 1 Com. Dig. 541, at the time of the loss by fire, inasmuch as there still remained something for the vendors to do, and consequently that the loss must fall upon them, and not upon the vendees. By the conditions of sale 30 days were to be allowed to the vendees for taking the casks from the warehouse of the vendors; and before they were removed the vendors were out of the two last casks to fill up all the rest, so as to make them correspond with the weights at which they were marked: and that was the more material, because until it was done, it could not be ascertained what was the whole price to be paid, as those two casks were to be paid for according to their contents, after the rest were filled up: the weighing of them, therefore, must necessarily precede the delivery, and the remainder of the whole purchase money was to be paid on the delivery of the goods. This brings the case within the decision of *Hanson v. Meyer*, 6 East, 614, where the vendee had agreed to purchase all the starch of the vendor then lying in the warehouse of a third person at so much per cwt. by bill at two months, the weight of which starch was afterwards to be ascertained, and 14 days were to be allowed for the delivery: and the vendor having given a note to the vendee addressed to the warehouseman, directing him to *weigh and deliver* to the vendee *all* his starch; the Court held, that the absolute property in the goods did not vest in the vendee before the weighing which was to precede the delivery and to ascertain the price; and that the vendee having become bankrupt before the whole had been weighed and delivered, the vendor might retain the remainder. It is true, that in that case the whole was to be weighed before delivery; and here only the two last casks: but here also all the prior casks were to be filled up, which was not done at the time of the loss; and none of them were in a condition to be delivered, as the bungs were left out, in order to permit the custom house officer to guage the casks, without which they could not be removed, and it was part of the business of the vendors to replace the bungs, and put the casks in a proper condition to be delivered. In *Hammond v. Anderson*, 1 New Rep. 69, all the bales lying at a wharf, which had been sold for an entire sum, had been taken possession of by the vendee and weighed, and part had been removed by him before his bankruptcy; and therefore it was held, that the vendor had

no right to stop what remained in the hands of the wharfinger. In *Hinde v. Whitehouse*, 7 East, 558, though the sugars were in the king's warehouses under the locks of the king and the owner, from whence they could not be removed till the duties were paid; which were to be paid by the sellers; yet they had been weighed and the duties ascertained; and one of the conditions of sale at the auction was, that the sugars were to be taken with all defects as they then were, at the king's weights and tares, with the allowance of draft, or reweighed giving up the draft, *and to be at the purchaser's risk from the time of the sale*; by which latter was evidently meant from the time when the lot was knocked down to the highest bidder: and besides, the acceptance of the sample by the purchaser, as part of the thing purchased, was held to bind the sale. If a horse were sold, and agreed to be delivered by the vendor after he was shod; and the horse died before; the loss would fall upon the vendor. So here, the act of filling up the casks was to be performed by the vendors before delivery: and though if the case rested upon that circumstance alone, a distinction might be taken as to those casks which had been filled up; yet the vendees were entitled to have the whole rebunged before delivery. [Lord *Ellenborough*, C. J. observed, that the vendees were entitled to have the casks filled up and the bungs belonging to them; but that the vendors had no concern with the unbunging or bunging of them, the former of which was done on account of the custom house officer intervening to do his duty before the goods were removed by the vendees. And upon inquiry at whose instance the guaging was to be performed, it was admitted that the vendees could not have removed the goods till they were guaged; and therefore the Court considered that it was their duty to get them guaged. The Court also inquired as to the number of casks which had been filled up; and it was agreed that all had been filled up except 10: on which they asked the defendant's counsel what answer he had to give to those 10.]

Carr, for the defendants, admitted that the vendors could not claim the value of the two casks, out of which turpentine had been taken to fill up the others, because the quantities they contained were not ascertained by weighing at the time of the loss: but with respect to the last ten which had not been filled up, he still contended that the property passed by the sale; for by the contract the mark on each cask was conclusive as to the quantity, and the price being also ascertained, every thing material to the perfection of a contract of sale was complete: and at any rate, the vendees should have called upon the vendors to fill up the remainder. [Lord *Ellenborough*, C. J. Still the fact is, that by the vendors' not having filled up the last ten casks, they were not in a deliverable state at the time of the loss; and it was certainly a material act to be done, to make up the quantity marked.] The warehouseman who was to do it was the common agent of both: and this case is so far distinguishable from that of *Hanson v. Meyer*, that there the vendee could not have removed the goods till they were weighed; but here the quantity and price being ascertained, the vendees might have waived calling on the vendors to fill up the casks, and might have taken them away when they pleased.

LORD ELLENBOROUGH, C. J. The Court have already intimated their opinion, as to those casks in the first lots which were filled up, and on which nothing remained to be done on the part of the sellers, but only the casks were left to remain for 30 days at the option of the purchasers in the warehouse at the charge of the sellers: the payment of the warehouse rent, however, is not material in this case; and when the casks were filled up, every thing was done which remained to be done by the sellers. It was necessary, however, that they should be guaged before they were removed, and the bungs were left out for the purpose of the guager's doing his office, which it was the buyer's business to have performed; and therefore, according to the case of *Hanson v. Meyer*, and the other cases, every thing having been done by the sellers, which lay upon them to perform, in order to put the goods in a deliverable state in

the place from whence they were to be taken by the buyers, the goods remained there at the risk of the latter. But with respect to the other ten casks, as the filling them up according to the contract remained to be done by the sellers, the property did not pass to the buyers, and therefore they are not bound to pay for them.

LE BLANC, J.(a) The case is to be considered as involving so many distinct contracts as there were distinct lots bought by the plaintiffs. The turpentine was purchased at so much per cwt., and it was to be taken according to the weight marked on each lot; but the casks were to be filled up by the sellers out of turpentine, *belonging to them*, in order to make the weights agree with the marks. I say, *belonging to the sellers*, because the two last casks were only sold according as their actual weights should turn out to be, after filling up the rest: and if more turpentine had been wanted than those casks could have supplied for filling up the rest, it must have been settled which of the respective purchasers was to take less than his calculated quantity. Till the several casks, therefore, were filled up, I consider the property as remaining in the sellers. But a certain number of casks were filled up; and with respect to them nothing further remained to be done by the sellers. But it was necessary that the custom-house officer should gauge them before they could be removed. Then the warehouseman who was acting as the common agent of the buyers and sellers, having filled up those casks, on the part of the sellers, left them unbunged for the purpose of the officer's gauging them, and ascertaining the duties, which was an act to be done on the part of the buyers, to entitle them to remove the goods. Then, as nothing more remained to be done by the sellers on those casks which were filled up, they were from that time at the risk of the buyers: but those which were not filled up, continued at the risk of the sellers.

BAYLEY, J. In many cases it happens, where every thing has been done by the sellers which they contracted to do, that the property passes to the buyers, though the goods may still continue in the actual possession of the sellers. It lies upon the plaintiffs then to make out, that something still remained to be done to the goods by the sellers at the time when the loss happened. But with respect to those casks which had been filled up, nothing remained to be done but the gauging by the officer, and as that was to be procured to be done by the buyers, *Arces*, who left out the bungs for the purpose of enabling the officer to gauge, must be taken to have acted as the agent of the buyers for that purpose; and therefore nothing more remaining to be done by the sellers, the property passed. But with respect to the other casks, something did remain to be done by the sellers, namely, the filling them up: and it is not sufficient for them to say, that they were not called upon to do so by the buyers; for if they meant to relieve themselves from all further responsibility, they should have done what remained for them to do, and until that was done the property continued in them.(1)

Upon this, it was agreed that the proportion to be allowed to the plaintiffs on the ten casks should be settled out of court; and that the verdict should be entered accordingly.

(a) *Grose*, J. was indisposed and absent.

(1) Vide *Whitehouse & al. v. Frost & al.* 12 East, 614.

Goodright, on the Demise of Drewry, v. Barron and Another.

11 East, 220. May 9, 1809.

After introductory words, "as touching" the testator's "worldly estate," &c. he devised a cottage house, &c. to *A.* and his heirs, and also gave to *B.* whom he made his executrix, "all and singular his lands, messuages, and tenements *by her freely to be possessed and enjoyed*;" held that the latter words being ambiguous, did not pass the fee against the heir; but might mean free of incumbrances, or dispensable of waste; and that the word *estate* in the introductory clause could not be brought down into the latter distinct clause.

THIS was an ejectment for a messuage and land in the parish of *Ulceby* in *Lincolnshire*; in which a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

John Drewry being seised in fee of the premises in question, before his death in 1793, devised as follows. "As touching such worldly estate wherewith it has pleased God to bless me in this life, I give devise and dispose of the same in the following manner and form: first, I give and bequeath to my brother *Thomas Drewry* a cottage house and all belonging to it, to him and his heirs for ever; *W. C.*, tenant. Also, I give and bequeath to my wife *Elizabeth*, whom I likewise make my sole executrix, all and singular my lands, messuages and tenements, *by her freely to be possessed and enjoyed*." The premises in question were not included in the devise to *Thomas Drewry*. Upon the testator's death his widow entered upon the premises, and after conveying them to the defendant *Barron*, died in 1808. The lessor of the plaintiff is the heir at law of the testator: and if he were entitled to recover, the verdict was to stand: otherwise, a nonsuit was to be entered.

Copley, for the heir at law, argued that *Elizabeth*, the widow, took only a life estate under the will of her husband. There are no express words giving her a greater estate; and no such intention is necessarily to be implied (and a probable intention is not sufficient^(a)) either from the introductory words, "as touching such worldly estate," &c.; which of themselves have never been deemed sufficient to carry a fee:^(b) or, 2dly, from the words "*by her freely to be possessed and enjoyed*," which may mean free of incumbrances or the molestation of any other during the period of her own possession and enjoyment: but if the meaning of them be equivocal, that is not sufficient to disinherit the heir; and it cannot be denied that the addition of the words, "*for life*," or "*in fee*," would have rendered the meaning more clear; and that the sense of the words used would well have admitted of either of those additions. This case is distinguishable from *Loveacres v. Blight*, Cowp. 352. 357, where similar words of devise were relied on to carry a fee; for there was a charge on the devisees which might enure longer than their lives, and there was a blank left which could only be sensibly supplied by the word *heirs*, which would have been decisive. But here it appears from the devise to the brother and his heirs, that the deviser knew how to give a fee in legal terms where he so intended; and this has been relied on in several cases against giving a fee by mere implication.

Balguy jun., contra, only relied on the introductory words as a circumstance conjoined with the others to shew a clear intention to pass the fee in this property to the widow; and carrying down the introductory words, the will would read thus:—"As touching such worldly estate, wherewith it has pleased God to bless me in this life, I give and bequeath to my wife *Elizabeth*, whom I likewise make my sole executrix, all and singular my lands, &c. *by her freely to be possessed and enjoyed*." By this he would give all his estate in the

(a) Per *Willes*, C. J. in *Moore v. Heaseman*, *Willes' Rep.* 141.

(b) *Doe v. Wright*, 8 Term Rep. 64. *Doe v. Allen*, *Ib.* 497, and *Doe v. Clayton*, 8 East, 141. 144, were cited; and vide *Loveacres v. Blight*, Cowp. 356, per Lord Mansfield.

lands, &c. to his wife *freely to be possessed and enjoyed by her*. And even these latter words were considered in *Loveacres v. Blight* to be sufficiently indicative of an intent to pass the fee, and were not merely to be taken as meaning only to give a life estate free of incumbrances: though the intent to give a fee in that case was also evinced from the previous charge on the devisees in respect of the estate devised. Then if the intent be clear in this part of the will, the mere circumstance of giving a fee in technical terms to his brother in another property will not vary the construction of the words in question.

Copley in reply said, that if the carrying down and applying the introductory words to the particular devise were to enlarge the sense of the latter, the same argument would have had more weight in the former cases.

Lord ELLENBOROUGH, C. J. Though it may be assumed, as Lord Mansfield once said, that in almost every case where property is devised to one generally, the testator means to give a fee; yet we are tied down by a positive rule of law, that in the devise of real property, where there are no words of limitation, and no necessary implication from the words of the devise to give a larger estate, the devisee can only take an estate for life. On the first view of the case of *Loveacres v. Blight* I thought the words here used might be sufficient to carry the fee: but the observation there made is material, that the words "*freely to be possessed and enjoyed*" by the devisees, could not mean only *free of incumbrances*, because the testator had before charged the estate with the payment of an annuity to his wife; and therefore they must either have been meant to give a fee, or they had no meaning at all. But here the testator has not put any charge on the estate; and therefore the same observation will not apply to the present case: but these words may have been meant to make her dispendable of waste, for which as tenant for life only she would have been liable. With respect to the introductory words, it has been held in many cases that they are not sufficient of themselves to carry a fee, but *juncta jvant*. The word *estate* used in the introductory clause is completely disjoined from the devise in question, and cannot be brought down to join in with the latter clause without doing violence to the words. For want therefore of words of limitation, or some words from whence the intention to pass the fee must be necessarily implied, the widow only took an estate for her life. The case has been very well argued on both sides, and not the worse from the omission of saying any thing which was not material to the case.

LE BLANC, J.(a) We are bound by a rule of law, contrary to what I think was the probable intention of the testator in this case, to say that the widow only took a life estate. There are no words of limitation added to the devise to her, but there are three parts of the will from whence it is contended that we may collect his intention to give her the fee; 1st, from the introductory words in general; 2dly, from the words in the particular devise, "*by her freely to be possessed and enjoyed*;" 3dly, from carrying down the word *estate* from the introductory clause into the subsequent clause. And if this last could be done, it would solve the difficulty very easily; but it is impossible thus to transpose the word *estate*: for the clauses are quite distinct, and there is an intervening devise to his brother, to whom he gives "a cottage-house and all belonging to it." Those words could not have been read "*my estate in a cottage-house*." But the testator goes on to give that to his brother *and his heirs*. So neither can the subsequent devise to his wife be read "*my estate in all and singular my lands*," &c. Then as to the introductory words in general, it has been held those alone will not suffice to give a fee, though they are a circumstance, with others, from whence the testator's intent to do so may be collected. This brings it to the question on the words, "*by her freely to be possessed and enjoyed*." If the words *during her life* had been added,

(a) *Grace, J. was indisposed and absent.*

that would have made the intent clear in one way : if the words *in fee*, or by *her and her heirs*, had been added, it would have been clear the other way. The words used are not inconsistent with a life-estate only. If he had given her the lands, &c. "*freely to be disposed of*," that would have shewn his intent to pass the fee ; but there is nothing in the words used to shew that he must have meant to pass the fee. In *Loveacres v. Blight*, Lord Mansfield thought that these words could not mean *free of incumbrances*, because the testator had before incumbered the property devised ; and there were other circumstances in that case, on which it was decided, which distinguish it from the present. But here there are no circumstances to extend the words of devise beyond a life estate.

BAYLEY, J. If all the words of the will can be satisfied by giving the widow a life estate, we are not warranted in giving her a greater estate against the heir at law. The only words on which any doubt could arise are "*freely to be possessed and enjoyed*:" but they may mean *freely during her life* ; they may mean *free from all charges* ; *free from impeachment of waste* : they may indeed also mean *freely for all purposes against the heir* ; but as it is not certain that the testator used them in this latter sense, we cannot give them so extended a meaning against the heir.(1)

Postea to the Plaintiff.

Dring v. Dickenson.

11 East, 225. May 10, 1809.

If a defendant be served with a writ by a wrong christian name of *W.*, and do not appear to it, the plaintiff cannot file common bail for him in his right name of *E.*, sued by the name of *W.*, nor declare against him *de bene esse* in that form ; and the proceedings were set aside for irregularity, after interlocutory judgment signed for want of a plea.

THE defendant, whose christian name was *Edward*, was served with a writ on the 18th of *April*, in which he was sued by the name of *William* ; and not having appeared to it, the plaintiff, on the 28th of *April* in this term, filed common bail for him in his right name of *Edward*, sued by the name of *William*, and also served him with notice of a declaration *de bene esse* by the name of *Edward*, sued by the name of *William*, and with notice to plead in 8 days. No plea having been filed within the time, the plaintiff signed interlocutory judgment, and gave notice of executing a writ of inquiry. Whereupon *Espinasse* having obtained a rule for setting aside the proceedings for irregularity ;

Puller now shewed cause, and referred to *Oakley* and *Giles*, 3 East, 167, where, in a penal action, the defendant having been sued by a wrong name, but served with notice of declaration in his right name, the Court held a judgment signed for want of a plea regular ; saying that pleas in abatement might be struck out of the books, if judgments could be set aside for such misnomers : and also to *Delanoy v. Cannon*, 10 East, 328, where, though the Court set aside the proceedings under similar circumstances, upon objection urged before plea ; yet they distinguished it on that ground from the prior case of *Oakley v. Giles*. He observed that in this case, common bail having been filed for the defendant by his right name, and he having had personal service of a notice of declaration by his right name, should have come in the first instance to stay proceedings, and not have waited till judgment had been signed.

But *The Court* held the judgment to be irregular, on the ground that the plaintiff, having sued out process against the defendant by a wrong name,

(1) [See contra, *Campbell v. Carson*, 12 S. & R. 54.—W.]

could not cure that defect by his own act of filing common bail for the defendant, and serving him with notice of declaration *de bene esse* by his right name.

Rule absolute.

Jefferies v. Duncombe.

11 East, 226. May 12, 1809.

An action on the case for setting up a certain mark in front of the plaintiff's dwelling house, in order to defame him as the keeper of a bawdy house, is not local in its nature; and if the declaration, after describing the house as situate in a certain street called *A. st.* in the parish of *O. A.* (there being no such parish) afterwards state the nuisance to be erected and placed in the parish aforesaid; it will be ascribed to venue, and not to local description, and therefore the place is not material to be proved as laid.

THE declaration stated, that at the time of committing the grievance after mentioned the plaintiff was the occupier of a certain dwelling-house, situate lying and being in a certain public street called *Artillery-street*, to wit, in the parish of the old artillery Ground, in the county of *Middlesex*, in which said house the plaintiff dwelt and, inhabited, and then and there carried on the business of a carpenter, and let out part of the said house in lodgings, &c.; and that the defendant, intending to defame him and expose him to punishment by the laws inflicted on the keepers of bawdy houses, maliciously and without probable cause, to wit, on the 25th of August 1801, in the parish aforesaid and county aforesaid, erected and placed in the said public street called *Artillery-street*, to wit, in the parish aforesaid, in the county aforesaid, a certain lamp in front of and near adjoining to the said dwelling house of the plaintiff, and caused the same to be lighted and kept burning in the day-time, &c.; thereby intending to mark out the said dwelling-house of the plaintiff as a bawdy-house, &c. The nuisance was proved at the trial, but it appeared that there was no such parish as the parish of the Old Artillery Ground: whereupon objection was taken to the plaintiff's right to recover in this action; which was over-ruled, but the point was reserved: and the plaintiff having recovered a verdict with damages, at the Sittings at Westminster, before Lord Ellenborough, C. J., a rule was obtained on a former day for the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered.

Park and *Espinasse* now opposed the rule, and observed that there is nothing local in the nature of the action, which is case and not trespass; and the parish is laid merely as a venue, and not as a local description of the nuisance, nor is the place at all material. Besides which the whole description is laid under a *videlicet*. And they cited *Frith v. Gray*, (a) and *The Mersey and Irwell Navigation Company v. Douglas*, 2 East, 497, as in point.

Garrow and *Bolland*, in support of the rule, endeavoured to distinguish this from the cases cited. *Frith v. Gray* was an action for the breach of a contract, and of course there was nothing of locality in it. *Drewry v. Twiss* was also a transitory action. And though in the *Mersey and Irwell Navigation* case it was considered not to be necessary to give a local description to the nuisance in an action on the case for diverting the water of the navigation by the erection of a weir; yet the question turned on the application of the word *there*, whether it were to be referred to local description of the place where the navigation was on which the nuisance operated, or to venue; and the Court would not intend that it was meant for local description when it might apply to venue. But it was admitted that the plaintiff in such an action might make it necessary to prove the *gravamen* in a particular place by giving it a specific local description; as by alleging the nuisance to be standing and being at a

(a) H. 7 Geo. 3. B. R. mentioned by *Grose*, J. in *Drewry v. Twiss*, 4 Term Rep. 561.

certain place particularly described. Now here the injury itself only attached upon the plaintiff in respect of his occupation of the house, and must therefore be considered as local, and the description of the parish in which the house was situated is carried all through the declaration; and the nuisance is alleged to have been *erected and placed in the parish aforesaid*, so described, not as a matter of venue, or under a *viz.* for the venue is repeated afterwards under the *videlicet*.

LORD ELLENBOROUGH, C. J. This is not a local injury; the house indeed is local, but the imputation meant to be conveyed by the nuisance is not against the property, but against the man who occupies it. Supposing the plaintiff had declared that in front of a certain house which he then inhabited the defendant had set up this mark for the purpose of defaming him; there needed no local description of the house; and it is quite immaterial where it was: the action therefore might as well have been brought in any other county as *Middlesex*; and the place mentioned is mere matter of venue, and not of local description.

The other Judges concurred; and the

Rule was discharged.

The King v. The Justices of Kent.

11 East, 229. May 13, 1809.

A *mandamus* to the justices in Sessions, to allow an item of charge in the coroner's account, refused; because the justices were of opinion under the circumstances, that there was no ground to suppose that the deceased had died any other than a natural, though a sudden death, and therefore that the inquisition had not been duly taken; and this Court seeing no reason for interfering with that judgment.

GARROW moved for a *mandamus* to the defendants to allow an item (which they had before rejected) in the coroner's account, for his fee on an inquisition taken by him on the body of *John Sutton*. This application was made on the affidavit of Mr. *De Lasaux*, coroner of the county of *Kent*, stating that in *December* last he was sent for by the parish officers of *Wye* in that county, to take an inquest on view of the body of *T. Austen*, supposed to have been killed by the kick of a horse. That he went there and took the inquest; and on his arrival at the inn where the jury were assembled, several of them informed him that there was another inquest for him to take, as one *John Sutton*, who had lately come from *Surry* to reside at *Wye*, had just before the coroner's arrival died suddenly in a shop in the town while he was purchasing some furniture. That in consequence of this information, after the inquest on *Austen* was taken, the coroner re-swore the jury to inquire into the cause of *Sutton's* death, in pursuance of the stat. 4 Ed. 1. st. 2, directing the coroner to go to the place where a person is slain or suddenly dead. That it appeared in evidence before the coroner, that *Sutton* went into Mr. *Howard's* shop apparently in very good health; that he complained of a pain in his hip, sat down in a chair in the shop, and suddenly died. In consequence of which evidence, and that of the surgeon who was immediately sent for to attend him, and who endeavoured to restore him, but without effect, the jury returned a verdict of, "died by the visitation of God." That on carrying in his bill to the last *Easter Sessions* pursuant to the stat. 25 Geo. 2. c. 29, the coroner charged the county 1*l.* for the last-mentioned inquisition, when the magistrates disallowed this charge, being of opinion that the inquisition had been improperly taken. The *mandamus* was now pressed for on the ground that the item ought to have been allowed; the death having been in fact sudden, and the coroner having been called upon by respectable inhabitants of the place to execute his office before he had interfered: and the refusal of the magistrates

to allow it being felt by the coroner as an imputation of improper practice on his part.

The Court, however, exculpated the coroner from the imputation of any intentional improper practice in the particular instance, as the taking of the inquisition seemed to have been suggested to him by others. Though Lord *Ellenborough*, C. J. observed, that there were many instances of coroners having exercised their office in the most vexatious and oppressive manner, by obtruding themselves into private families to their great annoyance and discomfort, without any pretence of the deceased having died otherwise than a natural death; which was highly illegal. But the Court still thought that there was no sufficient ground for the present application, for the statute had directed that the fees should be allowed to the coroner for all inquisitions *duly taken*; and the justices were to judge whether the inquisition in question had been duly taken; and there was no reason for imputing to them that they had exercised their judgment with any undue bias; and the Court did not see any occasion to interfere with that judgment in this instance.

Rule refused.

The King v. Samson.(a)

11 East, 231. May 12, 1809.

A defendant in custody under a writ *de excommunicato capiendo*, for contumacy in not paying a sum *for alimony*, and also for costs, in the ecclesiastical court, is not entitled to his discharge as an insolvent debtor under the stat. 33 G. 3. c. 5. s. 4, which extends only to persons in custody on such writ for non-payment of costs and expences only.

THE defendant was brought up to take the benefit of the Lords' Act, as an insolvent debtor, when it appeared that he was in custody under a writ *de excommunicato capiendo*, for his contumacy in not paying 15*l.* 10*s.* *for alimony* to the prosecutrix, and 30*l.* 1*s.* for costs in the said cause. *Lawes* objected, that this was not a case within the stat. 33 Geo. 3. c. 5. s. 4, which only extends to persons committed "upon any writ of *excommunicato capiendo*, or "other process for or grounded on the non payment of costs or expences in any "cause or proceeding in any ecclesiastical court." And the whole Court, upon consideration, were of that opinion, and ordered the defendant to be remanded.

Puller and Another v. Staniforth.

11 East, 232. May 13, 1809.

Freighters charter a foreign ship to take a cargo from *London* to *St. Petersburg*, and to load a cargo there and immediately return to *London*, paying so much freight per ton: and it was covenanted that if political or other circumstances should prevent the shipping a return cargo, or discharging the outward cargo, the freighters might detain the ship at *St. P.* for 40 running days; and if that time elapsed without the outward cargo being delivered, and consequently without the return cargo being put on board, the master should be at liberty to return to *London*, and the freighters should pay him 2500*l.* immediately upon the arrival of the ship at *London*. The freighters then procured a policy of insurance whereby the underwriters agreed to pay a total loss in case the ship was not allowed by the Russian Government to load a cargo at *St. P.* on the chartered voyage. In fact the Russian Government when the ship arrived at *St. P.* presuming that the outward cargo was British, refused permission to unload her, and consequently she could not take in a Russian cargo: on which the master, judging for the best, proceeded immediately to *Stockholm*, where, after disposing of the outward cargo to disadvantage, he brought home a Swedish cargo to *London*, and earned freight thereon. Held, 1. That the insurance was legal in the terms of it.

(a) Mr. *Dealtry* did me the favour to communicate this note.

2. That the refusal of the *Russian* Government to permit the ship to unload her outward cargo, was, in effect, and within the meaning of the contracting parties, a refusal to allow her to load a cargo at *St. P.*; and consequently, that a total loss within the policy was incurred.
3. That the proceeding directly from *St. P. to London*, was not a condition precedent to the master's right to recover from the freighters the dead freight of 2500*l.*; but that he was entitled to the same notwithstanding the intermediate voyage to *Stockholm*, under the circumstances; and consequently, that the freighters were entitled to recover the same from the underwriters. But,
4. That as the freighters would be entitled to deduct from the sum payable to the master for dead freight the amount of the freight received by him on the cargo from *Stockholm to London*, though such intermediate voyage were not originally contemplated by the contracting parties, but was undertaken upon the emergency; therefore the underwriters were entitled to make the same deduction from the total loss stipulated for by the policy in the event which had happened; every contract of insurance being in its nature a contract of indemnity.

THIS was an action on a policy of assurance in the common printed form, with none of the blanks filled up, but containing the following memorandum written at the bottom of it. "In consideration of 10 guineas *per cent.* hereby received, we, the underwriters on this policy, agree to pay a total loss, in case the ship *Ann*, Capt. *Flower*, is not allowed by the *Russian* government to load a cargo at *St. Petersburg* on the voyage he is at present chartered by Messrs. *C. and R. Puller*." The declaration, after setting out the policy, of which the defendant, on the 26th of *April* 1808, became an underwriter, proceeded to state, that on the 18th of *April* 1808, by a certain charter-party of affreightment of that date between *S. Flower*, master of the *American* ship *Ann* of *New York*, then in the port of *London*, and the plaintiffs, *Flower* let the said ship to freight to the plaintiffs for the voyage on certain terms and conditions; whereby *Flower* covenanted that the ship should be properly manned, &c. and provided for her intended voyage, and take on board from the plaintiffs a full and complete cargo of all such lawful goods as they should put on board, and immediately depart with the same from the port of *London*, and proceed to *St. Petersburg* in *Russia*, and then and there unload and make a right and true delivery and discharge of all the said cargo to the agents of the plaintiffs; and upon delivery and final discharge of all the said cargo so put on board at *London*, that *Flower* should immediately receive and take on board the said ship at *St. Petersburg* from the plaintiff's agents a full and complete cargo of hemp and such other goods as they should think proper to load, &c.; and the said cargo so being loaded and the ship dispatched, that she should immediately proceed and return to the port of *London*, and then and there make a right and true delivery of all the said cargo of hemp and other goods so put on board at *St. Petersburg*. In consideration whereof, the plaintiffs covenanted with *Flower*, that they should provide the ship with a *British* licence, and not only put on board the said cargo at *London*, and on her arrival at *St. Petersburg* unload the same, and thereupon put on board such return cargo of hemp, &c. and on her arrival at *London* unload and receive the same, but also should pay to *Flower* in full for the freight of the ship at the rate of 10*l.* per ton, with 10*l.* per cent. for primeage, and 100 guineas as a gratification to him as master, immediately upon the delivery of the return cargo at *London*. And *Flower* covenanted, that if political or other circumstances should arise to prevent the shipping a return cargo, or discharging the outward cargo, the plaintiffs or their agents should be at liberty to detain the ship at *St. Petersburg* for 40 running days in the whole after her arrival there. And the plaintiffs covenanted, that after the ship should have remained at *St. Petersburg* for 40 running days, without such outward cargo being unloaded and delivered, and consequently without the return cargo being put on board, *Flower* should be at liberty to return with his vessel to *London*, or any other port in *England*: and that the plaintiffs should pay *Flower* 2500*l.* immediately upon the arrival of the ship at *London*, or any such port in *England*. The plaintiffs then,

averred, that afterwards, on the 26th of *April* 1808, the ship so taken to freight had a licence from the *British* government for the voyage in the policy and charter-party mentioned; and that the plaintiffs were interested in the voyage insured to the amount of what was so agreed to be paid to *Flower* for the use of his ship: that she afterwards sailed from *London* upon the said voyage, and arrived at *St. Petersburg*; but was not allowed by the *Russian* government to load a cargo at *St. Petersburg* on the said voyage chartered, &c.; and after remaining there 40 days, without unloading and delivering her outward cargo, and without a return cargo being put on board her, she departed from *St. Petersburg* and arrived at *London*: by reason of which premises the defendant became liable to pay to the plaintiffs 200*l.* the amount of his insurance. There were also the common money counts. The defendant pleaded a tender of the premium, which was admitted, and the general issue to the rest of the demand.

The facts proved at the trial were in substance the same as stated in the first count: the ship which was *American* sailed on the insured and chartered voyage with a *British* licence: but when she arrived at *St. Petersburg*, it appearing upon examination of the captain that he had come immediately from *England*, with which *Russia* was then at war, he was refused permission to unload his cargo, being presumed to be *British*, though no particular examination of it was had; and being obliged to depart with his original cargo, and without any return cargo, the captain, judging as he thought for the best, determined to proceed to *Stockholm*, to see if he could dispose of his cargo there. He did accordingly proceed to *Stockholm*, and disposed there of his outward cargo of lead, though to disadvantage; and also took in other goods there, and returned from thence to the port of *London*: and freight was made on the goods shipped at *Stockholm* and brought home.

The plaintiffs went at the trial for the amount of the dead freight stipulated by the charter-party to be paid to *Flower*, amounting to 2500*l.*: or if not entitled to the whole of it, to so much of it as would remain after deducting the amount of the freight earned by the ship from *Stockholm* to *London*. The defendant, on the other hand, contended at the trial, first, that this was in effect a wagering policy, for the underwriters to pay 2500*l.* if the government of *Russia* would not suffer the ship to load at *St. Petersburg*; and was therefore illegal; (and this objection, if any, appeared on the record.) But, 2dly, supposing it to be legal, that the assured were bound to have presented the ship at *St. Petersburg* in a condition to receive a homeward-bound cargo, without any obstacle interposed by their own act to the obtaining permission to load from the *Russian* government: whereas it appeared that the refusal of the *Russian* government to permit the ship to load was founded altogether upon the nature and property of her outward-bound cargo then on board, which from the circumstances of the case was concluded to be *British*; and not upon any objection to permit their own export trade. And it was argued to be a very different question whether a foreign government would allow of an import trade from a particular country, or of their own export trade. That by the terms of the policy the underwriters were entitled to insist, as a condition precedent, that the ship should be presented at *St. Petersburg* in a condition ready to receive on board a *Russian* cargo, in which case it did not appear that the *Russian* government would have refused its permission; the only refusal given by it being to unload a *British* cargo; against which the underwriters had not undertaken to indemnify the plaintiffs. 3dly, It was objected (which went only to the *quantum* of the verdict,) that this being a contract of indemnity, and as the plaintiffs would be entitled to deduct out of the dead freight of 2500*l.* payable to *Flower* the amount of the freight earned by him in the course of the voyage home from *Stockholm*, the underwriters were also entitled to have the same deduction made. The plaintiffs having recovered a verdict at the trial (which was taken for the whole sum) these grounds of ob-

jection were stated again upon a motion in arrest of judgment, for a new trial, or for a proportionable deduction from the sum recovered.

Garrow and *Puller* shewed cause against the rule: 1st, This is no wagering policy, but strictly for an indemnity against any loss under the charter-party. The ship was chartered to proceed outwards with a cargo of *British* goods, and return with a *Russian* cargo instead; and if the assured could not dispose of the first and procure the second, they would be subject at all events to the payment of dead freight; and against this eventual loss it was the object of the policy to indemnify them. The insurance therefore, which was to protect an adventure for the exchange of *British* for foreign commodities, was strictly legal. The insurance of any event is not prohibited by the st. 14 Geo. 3. c. 48, if the assured be really interested in it, and the event itself be not illegal: (a) and it cannot be denied that the plaintiffs had an interest in the event. 2dly, It is neither expressed in the terms, nor can be inferred from the nature of the contract of insurance, that the assured engaged that the ship should be in a condition to receive a homeward cargo by the delivery of the outward cargo. On the contrary, the memorandum in the policy refers to the charter-party, in which the nature of the adventure is disclosed; stating the outward cargo to be goods shipped by the plaintiffs from the port of *London*; and the event is therein provided for "if political or other circumstances should arise to prevent the shipping a return-cargo or discharging the outward cargo." And under this charter-party the ship sailed with a *British* licence. It is impossible therefore to imply a condition that the ship should at all events be empty at *St. Petersburg*. 3dly, The captain's proceeding to *Stockholm* was wholly out of the charter-party, and a new adventure resting upon his personal responsibility. Whether he may have rendered himself liable in damages to the plaintiffs for having taken upon him to dispose of their property in a manner unauthorized by and disadvantageous to them, is another question with which the underwriters on this policy can have no concern; for the loss which they have undertaken to indemnify accrued before the voyage to *Stockholm*. But at any rate this objection only goes to the quantum of the verdict; and if the Court should be of opinion that the freight earned in that voyage may be deducted by the plaintiffs out of the amount of the dead freight they have engaged to pay to *Flower*, considering the policy in question on the strict ground of indemnity, as in *Godsal v. Boldero*, 9 East, 72, the quantum of the deduction may be ascertained by an arbitrator. [Lord *Ellenborough*, C. J. An unforeseen event has recouped part of the total loss: which brings the case within the principle of *Godsal v. Boldero*; this being strictly a contract of indemnity: the plaintiffs must therefore write off the difference. *Le Blanc*, J. Supposing any loss to have happened upon the sale of the lead at *Stockholm*, that was part of the adventure, and cannot affect the question of freight; the loss of which has evidently been diminished pro tanto by the freight earned from *Stockholm*. *Bayley*, J. The freight received on the cargo brought from *Stockholm*, on account of the plaintiffs, has paid part of the total loss which had at one time accrued.]

The Attorney-General, *Park*, and *Wigley*, in support of the rule, after slightly touching on the first question, as thrown out for the consideration of the Court, whether the event insured were such as it was legal for a subject of this country to speculate upon in a policy, proceeded to urge the second objection on the same ground as before; that the risk of the underwriters was much enhanced by the nature of the outward bound cargo, a risk not contemplated by them, or provided for in the terms of the policy; which was attempted to be enlarged so as to indemnify the assured against the risk of *not being permitted to UNLOAD a cargo of British goods in order to load a Russian cargo*. The underwriters were not bound to look into the licence granted by the

(a) Reference was made to what was said by *Lawrence*, J. in *Lucena v. Crauford*, in error, in Dom. Proc. 2 New Rep. 300, &c.

British government, which was only required in order to legalize the voyage to *St. Petersburg* in the existing state of things. The underwriters laid a wager with the plaintiffs, that the *Russian* government would let the ship load a cargo at *St. Petersburg*; and the evidence is, that when she arrived there, that government would not suffer her to *unload* a *British* cargo; she was never therefore in a condition to ask for a *Russian* cargo, which the assured impliedly engage that she shall be, without any obstruction interposed by their own act. On the last point they urged, that if the captain could not recover the whole of the dead freight against the plaintiffs who had chartered his ship, by reason of her having earned a certain proportion of freight from *Stockholm* to *London*, the plaintiffs could not be entitled to recover the whole from the underwriters on a contract of mere indemnity, as this was.

The *Attorney-General* then stated another objection, that, by the terms of the charter-party, Captain *Flower*, if not permitted to unload at *St. Petersburg*, was (after waiting 40 running days there if required) "*to return with his vessel to London or any other port in England;*" which must necessarily be understood, that he was to return with the outward cargo *directly* to *London*, &c. from *St. Petersburg*; and on that condition only the plaintiffs covenanted to pay him the 2500*l.* for dead freight "*immediately* upon the arrival of the ship at *London*, &c." The captain therefore not having performed this condition, but having upon his own judgment proceeded upon a different voyage and adventure to *Stockholm*, and there disposed of the cargo to a loss, is not entitled upon the charter-party, to recover the stipulated sum; and consequently the plaintiffs cannot recover upon this contract of indemnity.

LORD ELLENBOROUGH, C. J. I have no doubt upon any of the grounds on which this case was originally argued. First, I see nothing illegal in a contract entered into by *British* freighters for dividing their loss with underwriters in case a foreign port, to which it was lawful for them to ship the goods, should be shut against them. They have no interest in conducting towards the event, or in promoting war between the two countries. But the event against which they were desirous of being protected, not being within the common perils insured against, was supplied by a special memorandum, referring to the voyage on which the vessel was then chartered. I have no difficulty therefore in considering this as a contract legal in its terms. But then it is said, that the underwriters have only insured against the risk of the *Russian* government not permitting the ship to load a cargo at *St. Petersburg*. But looking to the nature of the adventure and the risk insured, the underwriters must have contemplated the event which happened. It was not likely that a vessel should be permitted to load a cargo there, if the *Russian* government would not permit its subjects to receive the cargo then on board; the refusal therefore to unload the outward cargo was in effect a refusal to permit a *Russian* cargo to be loaded, and brings the case within the plain meaning of the policy. Then the only question is that which has been recently made, whether the 2500*l.* is demandable at all by Captain *Flower* against the plaintiffs, by reason of his not having proceeded directly to *England* from *St. Petersburg*? At present it does not appear to me, that there is any express covenant on his part to do so, so as to make it a condition precedent to his demand of that sum, but only a mere liberty reserved to him. However, we will look farther into the terms of the charter-party, and deliver our opinion upon that point another day. With respect to the *quantum* to be deducted on account of the freight made from *Stockholm* to *London*, should the plaintiffs be entitled to recover anything, the amount may be settled out of court.

The other Judges concurred in opinion with his Lordship upon the points decided by him: and the case stood over for consideration upon the last objection made by the *Attorney-General*. And two days afterwards,

LORD ELLENBOROUGH, C. J. delivered the opinion of the Court.

On hearing the argument on the rule for a new trial in this case before the

Court on *Saturday*, the point upon which we then took time to consider was not one which had been urged at the trial, nor upon the motion to set aside the verdict, but was a point which suggested itself to the defendant's counsel in the course of the argument after the plaintiff's counsel had shewn cause against the rule. It was this, that according to the terms of the charter-party Captain *Flower* was bound to come direct from *Petersburgh* to this country, and to bring his outward cargo with him; that his doing so was a condition precedent, without performing which he could not claim the 2500*l.* or any part of it; that his going into *Stockholm*, and disposing of part of his outward cargo there, was a breach of that condition; that he could therefore have no claim upon the plaintiffs in consequence of his not being permitted to take in a cargo at *Petersburgh*; and consequently that the plaintiffs can have no demand upon the underwriters for an indemnity. It may be conceded, for the purpose of the present case, that the plaintiffs can have no demand upon the underwriters, if Captain *Flower* could have supported no claim against them; and it is therefore material to see whether Captain *Flower* could or could not have supported a claim against them. The parties foresaw when they entered into the charter-party, that circumstances might arise to prevent the shipping a return cargo; and they therefore provided that the plaintiffs should be at liberty to detain the ship 40 running days after her arrival at *St. Petersburg*; and the plaintiffs covenant, that after the ship shall have remained the 40 running days without the outward cargo being unloaded, and consequently in all probability without the return cargo being put on board, Captain *Flower* should be at liberty to return to *London* or any other port in *England*; and also that they would pay him 2500*l.* immediately on the ship's arrival in *London* or any other such port in *England*. There are therefore no words expressing it as a condition, that the ship should come direct to *England*, and with the whole of her outward cargo; and in the absence of such words, is there any thing from which such a condition is either necessarily or fairly to be implied? Many circumstances might occur to make it prudent and for the interest of all concerned, that the captain should touch at some port in his way home, should dispose of the outward cargo, and should get a freight home. Is such a construction then to be put upon the charter-party by implication, as to take away from him all power of availing himself of those circumstances. If he were to do it improperly, he would be answerable in damages for whatever injury his misconduct should occasion: so that justice would be done to the freighters, though this were not held a condition precedent; and the holding it to be a condition precedent might in the case I have just put be extremely prejudicial to them. Indeed if it were a condition precedent, the putting into a port for a single hour, or parting with a single pig of the lead, would be a breach, and would take away from the captain all right to his 2500*l.*, although such act of the captain were in ever so slight a degree injurious to the interest of the freighters and might be compensated by trifling damages: and so would any deviation, or disposal of the cargo be, however beneficial it might be to the freighters. As, however, the words do not import that this is a condition precedent; as the nature of the thing does not require that it should be so held; as great prejudice might result to the freighters from so holding, and as they will be entitled to indemnity for any damage, though it be not so held; we are of opinion that it is not to be deemed a condition precedent; that Captain *Flower*, therefore, is entitled to the 2500*l.* from the plaintiffs; and that they are therefore entitled to recover it from the underwriters; subject to the deduction from that sum, for the freight actually earned by Captain *Flower* from *Stockholm*, as we before intimated when the cause was last before us.

Postea to the Plaintiffs.

Clementi v. Goulding.

11 East, 244. May 13, 1809.

An action is maintainable on the st. 8 Ann. c. 19, for pirating a *single sheet* of music.

THE plaintiff obtained a verdict with damages against the defendant in this action, tried at the sittings before Lord *Ellenborough*, C. J. for pirating a sheet of music of which the plaintiff had the copyright : and the only question was, whether this being a *single sheet* were within the protection of the stat. 8 Ann. c. 19, which, mentioning in the preamble "*books and other writings*," speaks in the enacting part only of *book or books* : and liberty was reserved to the defendant to move to set aside the verdict and enter a nonsuit. *Garrow* moved accordingly, at the beginning of the term, and pressed to have the point settled : adverting to the words of the act which speaks in another part of "every sheet or sheets being *part* of such book or books." On which the Court, as the point had been reserved, granted him a rule *nisi* : but Lord *Ellenborough*, C. J. then said, that though he had leaned in favour of the objection at the trial, yet on further consideration he was now disposed to consider that a *sheet* was a *book* within the meaning of the act : and he recollected, that when the same question was made in a cause a few years ago, (a) the Court was disposed to think that the case was within the statute. And such appeared to be the opinion of the other Judges. And now, when the cause was called on in the paper of new trials, *Scarlett* moved to discharge the rule, understanding that it was abandoned ; and *Garrow* said, that he believed the parties had submitted to the intimation given by the Court of their opinion, on his moving for the rule.

Per Curiam,

Rule discharged.

(a) This was in *Hime* (or *Hine*) v. *Dale*, which was tried in December 1803, and came on first in this court in *Hil.* 1804, upon a motion by Mr. *Erskine* to set aside a nonsuit, founded on an objection taken at the trial, that the publication in question, which had been pirated, was a *song printed upon a single sheet of paper*. He referred to *Bach v. Longman*, Cowp. 623, where a *sonata* was certified by this Court to be a *writing* within the statute ; and to *Storace v. Longman*, Sittings after *Mich.* term 1788, at *Guildhall*, before Lord *Kenyon*, C. J., where, in an action for pirating music, the composition was stated in the declaration to be "a certain musical air tune and writing," and which was in fact a single sheet of paper ; but no objection was taken on that ground ; and the plaintiff recovered a verdict. He observed, that several works of great labour and utility were published on single sheets : such as lunar tables, and almanacs : and he referred to *Jones' Index to the Records*, which mentions the *Sheriffs' book* ; one of which he produced in court ; and it was a single piece of parchment about a foot long : and he recalled to recollection the familiar name of *horn-book*, as an instance of the old popular application of the term *book*, which was derived by *Johnson* from the Saxon *boc*, a beach, because they wrote on beachen boards ; as *liber* was derived from the bark of a tree used for the like purpose. And he also argued from the inconsistency of permitting an action to be maintained against a man for pirating a sheet of another's book, which might be composed of two or more sheets ; and yet refusing the same protection to the same composition if published alone. Finally, the case stood over till *Easter* term following, when the Court, without hearing any argument, made the rule absolute for a new trial ; Lord *Ellenborough*, C. J. saying that it was not fit that such a question should be decided upon a nonsuit ; but it would be better to put it upon the record.

Doe, on the Demise of Joseph Tofield, v. Esther Tofield,
Widow.

11 East, 246. May 15, 1809.

Real property may pass under the description of "personal estates" in a will; it being manifest from the whole of the instrument, as by terms of direct reference to that description in ulterior dispositions of the same real property, that such was the deviser's intention. A surrender out of court to the use of his will made by the surrenderee of a copyhold before his admittance is absolutely void and of no effect, and cannot be made good by his subsequent admittance.

THIS ejectment was brought by *Joseph* the brother and heir at law of *William Tofield* deceased, against *Esther* his widow and executrix, to recover the possession of certain premises at *Stewkley* in the county of *Bucks*, and of certain freehold and copyhold lands in the common fields of *Stewkley* parish. At the trial a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

William Tofield, in 1793, purchased of *R. Goldthorpe* certain freehold, leasehold, and copyhold lands in *Stewkley*. The freehold and leasehold were duly conveyed to him; and on the 10th of *October* in the same year, the copyhold lands, being copyhold of inheritance and held of the manor of *Stewkley*, were surrendered out of court, according to the custom of the manor, by *R. Goldthorpe* and *Elizabeth* his wife, into the hands of the lady of the manor by the hands of the deputy steward to the use of *William Tofield* in fee: and on the 14th of *November* 1793, they were again surrendered out of court by *Wm. Tofield*, by the hands of two other customary tenants of the manor, according to the custom thereof, to the use of his last will. Both these surrenders were presented at a manor court holden on the 17th of *June* 1795; and at the same court *Wm. Tofield* was admitted to the premises upon the surrender made by *Goldthorpe* and his wife in *October* 1793; there not having been any court previous to this time since the 15th of *June* 1791. *Wm. Tofield*, in 1801, purchased of *W. Griffin* other freehold lands in *Stewkley*, which were duly conveyed to him. In *April* 1804, *W. Tofield* died without issue, being at the time of his death and of the making of his will hereinafter mentioned possessed of the said leasehold premises, and seised of the said freehold and copyhold lands purchased of *Goldthorpe* and *Griffin*, and also seised in fee of certain other tenements specified in his will, namely, of two tenements in the occupation of *H. Chandler* and *J. Coles*, and the house wherein he himself dwelt, with the closes adjoining. On the 2d of *January* 1804, he made his will, duly executed and attested, wherein, after giving pecuniary legacies to his brothers *Joseph*, *Benjamin*, and *John*, and to his sisters *Mary* and *Elizabeth*, he proceeds thus: I give and devise unto my father and mother *William* and *Ann Tofield* two tenements now occupied by *H. Chandler* and *J. Coles*, with the yard, &c. for and during the term of both or either of their natural lives; and from and after their decease I give and devise the said premises to my executrix herein also named. I also give and bequeath unto the trustees of the Methodist chapel in *Stewkley* 30*l.* &c. I give unto my wife *Esther Tofield* all my stock of cattle, corn, hays, and grain, sheep, hogs, and cattle of all kinds, household goods and furniture, ready money, and securities of money, rights, credits, and *personal estates* whatsoever and wheresoever, subject nevertheless to the above legacies, to hold to the said *Esther Tofield* for and during the term of her natural life, provided she keep single; but and if she marry, she shall receive no profits or benefits from my estates whatsoever, but at the time of her marriage shall resign up all my *personal estates* to the after-mentioned legatees in manner following: first, I give and bequeath unto my brother *John Tofield* the house and premises wherein I now dwell; with the

closes adjoining, and all the appurtenances thereunto belonging, with the tenements to hold to him my said brother *John Tofield*, his heirs and assigns for ever: and the remaining of my *personal estates* I give and bequeath to my brother *Joseph Tofield*, my sister *Elizabeth Ratlidge*, and my sister *Mary Capel*, share and share alike, to hold to them their heirs and assigns for ever. But and if the said *Esther Tofield* shall remain single or unmarried, I hereby declare that she shall possess *all my abovementioned estates* for and during the term of her natural life, and at her decease I give devise and bequeath *my personal estates as abovementioned*; that is, to *John Tofield* my brother the house and premises wherein I now dwell, with the appurtenances thereunto belonging, to hold to him his heirs and assigns for ever: and *the remaining of my personal estates* I give and bequeath to my brothers *Joseph and Benjamin*, and my sisters *Elizabeth and Mary* equally share and share, to hold to them their heirs and assigns for ever. Lastly, I do appoint my said wife sole executrix, &c.

The question for the opinion of the Court was, whether the lessor of the plaintiff, as heir at law of the testator, were entitled to recover the freehold and copyhold estates of which the said testator died seised, or any and what part thereof.

This case was argued on a former day by *Peckwell* for the plaintiff, and *Best* for the defendant: when two questions were made; 1st, whether the widow took for life the residue of the testator's *real* property, not before specifically devised, under the description of *personal estates*. And if she did; 2dly, whether the copyhold would pass to which the testator had not been admitted at the time of his surrender to the use of his will. The last point, with the arguments bearing on it, was so fully discussed by the Court in delivering the judgment, that it is unnecessary to recapitulate the arguments urged at the bar. Upon the first point, it was urged by the plaintiff's counsel that no case had gone so far as to give effect to a devise of realty against the heir at law, where the testator had used the word *personal*, importing in legal sense and common understanding the very reverse of *real* estate: although he admitted that if such a construction could be put on the word, it might be collected from the rest of the will that the testator had used it in that sense. But Lord *Ellenborough*, C. J. said, that if it distinctly appeared, as it did in this case, that the testator meant to pass his real property under that description, the Court must pronounce their opinion that it did pass according to such manifest intention. And the rest of the Court being clearly of the same opinion, no farther argument was had on this other point. But the Court took time to consider of their judgment on the other point. And now

Lord *ELLENBOROUGH*, C. J. delivered judgment. This ejectment was brought for certain freehold and copyhold lands, which the lessor of the plaintiff claimed as heir at law to *William Tofield*, and the defendant claimed as his devisee. As to the freehold lands, the Court has had no doubt; the only question as to them was, whether they passed under the words "*all my personal estates*;" and it being clear beyond all possibility of doubt upon the face of the will, that the testator meant by these words (not what is ordinarily understood by them, but) such real property over which he had an absolute personal power of disposition and controul, we have no hesitation in saying that the freehold passed by this description.

With regard to the copyholds, the facts were these. They were surrendered out of court into the hands of the deputy-steward to the testator's use on the 10th of *October* 1793, and before that surrender was presented, and before the testator was admitted upon it, to wit, on the 14th of *November* 1793, the testator surrendered the same into the hands of two customary tenants to the use of his will. On the 17th of *June* 1795, and not before, these surrenders were presented at a court holden for the manor, and the testator was then admitted. The question therefore is, whether the surrenderee of a copyhold

can himself surrender to the use of his will before the surrender for his use is presented, and before he is admitted: and if he do, whether his admittance afterwards will make that surrender to the use of his will valid? Until admittance the surrenderor is the only person to whom the lord can look as his tenant, and he is the person to discharge all the services. The surrender so far binds the land, that the surrenderor cannot surrender to any other person: but the whole legal estate remains in the surrenderor: he has a right to retain the possession (subject however to an account for the mesne profits if the surrenderee be afterwards admitted. 2 Wils. 15); and if he die, the estate devolves upon his heir. Co. Cop. s. 39, and 7 East, 8. The surrenderee has no legal right to enter; and if he do, the surrenderor may bring trespass against him; the surrenderee cannot support an ejectment, unless he procure an admittance before trial; and if he commit a capital offence, the copyhold is not forfeited. 2 Wils. 13, *Roe d. Jefferies v. Hicks*. In all these respects a surrenderee differs from an heir: for the heir is tenant before admittance; he is entitled to the possession; he may support trespass or ejectment; and he may surrender, or forfeit. The point whether a surrenderee can surrender to a stranger before admittance is distinctly put by Lord Coke in his Cop. s. 39. His words are, "if he surrender to the use of another, the surrender is merely void, and by no matter ex post facto can be confirmed." And he gives the reason; "for though the first surrender be executed (i. e. by admittance) before "the second; so that at the time of the admittance of him to whose use the "second surrender was made, his surrenderor hath a sufficient interest as absolute owner; yet because at the time of the surrender he had but a possibility "of an interest, therefore the subsequent admittance cannot make this act "good, which was void ab initio." This passage is adopted by Mr. Justice Blackstone in the 2d vol. of his Comm. 368, and it is confirmed by other authorities. In *Wilson v. Weddall*, M. 6 Jac. 1. Yelv. 144, mentioned also in Co. Litt. 60. a. n. 2, by the name of *Wilson v. Woodfall*, it was adjudged that if a surrenderee surrendered, and died without admittance, though his surrenderee were afterwards admitted, such surrenderee had no title against the heir of the surrenderor. The case there was this: A copyhold was surrendered to the use of *Leonard* in fee, and he surrendered to the use of *Margery* for life: *Margery* was admitted, but *Leonard* never was. The first surrenderor's heir brought ejectment; and on special verdict it was adjudged, that a surrender of a copyhold to *J. S.* is not of effect till *J. S.* is admitted; and if *J. S.*, before admittance, surrender to a stranger who is admitted, that is nothing worth to the stranger; for *J. S.* himself had nothing, and so could pass nothing; and the admittance of the grantee shall not be taken by implication the admittance of himself, (viz. the grantor.) But it was held that the right and possession still remained in him who first surrendered, and descended to his heirs. And a difference was taken between a surrenderee, and an heir to whom a copyhold descends, who may surrender before admittance, because in by course of law; for the custom casts the possession upon him from his ancestors; but a surrenderee has nothing before admittance; because he is a purchaser; and till admittance he is not a customary tenant: so that he can transfer nothing to any other. This was adjudged in *Dizie's* case, 24 Eliz. In *Rawlinson v. Green*, M. 14 Jac. 1. Poph. 127, a copyholder surrendered out of court, and the surrender was presented at the next court; the surrenderee surrendered before admittance; and one question was, whether he could? *Houghton*, J. held that he could not: and he said that the entry of the surrenderee would not make an admittance, because it is the sole act of the steward: and *Dodderidge*, J. agreed. It appears indeed by 3 Bulstr. 237—240, where there is a fuller report of this case, that it ended in a compromise: so that this at the most is the opinion of the two judges only, and not a decision. There is however an able argument to shew that the surrender was void in Bridgm. 81. Against these authorities I find nothing which bears upon the point,

except a passage in 1 Roll. Abr. 505. X. pl. 1. 6 Vin. 82, and a note in Co. Litt. 60, a. n. 2. The passage in Rolle is to this effect: Surrenderee surrenders in court before admittance: this shall enure as an admittance on the first surrender, and afterwards as a second surrender; for by the acceptance of the surrender he is admitted to be tenant. *Dubitatur. B. R. 38 & 39 Eliz. in Keeping v. Bunning, Pasch. B. R. 41 Eliz. in Calchin's case.* In *Keeping v. Bunning*, however, it appears from Cro. El. 504, (reported by the name of *Gyphen v. Bunney*) that the first surrenderee was a remainder-man; and the tenant for life, on whose estate his remainder depended, was admitted: and the Court proceeded on the ground that the admittance of the tenant for life was the admittance of the remainder-man: so that the first surrenderee was in that case considered as admitted. And *Colchin v. Colchin*, as appears by Cro. Eliz. 662, was the case of an *heir* who surrendered before admittance, not of a *surrenderee*; and all the authorities agree that an *heir* is in before admittance, and may surrender. The note in Co. Litt. first notices *Dixie's case*, and *Wilson v. Weddall* (there called *Wilson v. Woodfall*) in these terms: A. surrenders to the use of B., "who before admittance surrenders to the use of C., and "C. is admitted: ruled that C. takes nothing; for B. who surrenders has not "any interest to surrender till admittance." And then it proceeds; "But yet "it hath been ruled good; for the admittance of C. shall be implied to be an "admittance of B. first, and so there shall be priority. M. 24 Car. B. R. *Baker v. Denham*, P. 41 Eliz. C. B. *Colchin v. Colchin*, Vide T. 15 Jac. B. R. 2. Pop. 5." It has already been noticed, that *Colchin v. Colchin* was the case of an *heir*; so that the point could not have been ruled there. *Baker v. Denham* is stated in the supplement to Lord Coke's Copyholder, s. 4: and from that statement it is obvious that the point supposed in the note in Co. Litt., if it arose at all, was ruled the other way. This is the statement: "The custom of a manor was, that a copyholder might surrender his copyhold out of "court to the use of another: the party, to whose use it was, to be admitted "at the next court: such a surrender was made; but before the next court "cestui que use died, and so was not admitted. It was resolved in this case "that he was not a copyholder within the custom: for by the surrender before "admittance the surrenderee hath no possession; and the heir (viz. of the "surrendoror) is in by descent, and holds by the copy of his ancestor; and so "the cestui que use is not a perfect or complete copyholder. "The surrender "is but quasi inchoatum till the surrenderee be admitted to the copyhold." It is not impossible upon this statement, that a surrenderee might have surrendered out of court before admittance; and the question might be, whether such surrender were within this custom. But as it was resolved that he was not capable of surrendering, it could not have been ruled that his surrender was good. The reference in the note to 2 Poph. 5, evidently applies to *Rawlinson v. Green*, already cited, which is the 5th case in the 2d part of Papham's Reports. The authorities therefore of Co. Cop. s. 39. Yelv. 144, and Poph. 127, are not to be considered as impeached by the passage in Roll. Abr. or the note in Co. Litt.; but we may still conclude that a surrenderee is incapable of surrendering to the use of a stranger before admittance, and that no subsequent admittance will make his surrender valid. It was argued, however, that though a surrenderee might be incapable of surrendering before admittance to the use of a stranger, it did not follow that he could not surrender to the use of his own will. But no authority was adduced for such a distinction, and there seems no foundation for it upon principle. The reasons why he cannot surrender to the use of a stranger are, that he is not tenant to the lord, and has no legal interest; and those reasons apply equally against his making any surrender. This distinction therefore seems untenable. In considering this case the point occurred, whether, as neither surrender was presented till the day of admittance, each surrender might not be considered as of the same date with the admittance; and then, *ut res magis valeret*, the admittance might

be taken to have preceded the surrender to the use of the will. But as it is established that the presentment is to be made, though surrenderor, surrenderee, and the other persons who took it, all die before the next court; it follows that the surrender, when presented, must be treated as a surrender of the day on which it was in fact made. As to the case of *Benson v. Scott*, 3 Lev. 385, and other cases which might have been cited, where the admittance has had such relation to the surrender as to make the estate pass in the same course of descent, and give the same right to dower and curtesy, &c. as if the admittance and surrender had been contemporaneous acts; the answer seems to be, that though every act of law which would have operated upon the estate, had the admittance immediately followed the surrender, shall still operate upon it; it cannot be affected by any act of the party. And this is agreeable to the distinction in *Buller* and *Baker's* case, 3 Co. 29. a. cited by Mr. *Peckwell*, that relation in many cases shall help acts of law; as in the case of *dower*, &c., but shall never help acts of the parties, that is to say, to make the void acts of the parties good by relation or fiction of law. For these reasons it appears to us that the surrender out of court, made by *William Tofield* on the 14th November 1793, to the use of his will, could not operate, so as to enable him to pass the copyhold tenements by his subsequent surrender; he not being at the time of such surrender admitted tenant. And although he was afterwards admitted on the first surrender made to him, such admittance could not operate by relation, so as to render valid the surrender to the use of his will. The consequence is that the copyholds are undisposed of, and the plaintiff as heir at law is entitled. The *postea* must therefore be delivered to the plaintiff, with liberty for him to enter up judgment for the copyhold premises only.

Crosby and Another, Assignees of Boucher, a Bankrupt, v. Crouch.

11 East, 256. May 15, 1809.

Where the act of delivering goods by a trader, to secure the defendant, who was under acceptances for him payable at a future day, was clearly not voluntary on the trader's part, but made in consequence of the urgency of the defendant (evidenced by the proposal for giving such security originating with him) it is immaterial to consider whether the trader had his bankruptcy in contemplation at the time. Nor will the transaction, being *bona fide* and not colourable, be impeached by the secrecy with which the delivery was made by the trader, in order to save his own credit in the view of the world.

IN trover for printed books and stationery, alleged to have been the property of *Boucher* before his bankruptcy, and afterwards to have belonged to the plaintiffs, as his assignees under a commission of bankrupt issued against him, the question was, whether the goods had come to the possession of the defendant before the bankruptcy of *Boucher* by his voluntary and undue preference of the defendant, in fraud of the bankrupt laws, or by the due diligence of the defendant himself seeking his own security or indemnity. It appeared in evidence at the trial before Lord *Ellenborough*, C. J. that *Boucher* at the time of his bankruptcy in March 1808, and for about 18 months before, was a bookseller and stationer, having been before that a pawnbroker, in which last mentioned business he had made a composition with his creditors, of whom the defendant a pawnbroker was one, for 5s. in the pound. The nature of the dealings between them since that period was disclosed in the defendant's examination taken on the 30th of April 1808, before the commissioners upon *Boucher's* bankruptcy; in which it was stated, that about a year and a half or two years before, the defendant was applied to by the bankrupt to indorse a bill for 125*l.*, drawn by the bankrupt on one *Jones*, a baker; which bill was given for the purpose of settling a composition made by the bankrupt with his credi-

tors about that time, when he was a pawnbroker. That bill became due in *November* 1807, and was held by a Mr. *Williams* for the trustees who were to raise money to pay the composition. That 4 or 5 months after the defendant's indorsement of that bill, the bankrupt brought at different times small quantities of books and paper to him to dispose of, in order to raise money to pay the bill; some of which goods the defendant caused to be sold at *Robbins's* auction-rooms, and others he disposed of in his own shop. When the bill became due the defendant took it up, by giving his own note at a month for part (since paid) and the remainder in cash; having at that time 70*l.* in hand, the produce of part of the said goods, and also remaining goods to nearly the amount of the bill. The bankrupt afterwards brought other goods to the defendant, which when sold over paid him his advance on the bill, and he returned the difference, about 7*l.*, to the bankrupt. That in *September* 1807, the bankrupt applied to the defendant to discount three bills for him of 50*l.* each; two of them drawn by the bankrupt on the said *Jones*; the other upon one *Young*; all of which the defendant cashed before the bill for 125*l.* became due: but immediately after that bill was dishonoured by *Jones* the acceptor, the defendant, being alarmed lest the three 50*l.* bills should not be paid, applied to the bankrupt to know whether they were not accommodation bills, who informed him that they were; on which he required the bankrupt to put some security in his hands to answer the payment of them, in case the acceptors should not pay them when due. That in consequence of the defendant's application the bankrupt, at different times between *November* 1807 and *February* 1808, brought to him different parcels of books, to the amount of 270*l.* or 370*l.* in value, as stated by the bankrupt, and which books were deposited with the defendant, for the purpose of being sold by him in case the three 50*l.* bills should not be paid by the acceptors in order to reimburse him the amount; and those bills were still held by the defendant. And the defendant negatived in his examination that the books were pledged with him in the way of his business as a pawnbroker, or for safe custody, or for any other purpose than to cover the bills, as before stated. And he also stated, that the books were brought to him in coaches, and generally in the evening after dark; that *Boucher* always came with them himself; that there might have been one or two parcels come in the day-time. The defendant further stated that he had known *Boucher* about two years and a half: that he knew him when he failed in the business of a pawnbroker, and paid his creditors a composition of 5*s.* in the pound: that he himself was then a creditor of his for 18*l.* and received the composition: and that he never knew that *Boucher* had realized any capital after his failure, or that he possessed any money to enable him to enter into the business of a bookseller. Lord *Ellenborough*, C. J., being of opinion upon this evidence, that the security having been required of the bankrupt by the defendant, and not offered voluntarily by him, negatived the undue preference, would have left the case to the jury with that instruction; whereupon the plaintiff's counsel submitted to a nonsuit, in order to take the opinion of the Court, whether assuming such to have been the direction of the Lord Chief Justice to the jury, it was warranted by the evidence. A rule nisi was accordingly obtained for setting aside the nonsuit; which was supported by *The Attorney-General*, *Garrow*, and *Lawes*, and opposed by *Park* and *Marryat*; each of whom argued upon their respective views of the facts. After which the case stood over some days for consideration: when

Lord *ELLENBOROUGH*, C. J. delivered the judgment of the Court.—This was an action of trover brought by the assignees to recover the value of a quantity of books received by the defendant from the bankrupt, and which had been privately conveyed from the bankrupt's shop in a hackney coach after dusk at several times between *October* and *February*, and delivered by him to the defendant. No act of bankruptcy was committed till the *March* following. The commission was in *May* following. The goods were delivered on the

defendant's requiring to have some security against three running bills which he had discounted for the bankrupt, and of the payment of which the defendant had become apprehensive, on understanding they were accommodation bills. The defendant's examination before the commissioners of bankrupt was read on the part of the plaintiff, in which the defendant deposed, "that the books in question were deposited with the deponent for the purpose of being sold by him, in case the three bills for 50*l.* each should not be paid by the acceptors thereof, to reimburse him the amount thereof." The bankrupt had before satisfied the defendant the amount of a bill of exchange which he, as indorsee, had taken up for the bankrupt, as drawer, by the sale of books and paper delivered to him by the bankrupt, part of which the defendant had sold in his own shop as a pawnbroker, and part at another person's auction-room. The fair result of the whole evidence was, that the defendant had reason to believe that *Boucher* was in bad circumstances, and that so believing, and having incurred the risk of becoming an indorser of these three bills which the bankrupt *Boucher* was liable to pay, he required, and, on his requisition, obtained from the bankrupt, security against those bills by a deposit of goods by the bankrupt, to be sold if the acceptors did not pay those bills. The circumstance of the debt secured not being demandable, and capable of being enforced at the time, makes no difference; as was held in the case of *Thompson v. Freeman*, 1 Term Rep. 155, and in *Hartshorn v. Slodden*, 2 Bos. & Pul. 584, decided as to that point on the authority of *Thompson v. Freeman*. The question therefore, is, whether, upon the facts thus stated, the delivery of the goods in dispute were an act of voluntary preference on the part of the bankrupt in contemplation of bankruptcy? Two things are necessary to concur in order to avoid the delivery of the goods; namely, the purpose of voluntary preference in respect to such delivery, and the contemplation of bankruptcy at the time when the goods were delivered. In considering whether the act in question were in this sense properly *voluntary*, it is material to see from which party the proposition of making the deposit originated, whether from the bankrupt or from the defendant. It certainly proceeded wholly from the defendant: he is stated to have *required* the act to be done. It is, therefore, upon any fair interpretation of the words, not referable to any supposition of favour and preference exercised on the part of the bankrupt, but to urgency and importunity applied on the part of the person obtaining the deposit: and it has not been suggested that such requisition and urgency were colourable. This distinction between payments and deliveries by the bankrupt which are *voluntary*, and those which are not so, with reference to this head of bankrupt law, was so fully considered and discussed by Lord *Alvanley*, and the other judges of the court of *Common Pleas*, in *Hartshorn v. Slodden*, 2 Bos. & Pul. 583, that it is enough upon the present occasion to refer to the arguments of those judges upon this point. It is there laid down to be immaterial whether the debtor had or had not an act of bankruptcy in contemplation at the time, if the creditor pressed for payment or security, and thereby obtained such payment or security. As there was no doubt, at the trial, of the fact of urgency for the security; such fact appearing upon the face of the defendant's deposition read in evidence by the plaintiff; what fact was there to be left to the jury; unless indeed it were contended that such urgency was colourable; but no such point was made at the trial. The receiving of goods, removed under the circumstances of secrecy already stated, has been treated in argument as fraudulent: but if the creditor were entitled to demand, and, demanding, to receive a security in goods for a running debt, I want to know upon what principle he was obliged to insist upon the transaction being conducted by his debtor with any particular circumstances of publicity, and which might be in other respects injurious to the general credit of such debtor. The defendant had no interest to keep up his credit, as he owed him no other debt. If his debtor made the payment or gave the security exacted from him, surely it was allowable to the creditor to

leave the time and manner of doing so to the debtor's own convenience and discretion, as seems to have been done in this case. If such a *bona fide* urgency for the security, as must be taken to have existed in this case, exclude the security from being considered as a voluntary one, it is then unnecessary to consider whether there were evidence to have been left to the jury in respect to the other point, *viz.* of a contemplation of bankruptcy. Though as to that, it might be perhaps too much to hold that any particular act of bankruptcy, or even the event of becoming a bankrupt at all, was specifically in the bankrupt's contemplation in *September*, and the other successive months, during which the delivery was made, up to *February*; the act of bankruptcy not taking place till late in the *March* following. But this point, for the reason already given, is not material to be considered upon the present occasion.

Rule discharged.

Vivian v. Blake and Others.

11 East, 263. May 15, 1809.

Trespass for breaking and entering the plaintiff's free fishery in *A.*, and also in *B.*, and also in *A.* and *B.* Pleas, 1. Not guilty. 2. That the said free fisheries were parcel of a navigable harbour, &c. common to all the king's subjects. Replication, prescribing for a free fishery in the said place in right of the plaintiff's manor. Rejoinder, taking issue on such prescription. Held, that on verdict for the plaintiff on the general issue, and for the defendant on the prescription, the latter going to the whole declaration, the plaintiff is not entitled to costs.

THIS was a question of costs, which was argued in the last term by *Moore* for the plaintiff, and *Dampier* for the defendants; and was then directed to stand over for consideration. And now

Lord ELLENBOROUGH, C. J. delivered the opinion of the Court.

This was a rule obtained in the last term on behalf of the plaintiff, calling on the defendants to shew cause why the master should not tax the plaintiff his costs, on the ground that a verdict was entered for the plaintiff on the first plea of not guilty, with 1s. damages. The pleadings in substance were these: the declaration complained of a trespass by the defendants in the plaintiff's free fishery in the creek, otherwise the river, in the parish of *St. Anthony*; and also in the free fishery of the plaintiff in the parish of *St. Just*; and also in his free fishery in the parishes of *St. Anthony* and *St. Just*. Pleas, first, not guilty, generally. 2d, That the said free fisheries were parcel of a public navigable harbour or creek in which the tide flowed and reflowed, where all the king's subjects had a right to fish. Replication to the second plea, protesting that the free fisheries are not parcel of the public harbour, replies, that the plaintiff is seised in fee of the manor of *Bohurra*, and prescribes for a free fishery in the said place in right of his said manor. Rejoinder takes issue on the prescription. A verdict has been entered on the general issue for the plaintiff, with one shilling damages; and on the prescription, for the defendant. The question on the verdicts on these issues is, whether the issue on the prescription, which has been entered for the defendant, do not go to the whole trespass: for if it do, the finding on the whole record being in favour of the defendants, the plaintiff cannot be entitled to costs. And we are of opinion that the issue found for the defendants does go to the whole. The free fishery claimed by the plaintiff, and which by his count he complains of the defendants' having broken and entered, is by his replication confined to a free fishery in the right of his manor of *Bohurra*; and the verdict finds that he is not entitled to any such free fishery. It resembles the case put in argument at the bar, where to an action of trespass *quare clausum fregit* the defendant pleads not guilty, and *liberum tenementum* of *A.*, by whose command the defendant entered. The replication deduces a title to the plaintiff under

A.; which derivative title is traversed, and found for the defendant: in which case the plaintiff cannot be entitled to costs, because the issue found for the defendant goes for the whole. The consequence will be, that the rule must be discharged.

De Tastet and Others v. Baring and Others.

11 East, 265. May 15, 1809.

A verdict having passed for the defendants in an action to recover the amount of the re-exchange upon the dishonour of a bill drawn from *London* on *Lisbon*, upon evidence that the enemy were in possession of *Portugal* when the bill became due, and *Lisbon* was then blockaded by a *British* squadron, and there was in fact no direct exchange between *Lisbon* and *London*, though bills had in some few instances been negotiated between them through *Hamburgh* and *America* about that period, the Court refused to grant a new trial, on the presumption that the jury had found their verdict upon the fact that no re-exchange was proved to their satisfaction to have existed between *Lisbon* and *London* at the time; the question having been properly left to them to allow damages in the name of re-exchange, if the plaintiff who had endorsed the dishonoured bill to the holder, had either paid or were liable to pay re-exchange; and saving the question of law, whether any exchange or re-exchange could be allowed between this and an enemy's country.

THE plaintiffs declared that one *J. Hodson*, on the 24th of *November* 1806, at *London*, according to the custom of merchants, made his bill of exchange of the same date directed to *Joza da Silva* in *Lisbon*, being in *Portugal* beyond the seas, and required him at 12 months date to pay to the order of the said *J. Hodson* 2220 mil 767 reis. That *Hodson* on the 27th of *February* 1804, at *London* indorsed the said bill to *Heinzelman* and *Rikarby*, who indorsed to the defendants: and the defendants on the 7th of *April* 1807, at *London*, indorsed to the plaintiffs by their trading firm of *Anthony Mangin*; and the plaintiffs, on the said 7th of *April*, indorsed to *Treves* and Company. That the bill when due and payable on the 30th of *November* 1807, at *Lisbon*, was duly presented to *Joza da Silva* for payment, who refused so to do, and *Treves* and Co. caused it to be protested for non-payment; and it was returned to the plaintiffs as indorsers, and they were obliged to pay the sum therein contained, being of the value of 650*l.* sterling, together with exchange and re-exchange, interest, damages, costs and charges, &c. of all which the defendants had notice; and by reason of the premises, and according to the usage and custom of merchants, they became liable to pay to the plaintiffs the said sum in the said bill or the value thereof, together with the exchange, re-exchange, &c. There was another set of counts, only charging that the defendants became liable to pay the exchange, re-exchange, &c. without charging that the plaintiffs had been obliged to pay the same.

It appeared at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, that the facts and dates of the several transactions corresponded with those stated in the first count of the declaration, except that it did not appear that the plaintiffs had in fact paid any re-exchange. It further appeared that the plaintiffs had purchased the bill in question of the defendants, and that when it was returned dishonoured, the defendants had offered to pay the principal, interest, and all expenses attending the dishonour, except the claim for re-exchange, (which was the only claim now in question: the rest having been paid into court;) and which claim they resisted on the ground, that at the time when the bill became due and was dishonoured the *French* were in possession of *Portugal*, and entered *Lisbon* on the 1st of *December* 1807; which then and for some time before was actually blockaded by a *British* squadron at the mouth of the *Tagus*: and that there was not in fact any exchange existing at the time between *Portugal* and *England*, even if it could legally take place while the two countries were in a state of hostility. On the other

hand, an instance or two were shewn of an exchange of bills about this time between the two countries, through the medium of other bills on *Hamburgh*, or *America*. Lord *Ellenborough*, C. J. told the jury that if the plaintiffs had paid the re-exchange, or were in the common course of dealing liable to pay any, a verdict should be found for them, reserving the question of law, whether in the relative situation of the two countries at that period a charge for re-exchange could legally be demanded. The jury found a verdict for the defendants. On which *The Attorney-General* moved for a new trial, assuming the verdict to have passed, not upon the ground that there was no exchange in fact between the two countries at the time, the contrary of which he considered to have been shewn in evidence: but that the jury had been led to suppose, by the course which the cause had taken, that the plaintiffs were not entitled to the re-exchange, without proving that they had in fact paid it. This he contended was not necessary; but it was sufficient to entitle the plaintiffs to recover, if they were liable to pay the re-exchange to the holders of the bill at the time of the dishonour. And then the question of law, which had been reserved, would arise. A rule nisi having been obtained: Lord *Ellenborough* C. J. now, on reporting the evidence, stated the manner in which he had left the case to the jury; which he observed was a special jury consisting of many eminent merchants conversant with the subject, and therefore he had encouraged them to take an active part in the examination of the witnesses; which they had done: and they had drawn their conclusion from the whole evidence in favour of the defendants against the claim of re-exchange.

Garroo and *Marryat*, against the rule, said that at this period there was in fact no market at *Lisbon* for bills on *London*, and consequently there could be no re-exchange, the charge for which consisted of the sum which would have been paid in the *Lisbon* market for a bill drawn there on *London* of the same relative value as the dishonoured bill, supposing there had been any exchange at that time existing between the two countries. That in effect the same purpose was answered by the defendants having engaged to pay the plaintiffs in *London* the actual loss sustained by them on the bill in consequence of its having been dishonoured, which was the principal and interest and the amount of the charges of protesting and returning the bill; and they only resisted the payment of an arbitrary sum, which was said by some persons to be the charge of transmitting the money from *Lisbon* to *London*, through the medium of bills on *Hamburgh* or *America*, or *Paris*, when all direct exchange between *Lisbon* and *London* had then ceased. That the verdict of the jury was founded upon the fact that no such exchange existed between the two countries at the time; and that in point of law it could not exist, as the right to re-exchange in this case must be founded upon the right which persons in *Lisbon* then had to draw upon others in *London*, and the obligation of the subjects residing here to pay such bills; an obligation which could not exist during the continuance of hostilities between the two countries; and if it were illegal to do it directly, it must be equally illegal to do it indirectly, though the discovery of it might be more difficult in the latter case.

The Attorney-General and *Littledale*, contra, said that at all times, and particularly in the present state of the commercial world, it would require grave consideration before it was laid down as a general rule, that no bill drawn from a foreign hostile country upon this could legally be paid here: it frequently happened that this was the only medium by which our own merchants abroad were able to remit their property home out of an enemy's country. A merchant in *England* might be indebted to a foreign merchant; and a *British* merchant, in a foreign country, invaded by the enemy, might make over property which he had upon the spot to that foreigner in exchange for his bill upon the *British* merchant at home; and in these and the like cases no actual property is transmitted from this country to the enemy's country; for the

money is paid to a subject at home, and the principal benefit of the transaction centers here. Then the nature of the transaction which gives rise to the question of exchange and re-exchange is this—A merchant in *London* draws on his debtor in *Lisbon* a bill in favour of another for so much in the currency of *Portugal*, for which he receives its corresponding value at the time in *English* currency; and that corresponding value fluctuates from time to time, according to the greater or lesser demand there may be in the *London* market for bills on *Lisbon*, and the facility of obtaining them: the difference of, that value constitutes the rate of exchange on *Lisbon*. The like circumstances and considerations take place at *Lisbon*, and constitute in like manner the rate of exchange on *London*. When the holder, therefore, of a *London* bill drawn on *Lisbon* is refused payment of it in *Lisbon*, the actual loss which he sustains is not the identical sum which he gave for the bill in *London*, but the amount of its contents if paid at *Lisbon*, where it was due, and the sum which it will cost him to replace that amount upon the spot by a bill upon *London*, which he is entitled to draw upon the persons there who are liable to him upon the former bill. That cost, whatever it may be, constitutes his actual loss and the charge for re-exchange. And it is quite immaterial whether or not he in fact re-draws such a bill on *London* and raises the money upon it in the *Lisbon* market; his loss by the dishonour of the *London* bill is exactly the same, and cannot depend on the circumstance whether he repay himself immediately by re-drawing for the amount of the former bill, with the addition of the charges upon it, including the amount of the re-exchange, if unfavourable to this country at the time; or whether he wait till a future settlement of accounts with the party who is liable to him on the first bill here: but that party is at all events liable to him for the difference; for as soon as the bill was dishonoured, the holder was entitled to re-draw. That, therefore, is the period to look to. It ought not to depend on the rise or fall of the bill market or exchange afterwards; for as he could not charge the increased difference by his own delay in waiting till the exchange grew more unfavourable to *England* before he re-drew: so neither could the party here fairly insist on having the advantage if the exchange happened to be more favourable when the bill was actually drawn. Where re-exchange has been recovered on the dishonour of a foreign bill, it has not been usual to prove that in fact another bill was re-drawn. If the quantum of damage is not to be ascertained by the existing rate of exchange at the time of the dishonour, the rule will become extremely complex for settling what is to be paid on the bill between different indorsees, each of whom takes it at the value of the exchange when he purchased it. If then the amount of the re-exchange between the two countries at the time of the dishonour be the true measure of damage which the holder at *Lisbon* was entitled to receive from his indorsee in *England*; and that re-exchange consist of the amount of a bill on *London* which would put the holder of the dishonoured bill in the same situation as if he had received the contents of it when due in *Lisbon*; it cannot make any difference whether the exchange between *Lisbon* and *London* at the time were carried on directly, or through the medium of other places. The more circuitous and difficult it was, the greater would be the loss of the holder by the dishonour.

The Court said they would consider of the case, and two days afterwards

Lord ELLENBOROUGH, C. J. delivered their opinion, that the rule for a new trial should be discharged, on the ground that the question was properly put to the jury, to allow the plaintiff damages or expences in the name of re-exchange, if the plaintiff were either liable to pay, or had paid, re-exchange on these bills. And that as it did not appear to have been clearly made out, that there was at the time any course of re-exchange between *Lisbon* and *London*, the Court must presume that the jury, which was one particularly conversant in subjects of this sort, found for the defendant on that ground: viz. that the

plaintiff was not liable to pay re-exchange in this case, and not on the ground that the plaintiff had not actually paid it.(1)

Rule discharged.

Wathen and Another v. Beaumont and Another, Bail of Askew.

11 East, 271. May 15, 1809.

On a four-day rule for bail in *scire facias* to appear and plead, in term, *Sunday*, though an intermediate day, is not to be reckoned.

A RULE was given by the plaintiffs, on *Saturday* the 6th of *May*, to the defendants, the bail, to appear and plead to the writ of *scire facias*, otherwise judgment would be signed; and default being made, judgment was signed on *Friday* the 12th (*Thursday* being a *dies non*, &c.) *Bowen* thereupon obtained a rule nisi for setting aside the proceedings for irregularity; which was now opposed by *Abbott*; and the question was, Whether *Sunday* being an intermediate day within the term, were to be reckoned as one of the four entire days which the defendants were entitled by the practice to have, in order to appear and plead in *scire facias*; in which case, *Thursday* being a *dies non*, &c. the judgment was signed one day too soon. It was observed against the rule, that there was nothing in this case to do in court, and therefore it was not like a rule for judgment nisi, &c.(a) But after reference to the Master, Lord *Ellenborough*, C. J. said that it appeared to be the settled practice now in all rules for pleading against bail in *scire facias* to exclude *Sundays* and *holidays* from the computation of time given, though not happening on the last day.

Per Curiam,

Rule absolute.(b)

(1) [The acceptor is not liable for re-exchange. *Dawson v. Morgan*, 9 B. & C. 620. *Henrick v. The Farmers' Bank*, 8 Porter, 539.—W.]

(a) Vide *Tidd's Prac.* ch. 38 referring to 4 Burr. 2130.

(b) In *Roberts v. Quickenden*, M. 50 Geo. 3, this case was explained as not meant to extend the like mode of computation to rules for pleading in actions in general. The practice appears to be thus—in rules to plead, in actions in general, a *Sunday* or a holiday reckons as a day, except it be the last; but in rules for judgment a *Sunday* or a holiday does not reckon, though it be not the last day; and in proceedings in *scire facias* against bail the rules for pleading are assimilated to, and operate in this respect as, rules for judgment, and are entered as such in a separate book in the office.

MEMORANDUM.—On the last day of the term, *Robert Henry Pecknell* of *Lincoln's Inn*, and *William Frere* of the *Middle Temple*, Esquires, were called Serjeants, and took for the motto on their rings, "*Traditum ab antiquis servare.*"

CASES

IN

TRINITY TERM,

IN THE FORTY-NINTH YEAR OF THE REIGN OF GEORGE III.

REGULA GENERALIS.

Rule for changing the venue to be drawn up on reading the declaration.

INCONVENIENCE having arisen in some cases from the venue having been improperly changed, without adverting to the cause of action; Lord *Ellenborough*, C. J. early in this term said, that the Court would require in future that all rules for changing the venue in any action should be drawn up "upon reading the declaration."

Bolton v. Sowerby and Another.

11 East, 274. June 3, 1809.

A farmer and grazier exercising also the business of a *drover*, by buying and selling cattle from time to time beyond the occasions of his farms, is exempted from the operation of the bankrupt laws by stat. 5 Geo. 2. c. 30. s. 40. And the purchase of hay for the support of his cattle, and the sale of part of it again, because it was more than was required for their consumption, will not make him a trader.

IN trover for cattle and other goods, tried before *Lawrence*, J. at *York*, the sole question was, Whether the plaintiff were a trader at the time when a commission of bankrupt was taken out against him, under which the defendants claimed. It appeared that the plaintiff lived on his own farm of 60 or 70 acres at *Faceby*, and had a great deal more stock upon it than the farm could support. In the course of 1806 and 1807, he bought cattle to sell again for profit, and sold them off as fast as possible. At one time, in *June*, when he had already more cattle on his farm than it would carry, he bought 40 lean cattle, with a view to sell them again directly, and make money of them as he expected; and he sold two in a day or two afterwards. He had bought more before; and he bought about four score of lean cattle just before *Candlemas*, when he had no grass on his farm for them: but these latter were for the use of another rented farm, of 1000 acres, at *Langton*, to which he was going at *Lady-day*. He also bought at different times lots of lean *Scotch* cattle travelling along the roads, for the purpose of selling again as fast as he could find purchasers: once he re-sold some on the same day: sometimes within a few days; at other times they were re-sold several months after the purchase. Sometimes he took cattle to different fairs for sale. His pastures were always much overstocked,

and at several times he was obliged to purchase stacks of hay for the support of the cattle. On one occasion he sold part of one of the purchased stacks which had not been consumed by the cattle; and on another occasion he exchanged one stack for another. Several lots of cattle bought were unfit for the farm; and were sold by him in their lean state as well as in better condition; and he admitted that he had lost money by all the cattle he had bought in 1807, except one or two. On this evidence the jury found a verdict for the plaintiff for 650*l.*; and liberty was given to the defendants to move to enter a nonsuit, if the Court should be of opinion that the plaintiff was a trader within the bankrupt laws; it being admitted that the cattle he had bought were much more than he wanted for the occupation of his farm at *Langton*. A rule *nisi* was accordingly obtained in the last term for entering a nonsuit, which was now opposed by

Park and Holroyd: but after the former had referred to the case of *Mills v. Hughes*, Willes, 588, as in point, that persons who bought and sold cattle for profit came within the description of *drovers*, who, together with *farmers* and *graziers*, are expressly excepted(a) out of the operation of the bankrupt laws; and had observed that every act of the plaintiff done for the purpose of gaining a livelihood was referable to one or other of the three excepted characters; the Court called on the defendants' counsel to support their rule.

Cockell, Serjt., *Topping*, and *Hullock*, then insisted that the plaintiff was a trader within the general provisions of the bankrupt laws, having sought his livelihood by buying and selling cattle plainly beyond the occasions of his farms, and therefore not protected by the character of *farmer* or *grazier*; and that he did not come within the exception of a *drover*, who, by the description of such persons in the stats. 5 & 6 Ed. 6. c. 14, and 5 Eliz. c. 12, is one who buys cattle in one place in order to sell in fairs and markets at a distance, and who was regulated and required to be licensed by those acts. That one who, like the plaintiff, was a farmer or grazier, and bought and sold cattle which were stocked on his own farms, could never have been obliged to take out a licence, though such buying and selling were not for the purpose of farming or grazing his own land, but to carry on a trade in cattle. The true description of this man, they said, was that of a farmer dealing in cattle beyond the occasions of his farm: it was a mixed character, not falling precisely within either of the exceptions, and must therefore be governed by the general provisions of the bankrupt laws. They admitted, however, that the case in Willes' Reports, which was not adverted to at the trial, pressed against them; and they did not urge the argument further, after Lord *Ellenborough*, C. J. had observed, that the plaintiff could not be less exempt from the operation of the bankrupt laws because he came under all the three descriptions of excepted persons, namely, of farmer, grazier, and drover; to one or other of which characters all his acts were attributable. And with respect to the single instance in which the plaintiff had sold hay before purchased by him, *Le Blanc*, J. observed, that the hay had been purchased for the sake of the cattle, and not to sell again; and the sale of it was quite accidental, because the plaintiff found he had more than was wanted for the consumption of his cattle: and therefore there was no ground for calling that a trading in hay.

Lord ELLENBOROUGH, C. J. afterwards continued—Three descriptions of persons are specifically exempted by the st. 5 G. 2, from the operation of the bankrupt laws; farmers, graziers, and drovers of cattle. The plaintiff's character of farmer or grazier would not protect him for any trading carried on ultra his business of farming or grazing, and collateral to the management of his farms. But the question is, whether all the acts of buying and selling cattle proved to have been done by the defendant do not come within the other description, that of drover; or whether every act not done by him as a farmer

(a) By st. 5 Geo. 2. c. 30. s. 40, made perpetual by st. 27 Geo. 2. c. 16.

CASES

TRINITY

IN THE FORTY-NINTH

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Rule for changing

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contemplated to exempt persons from the bank-
of their own land or of the lands of others by
in cattle; under the names of "farmer, grazier
The plaintiff acted in all instances as one or other
lover or dealer in cattle cannot be less within the protec-
because he also partook of the character of farmer or grazier.
In the case of *Mills v. Hughes*, Willes, 588, a construction
put upon the word *drover* in the stat. 5 Geo. 2, at no great distance of
time after the passing of it and after much consideration, which has decided
the legal meaning of that word: and, according to that, the meaning of it,
is not confined to the description of a drover as collected from the statute of
Ed. 6th, but extends to persons buying cattle at different places and selling
them afterwards as opportunity offers. The act of Geo. 2, exempts the three
descriptions of persons; "farmer, grazier, and drover of cattle;" which latter
is in fact a dealer in droves of cattle. And in the case in Willes decides, that
a person employing himself in buying cattle where he can, though not in
large droves, and selling them again, is a drover within the act of Geo. 2; in
short, that a drover in a small way is within the same protection as one upon a
great scale. The plaintiff then, by buying and selling cattle beyond the occa-
sions of his farm, has only added to his business of farmer and grazier that of
drover, which is equally exempted by the act. And if a drover of great droves
would be exempted he could not be less a drover, or less exempt, by buying 2
or 3 head of cattle at a time in different places as they came along the road
from *Scotland*. Such a dealing would still be conformable to his general char-
acter of drover.

BAXLEY, J. It was necessary for the defendants to shew that the plaintiff
was a dealer, by such acts of dealing in buying and selling as do not range
themselves under the occupations of farmer, grazier, or drover; but no such
acts were given in evidence; and the case in Willes, which was much consid-
ered, has determined that a drover is a person who employs himself in buying

(a) M. 27 Geo. 3. B. R. cited in *Patman v. Vaughan*, 1 Term Rep. 573: Vide *Stewart v. Ball*, 2 New Rep. 78.

Willes, which
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WILLES, GEORGE III.

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CASES IN TRIAL
me to know several instances in which the extreme
commissioners who drew it up has exceeded any
expected. And when I find from thence, that a
made for the premises in 1649, and there is no
since that time: and when I find, that there
16 and 1649, (for the king continued in the
the greater part of that time) competent
presume any thing capable of being
ment for so long a period. As Lord
that he would not only presume one,
support such a long enjoyment. It is
investigation of the case. And
the Court, added that the costs

Rule absolute.

IN ejectment for certain copyhold lands, &c.
for the plaintiff before *Heath J.*, at *Chebmsford* a.
new trial, the only question was, Whether the learned
left it to the jury, under all the circumstances, to presume a.
by the crown: in which case the verdict ought to have been for the
It appeared upon the report, and was now agreed, that the lands in ques-
which lay within the manor of *Westham*, were once copyhold, and continued
so at least down to the 30th of April 1636, in the 12 Car. 1, when one *J. New-*
man, who had been admitted tenant in the 5 Jac. 1, on the surrender of cer-
tain persons to him and his heirs, surrendered the premises in question, con-
sisting of two cottages with gardens, &c. to the use of *B. Collier* and another,
churchwardens of the parish of *Westham*, and to their successors. These
entries were read from the court rolls, and no mention was made of the rent
in either of those entries: but it appeared that 6s. 6d. was the old copyhold
rent. And it was admitted that no tenant appeared on the rolls at any time
subsequent to *Newman's* surrender, but that the annual rent of 6d. had been
constantly paid by the holders of these tenements since that time. There was
also given in evidence the copy of a tablet of parochial benefactions suspended
in the church, dated 30th April 1656, (the old letters of which were still visi-
ble, though it had been then recently painted,) viz. "*John Newman* surrendered
unto the churchwardens 2 messuages and 2 gardens, situate in the church-
yard." There were also proved two leases from the crown of the manor of
Westham, the one of the 10th January 14 J. 1. 1616, granted by the king to
Sir Francis Bacon and others for 99 years absolute from *Mick*, then last past,
to the use of *Prince Charles*, and *Henrietta Maria* his consort, and *Queen*
Catherine. The other, of the 15th June 1694, to *Sir George Booth*, for 99
years absolute from the death of *Queen Catherine*, which was to be concu-
rent with a former lease. The last lease expired in December 1804. A con-
veyance from the crown to the lessors of the plaintiff under the land-tax act
was admitted. And in 1806 and 1807, several proclamations were made in
the manor court calling on the tenants to come in and be admitted; and none
appearing, proceedings were had thereupon, according to the custom of the
manor, the result of which was, that the premises were declared to be for-
feited to the lord. For the defendant it was insisted, that the jury ought to
presume that these, which were formerly copyhold premises, had been enfran-
chised by the crown; and in support of such presumption the following

that if there were one taxable item in the bill, the whole bill was taxable: but the Court said that he need not labour that point, but proceed to shew that there was any one taxable item in the plaintiff's bill: on which he rested on the first mentioned item; and cited *Winter v. Payne*, 6 Term Rep. 645, where items for "attending and taking instructions to commence an action; drawing and engrossing affidavit of debt; attending the party to be sworn," &c. were considered as business done in Court. [Lord *Ellenborough* observed, that that was a proceeding in court.] Here there was a consultation with immediate reference to a cause in court; and it is enough that there be a cause existing, and that the business be done with reference to that cause. This has always been considered as a very beneficial statute, and fit to be extended as far as the words will warrant; and the present case comes within the reason and the words of it.

BAYLEY, J. asked what he had to say, why the plaintiff might not recover the amount of the last item, for cash paid by the plaintiff for the stage hire of the defendant's son, which had no manner of reference to the business of an attorney. To which *Best* replied that in *Hill v. Humphreys*, 2 Bos. & Pull. 343, Lord *Eldon* had considered that an attorney would not be entitled to recover such items mixed with others in a taxable bill, if the statute were not complied with.

LORD ELLENBOROUGH, C. J. What was there said by Lord *Eldon* was with reference to a case where an attorney had delivered a bill including taxable items: but this is not the case of a bill delivered as an attorney, but an account of the plaintiff's whole demand against the defendant obtained under a Judge's order, as in any other case.

All the Court agreed in respect to the last item; and some of the Judges doubted whether the first item were to be considered as any thing more than an attendance by the defendant's desire for the purpose of compromising the suit against his brother.

Rule absolute.

Garrow and *Nolan* were to have supported the rule.

Denne, on the Demise of Bowyer, v. Judge.

11 East, 288. June 5, 1809.

Where one devises land to five trustees to sell and apply the money to certain uses, and afterwards makes the same persons his executors; they do not take the land as executors, but as devisees in trust and joint tenants. And at any rate, the case is not helped by the stat. 21 H. 8. c. 4, so as to pass the whole estate upon production of a conveyance purporting to be executed by the five, but the execution of which by three only, could be proved. But taking it to be a conveyance by the three only, it would sever the joint tenancy, and convey 3-5ths of the estate, to be held in common with the two remaining parts.

IN ejectment brought for a messuage at *Maidstone*, the lessor of the plaintiff derived title under the will of *T. Smith*, dated the 15th of *March* 1806, by which he devised his real property to five trustees named, in trust to sell the same, and apply the purchase money to certain uses. He also gave specific legacies, disposed of the residue, and made the same persons executors of his will, whom he had before appointed trustees of the real estate for the purpose of sale. Deeds of lease and release to the lessor of the plaintiff were then produced by him appearing upon the face of them to have been duly executed by all the five trustees, but the execution of three of them only was in fact

Garcia, Kingston Lent Assizes, 1800, 3 'Esp. N. P. Cas. 149, where *Heath*, J. held, that the attorney's demand could not be severed, though no bill were delivered by him before the action brought. But there the whole demand was connected with the plaintiff's character of an attorney.

proved. On the part of the defendant it was insisted, that this was a defective conveyance, and proved no title in the lessor to any part of the property. But the Chief Baron was of opinion that some estate at least passed to the releasee; either the whole, or 3-5ths, by severance of the joint estate, to be held in common with the two remaining parts: and therefore he directed the jury to find a general verdict for the plaintiff, which might be confirmed, or modified, or a nonsuit entered, as the court thought proper. A rule nisi having been obtained for entering a nonsuit, or confining the verdict to 3-5ths;

Best, Serjt., and *Roberts* shewed cause against the rule; endeavouring at first to sustain the verdict for the whole under the st. 21 H. 8. c. 4, which enacts, that where part of the executors, named in a will directing a sale of lands by executors, refuse to act, and the residue accept the charge, all bargains and sales of such lands by the acting executors shall be as good as if all the others refusing to administer had joined with them. And they referred to Co. Lit. 113. a, and *Bonifant v. Greenfield*, Cro. Eliz. 80, where the case was this; one devised lands to *J. S.* and three others and their heirs, to sell and apply the money to the performance of his will; and appointed the four his executors; one of whom refusing to meddle, the other three sold the land: and such sale was held good either by the common law or the statute. For when he devised the land to four to sell, and afterwards made them his executors, it was tantamount to devising at first that such his executors should sell.

Lord ELLENBOROUGH, C. J. The statute was passed to remedy the inconvenience where some of the executors refuse to act: but here there was no such refusal: so far from refusing to act, they have all apparently concurred in the conveyance, though there was a defect of proof as to the execution of two of them. Besides, here the estate was not devised to them as *executors* to be sold, but as *devisees*: though they were also appointed executors. They had nothing to do with the land as executors. If indeed the fund, when raised, had been distributable by them in that character, that might have brought the case within the rule contended for.

Lawes, for the defendant; admitting that the plaintiff was entitled to enter his verdict for 3-5ths; it was ordered by the Court accordingly.

Doe, on the several Demises of Andrew and Others, v. Lainchbury and Others.

11 East, 290. June 6, 1809.

A devise of all the residue of the testator's "money, stock, *property*, and *effects*, of what "kind or nature soever," to *A.* and *B.* "to be divided equally between them, share and "share alike," will pass *real* as well as *personal* estate, where from other parts of the will it appeared that the testator had applied the words *property* and *effects* to real estate. As where he began his will by stating "as to my money and *effects*, I dispose "thereof as follows," &c. and then proceeded to dispose of parts of his *real* estate. And again, having lands interlying with another's lands, he directed the purchase of the latter, if offered for sale, to be added to his other adjoining *property*.

IN ejectment for the recovery of one undivided moiety of certain messuages in the parish of *St. Andrew Holburn* in *Middlesex*, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case.

James Lainchbury being seised in fee of the said messuages, and also seised and possessed of other real and personal estate of considerable value, consisting, among other things, of an estate in the county of *Oxford*, part freehold and part copyhold, and of various leaseholds in the county of *Middlesex*, by his will, dated the 13th of *March* 1800, and duly executed and attested, devised as follows: "As to the little *money* and *effects* with which the Almighty has intrusted me, I dispose thereof as follows, that is to say, first, I order my

set of chambers (in *Gray's Inn*) to be sold within twelve months after my decease, together with such part of my fixtures, books, and furniture as may not be wanted and not hereinafter disposed of. I leave unto my brother *William Lainchbury* all my houses, farm, lands, and estate, both freehold and copyhold, situate at *Ramsdon* and *Finstuck* in the county of *Oxford*, for his life: all of which said premises, being copyhold, have been by me surrendered to the use of my will. And if my said brother *William* should happen to die before his present wife *Martha*, then I leave unto his said widow *Martha* 20*l.* a-year, payable quarterly during her life, out of my landed estate above-mentioned, by the person or persons next after in possession; and which after my said brother's death I leave all the said houses, farm, lands, and estate, as aforesaid, unto my nephew *James Lainchbury* for his life; he keeping the same in good tenantable repair, and committing no waste. And after the death of my nephew *James*, then I leave the same unto my sister's eldest son *Edward Lainchbury* for his life; he keeping the same in good tenantable repair, and committing no waste. And after the death of my nephew *Edward*, then unto his brother *William* for his life; he keeping the same in good repair without waste. And after the death of my brother and three nephews, as herein-above described, I then leave all the said houses, lands, farm, and estate, both freehold and copyhold, situate at *Ramsdon* and *Finstuck*, in the county of *Oxford* aforesaid, unto and amongst my five nieces, or as many of them as shall or may be then living, share and share alike." Then, after giving several life annuities to different relations, and some small legacies, the will proceeds: "I do hereby also charge all and every of my freehold and leasehold ground rents, that now do, or that shall or may hereafter belong to me, in *London* or elsewhere, with the several payments of all and every the said annuities herein mentioned." And then he directs, that on sale or assignment of any of the annuities, they shall cease. "And whereas I have reason to suppose that the two grounds and a little slip of woodland formerly belonging to the late *J. J.*'s estate which I purchased of his nephew *E. B.* must be sold after the death of the present owner, and as the owner of the said grounds has a right to a road to and through my lands to theirs, it may be advisable for me or my heirs to become the purchaser, in order to lay them together: and if it should ever so happen, it is my wish to have them purchased, and add them to my *other adjoining property*, and to be held in rotation during the several lives, as herein-before I have left and bequeathed my other lands. And for that purpose I bequeath 500*l.* in trust to purchase the said two grounds and woodland when a fair opportunity shall offer. And in the mean while, it is my request that the said 500*l.* so left be invested in the 3 per cent. consols. in my nephew *James's* name, in trust until the said purchase can be obtained, provided the same can be had in 10 years after my decease; and if not, I leave the said 500*l.* with all interest, unto my said nephew *James*," &c. The testator then gives small legacies to different friends, and concludes as follows; "And as to all the rest, residue, and remainder of my money, stock, *property* and *effects*, of what kind or nature soever the same may be at the time of my decease, I leave and bequeath the same, and every part thereof, unto my nephew *James* and my niece *Sarah Lainchbury*, for to be divided equally between them, share and share alike. And I do hereby also appoint my said nephew *James Lainchbury* and my niece *Sarah Lainchbury* executor and executrix, &c. and likewise joint and equal residuary legatees," &c. The testator died on the 2d of *April* 1802, leaving *William Lainchbury* of *Ramsdon*, in the county of *Oxford*, in the will named, his only brother and heir at law. By indentures of lease and release of the 7th and 8th of *July* 1803, being the marriage-settlement of the said *Sarah Lainchbury*, with *Paul Moore*, (both lessors of the plaintiff,) the said undivided moiety of the premises in question was conveyed to *T. Andrew* and *J. P. Vincent*, the other lessors of the plaintiff, as trustees upon the trusts therein mentioned. And by certain other indentures of lease

and release, dated the 14th and 15th of June 1808, the premises in question were conveyed by *William Lainchbury*, the testator's brother and heir at law, to *James Lainchbury*, the nephew, and the other of the residuary legatees of the testator, and one of the defendants in this action. The other defendants are tenants in possession. The question for the opinion of the Court was, Whether any estate in the premises in question passed by the said will to *Sarah*, now the wife of *Paul Moore*, and whether the plaintiff were entitled to recover? If he were so entitled, the verdict was to stand: if not, a nonsuit was to be entered.

Richardson, for the plaintiff, contended that the deviser's real property in *Oxfordshire* and *Middlesex* passed under the residuary clause, by the words "property and effects, of what kind or nature soever:" though preceded by the words "money and stock;" such being the apparent intention of the deviser. A residuary devise of all a man's "effects both real and personal," was held in *Hogan v. Jackson*, Cowp. 299, and 7 Bro. P. Cas. 467, to pass land. The addition of the word *real* in that case only shewed the intent more clearly: and here it is shewn by the introductory words, as to "my money and effects, &c. I dispose thereof as follows;" and then proceeding to dispose immediately of his *real* estate; which shews a more consistent use of the word *effects* as referring to realty than was shewn in the former case, where the introductory words were "as to my worldly substance." And the word *effects* being clearly used as descriptive of realty in the beginning of his will, it may fairly be presumed that he used it in the same sense in the residuary clause. In *Doe d. Chilcott v. White*, 1 East, 33, when the testator having before devised real and personal property to his wife for her life, empowered her to give what she thought proper of her *said effects* to her sisters for their lives: this was held to extend her disposing power over the realty. The cases of *Doe d. Spearing v. Butler*, 6 Term Rep. 610, and *Camfield v. Gilbert*, 3 East, 516, which may be cited for the defendant, only shew that the word *effects*, unless coupled with an apparent intention from the context to pass real estate, will only pass personalty; and there were circumstances in each of those cases to shew that the testator only meant to pass personalty. Here also the word *property* is used, which is as applicable to real as to personal estate. And in *Hurtep v. Brooman*, 1 Bro. Ch. Cas. 437, a devise of "all I am worth," which can mean no more than "all my property," was held to include realty. So Lord Mansfield in *Hogan v. Jackson*, Cowp. 304, considered a devise of "all a man's property" to be synonymous with "*real* and personal effects;" which were there held to carry the land. [Lord Ellenborough, C. J. observed, that there was a further reason in the present case for saying that the testator must have meant the *realty* by the word *property*, as he had evidently used it in that sense in another part of the will, where he directs money to be laid out in the purchase of a certain piece of land to be added to his "other adjoining property."]

Reader, contra, admitting this to be a question of intention, distinguished this case from *Hogan v. Jackson*, on account of the word *real* there added to *effects*: and from *Doe v. White* by the addition of the word *said* before *effects*, which referred it to the realty before devised, and which could only be enjoyed after the death of the first taker. And he relied principally on *Camfield v. Gilbert*, as coming nearest to the present case; where a devise of "all the residue of her *effects* wheresoever and whatsoever, and of *what nature kind* "or *quality* soever," &c. was held not to pass land. And though there was an exception added of wearing apparel and plate; and the division of the residue was to be made by her *executors*; from whence it might be collected that the testatrix only meant the residue of her *personal* effects: yet the indication of such an intention from these collateral circumstances was fully counterbalanced by her having before reserved a rent charge out of the land to her *heir at law* for life. Here the testator first directs his chambers, fixtures, books, and

furniture to be sold; and then he disposes of his real estate; and afterwards in the residuary clause he bequeaths his personality; associating the words "*property and effects*" with "*money and stock*," which latter are first mentioned by him: and the argument to be derived from such association was strongly put by *Grose, J.* in *Camfield v. Gilbert*; and that will serve as an answer to the observation made upon the use of the word *property* in a former part of the will. At any rate the heir will take if there be any doubt of the testator's intention.

LORD ELLENBOROUGH, C. J. It is a known maxim that an heir at law is not to be disinherited but by express words, or necessary implication. Here are no express words; but the question is, whether there be not a plain implication from the words used, that the testator meant to pass real as well as personal property and effects by the words used in the residuary clause. The word *effects*, indeed, in its natural sense, more peculiarly imports moveable personal property: but that this testator did not mean to confine it to that sense, the first sentence of his will shews. For he begins, "As to the little money and effects, &c. I dispose thereof as follows; that is to say" and then he first orders his chambers in *Gray's Inn* to be sold: that was not moveable personal property; it was at least a chattel real; and if no more, still it would shew that he meant to include chattels real. But he proceeds next to devise lands, &c. freehold and copyhold; and that clearly shews, that in his understanding of the word *effects*, it was sufficiently large to carry his real estate. He afterwards directs money to be laid out in the purchase of land to be added to his "*other adjoining property*." That gives us a standard of his meaning of the word *property*, and shews that he meant by it real estate. Then follows the residuary clause, by which he disposes of the rest of his "money, stock, property, and effects of what kind or nature soever," &c. Then having before shewn his meaning of the word *effects* and of the word *property*, as comprehending real estate, are we to look for a different use of the word by other persons on other occasions, when we have an index of his own mind to resort to in the very instrument before us, where he has told us that by those words he meant real estate. I know of no word in general use so inflexibly importing one meaning only as to be incapable of bending to the manifest sense of the party using it differently. In a late case, *Doe d. Tofield v. Tofield*, ante, 246, before us, we held that the words "*personal estate*" carried real estate, such being the clear meaning of the testator as collected from the rest of the will. In *Hogan v. Jackson* the word *effects* joined with other words importing the realty would carry it: and in *Camfield v. Gilbert*, we restrained it to personality, because it appeared by the context that personality only was intended. But here it evidently was meant in the larger sense, and therefore we must give it that meaning, without doing any violence to any different construction put upon the same word in any other case.

The rest of the Judges concurred in the reasons given by his Lordship.

Postea to the Plaintiff.

Gyfford v. Woodgate and Another.

11 East, 297. June 6, 1809.

In case against a judgment creditor for maliciously suing out an *alias fi. fa.* after a sufficient execution levied upon the plaintiff's goods under the first *fi. fa.*: held that the sheriff's returns indorsed upon the two writs (which writs had been produced in evidence by the plaintiff as part of his case) wherein the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, were *prima facie* evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons.

IN case, the declaration, after setting forth a judgment obtained by the

defendants against the plaintiff, stated that they sued out a writ of *feri facias* thereupon, indorsed to levy 71*l.* 1*s.* besides sheriff's poundage, &c.; by virtue whereof, the sheriff, at the defendants' request, seized the plaintiff's goods to a much greater amount than was necessary; yet that the defendants, before the sheriff had made any return to that writ, and before they could lawfully sue out another, wrongfully and maliciously sued out an alias *feri facias*, under colour and pretence thereof, indorsed to levy 72*l.* 2*s.* 4*d.* besides poundage, &c.; whereby the plaintiff was put to unnecessary expence and oppressed, &c. The defendants pleaded the general issue, and also a licence which was denied by the replication. At the trial before Lord *Ellenborough*, C. J. at *Westminster*, the writ of *feri facias* having been given in evidence on the part of the plaintiff, the following return annexed to it was required to be read by the defendant's counsel, as part of the instrument produced by the plaintiff; and though resisted by the plaintiff's counsel, was directed to be read by his Lordship. It ran thus—"By virtue of the writ annexed, I have seized and taken in execution the goods and chattels of the within named *E. Gyfford*, in my bailiwick hereafter mentioned, to be sold and disposed of; and at the request of the within named *E. Woodgate* the elder and *E. W.* the younger, the plaintiffs, and *E. Gyfford*, the defendant, I kept and retained the same in my custody until the return of the annexed writ; and at the return thereof, in pursuance of an agreement made between the said plaintiffs and defendant for that purpose, a writ of *alias feri facias*, returnable, &c. indorsed to levy 72*l.* 2*s.* 4*d.* besides sheriff's poundage, &c. was delivered to me the said sheriff, and at the request of the said *E. Gyfford*, I forbore to sell the same until the 26th of *August* last, when I sold and disposed of the same for the sum of 110*l.* 17*s.* and paid and applied the same as stated and set forth in my return to the writ of *alias feri facias*." To the *alias feri facias*, (also given in evidence) the sheriff made a very special return, (also read in evidence) stating, that he had paid to the now defendants the sum indorsed on the writ: That he had disposed of other part of the money for which the goods sold, in payment of rent and taxes, for which the now plaintiff was liable: and that he had always been ready to pay to the latter the residue thereof, if he would accept the same. On the part of the defendants it was contended, that these returns were conclusive evidence in support of the plea of licence, and shewed that all that the plaintiff now complained of had been sanctioned by him at the time. On the other hand, it was denied that the plaintiff *Gyfford*, who was no party to the sheriff's return, which was in effect made on the suggestion of the then plaintiffs, (the *Woodgates*) ought to be affected by its contents: and it was contended, that the execution having been irregularly made, it lay upon the defendants to shew the fact of the now plaintiff's licence and consent to that irregularity, and not the mere *dictum* of the sheriff, made in his own justification. Lord *Ellenborough*, C. J. however, was of opinion that this was *prima facie* evidence of the facts stated in the return, upon the ground that faith was to be given to the official act of a public officer, like the sheriff, even where third persons were concerned. That if the sheriff returned a rescue, the court above, to which the return was made, would so far give credence to it, that they would issue an attachment in the first instance: *Rex v. Elkins*, 4 Burr. 2129, though upon an indictment for a rescue, it would be open to the defendant to shew that the return was false.

Objection was now again made, upon motion for a new trial, by *Garrow* and *Curwood*, to the admissibility of the evidence and the direction of the Lord Chief Justice: but his Lordship (and the rest of the Court concurred with him,) still thought that the sheriff's return was *prima facie* evidence of the facts therein stated; and therefore the Court refused a rule,

Law v. Hodson.

11 East, 306. June 6, 1809.

The stat. 17 G. 3. c. 42, which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller; if bricks be sold and delivered under the statutable size unknown to the buyer, the seller cannot recover the value of them.

THIS was an action of *assumpsit* to recover the value of a quantity of bricks which had been sold and delivered by the plaintiff to the defendant. An objection was taken at the trial, that the bricks were made of less dimensions than is required by the stat. 17 Geo. 3. c. 42, which after reciting "that inconveniences had arisen to the public by frauds committed in lessening the size of bricks under their usual proportion, without any diminution of price; for remedy thereof, and for the common good and benefit of the subject," enacts, that all bricks made for sale, shall be of certain dimensions therein specified: and then gives a penalty, on conviction, of 20s. per thousand for the breach of this regulation. It appeared in evidence, that the bricks in question had been seen by the plaintiff, and selected by him out of a larger quantity, some of which had been rejected by him for other defects, but no notice had been taken of the size; and the bricks were afterwards received and used by the defendant. But Lord *Ellenborough*, C. J. being of opinion, that the making and selling of such bricks was a fraud upon the statute, nonsuited the plaintiff.

Garrow now moved to set aside the nonsuit, on the ground that, however the breach of this law might have been a reason for the defendant's rescinding the contract, and returning the bricks when he discovered them to be under the statuteable dimensions, yet having accepted and actually converted them to his own use, the contract was executed, and the vendee was at all events liable to pay the actual value of the goods. That the legislature had not avoided the contract itself, but only subjected the brickmaker to a penalty, which was also limited to be sued for within a month.

LORD ELLENBOROUGH, C. J. This was a fraud upon the buyer, whom the legislature meant to protect. He gave credit to the maker at the time that the bricks were of the statuteable size, and they turned out to be all under that size.

GRÖSE, J. The legislature has prohibited the general sale of bricks which are under size.

LE BLANC, J. It did not appear that the defendant bought the bricks, knowing them to be under size.

BAXLEY, J. The policy of the act was to protect the buyer(a) against the fraud of the seller, and this can only be done by holding that the latter shall not recover the value of such bricks so sold. Rule refused.

Bogget v. Frier and Another.

11 East, 301. June 9, 1809.

A wife cannot as feme sole, maintain trespass for breaking and entering her house and seizing goods in her possession, by replying, in answer to a plea of coverture, that her husband had four years before deserted her and gone beyond seas without leaving her any means of support, and that he had not since returned, nor been heard of by her; and that during all the time she had lived separate from him, and had traded and contracted as a sole trader and single woman, and as such was lawfully possessed, &c.; the defendant rejoining that the husband was a natural born subject, &c. and had not abjured the realm, or been exiled or banished, or religated therefrom.

TRESPASS for breaking and entering the dwelling-house and shop of the

(a) Vide *Johnson v. Hudson*, ante, 180, and note this distinction.

plaintiff *Sarah Bogget*, on the 8th of *April* 1807, and expelling her therefrom, and taking her goods, &c. Plea, That the said *Sarah* at the time of the trespass committed, and from thence hitherto hath been and still is, under coverture of one *Joseph Bogget*, her husband, who is still alive, &c. Replication, That before the time of committing the trespass, to wit, on the 17th of *February* 1805, the said *Joseph* deserted and left the said *Sarah*, and departed out of this kingdom to certain parts beyond the seas, to wit, to *America*, without leaving any means of necessary provision and support to the said *Sarah*; and that from the time of his said departure hitherto the said *Joseph* has not returned to this country, nor corresponded with, nor been heard of by the said *Sarah*; and that during all that time the said *Sarah* hath lived in this kingdom separate and apart from the said *Joseph*, and made contracts and obtained credit as a single woman, and for her necessary support and maintenance hath during all that time carried on the trade and business of a merchant as a single woman and sole trader, and as such was lawfully possessed of the said dwelling-house and shop in the declaration mentioned. Rejoinder, That the said *Joseph* was born within this realm, and from his birth hitherto hath been and still is a subject of our lord the king, owing allegiance, &c.; And that the said *Joseph* hath not at any time hitherto abjured this realm, or been exiled or banished or religated therefrom, &c. To this there was a general demurrer, which

Roberts was to support: but he was asked in the first instance by the court, whether he could distinguish this case in principle from that of *Marshall v. Rutton*, 8 Term Rep. 545; on which he urged the departure of the husband in this case out of the realm, and consequently beyond the reach of process, under circumstances which evinced a permanent desertion of his wife and country. And he also referred to several cases and authorities, which either bore against the doctrine of *Marshall v. Rutton*, or distinguished this case from it; particularly that of *de Gaillon v. l'Aigle*; (a) where the wife having traded and obtained credit in this country, as a feme sole, in the absence of her husband, a foreigner, who resided abroad, was held liable to be sued for her own debts.

But all these cases, it was observed by the Court, were antecedent to that of *Marshall v. Rutton*; and, so far as they were opposed to, were overruled by that decision, which restored what was the old established rule of law, founded generally upon the relation of husband and wife, by which, with certain known specific exceptions, no married woman was capable of contracting or acting as a feme sole, or of suing or being sued as such. And Lord *Ellenborough*, C. J. referred to *Marsh v. Hutchinson*, 2 Bos. & Pull. 226, which was under discussion at the same time as *Marshall v. Rutton*, and was afterwards decided in conformity with that determination, as bearing strongly upon the present case. And the same principle he said was acted upon in *Chambers v. Donaldson*, 9 East, 471.

The only cases mentioned by *Roberts*, as subsequent in time to these, were *Carroll v. Blencow*, 4 Esp. N. P. Cas. 27, and *Farrer v. Granard*, 1 New Rep. 80. The first was the case of a married woman, whose husband had been transported for 7 years from *March* 1794, and during this time she had sold and delivered goods to the defendant, for which the action was brought, and which came to trial at the sittings in C. B. after *Easter* in *June* 1801: and it was objected, that the term of transportation being expired, the husband was competent to sue for this debt. But there being no evidence of the husband's return, Lord *Alvanley*, C. J. permitted the plaintiff to recover. In the other case, which was in *Trinity* term 1804, the Court overruled, upon general demurrer, a replication to a plea of coverture, stating, that the defendant's husband resided in *Ireland*, and the defendant in this kingdom, separate from her husband as a single woman, and as such contracted and promised, &c.:

(a) 1 Bos. & Pull. 357, where all the prior cases are collected.

the Lord Chief Justice of C. B. saying that the terms of the replication were consistent with a mere *temporary* absence.

Neither of these cases were considered by the Court as bearing against the opinion they had intimated: and therefore, without hearing *Littledale*, who was to have supported the rejoinder, they gave judgment for the defendants. (1)(2)

The King v. The Inhabitants of the Parish of Bridekirk in Cumberland.

11 East, 304. June 10, 1809.

To an indictment against the inhabitants of a parish for non-repair of a highway within it, a plea stating that the parish was immemorially divided into several townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that part of the highway indicted was within the township of *G. B. &c.* and that the residue, &c. was within the township of *L. B. &c.* and that the respective parts ought to be repaired by the inhabitants of the respective townships, &c. is bad; without specifying *what part of the highway lay within one township, and what part within the other.*

THIS was an indictment for the non-repair of a common highway within the parish; which, after stating the *termini* of the highway, charged that a *certain part* of the same highway between such and such places (describing them with the length and breadth,) on the 1st of June 1807, &c. was out of repair, &c.: and then it alleged, that the inhabitants of the parish of *Bridekirk* were immemorially bound to repair the said highway. The defendants pleaded, that the parish of *Bridekirk* from time immemorial was divided into seven townships (naming them,) and that the inhabitants of the said several townships respectively from time immemorial have repaired, independent of each other, when necessary, such and so many of the several and respective

(1) The question, In what cases a feme-covert may sue and be sued as a feme-sole, has of late been much considered. A classification of those cases may be useful.

1. Whatever, in contemplation of law, amounts to a *civil death* of the husband, will, of course, devolve on the wife the rights and liabilities of a feme-sole. Thus, in *England*, abjuration of the realm and entering into religion formerly had, and perpetual banishment still has, this effect. In this country, a sentence of imprisonment for life would be attended with the same result.

2. Where the husband has been transported for a term of years, and has not returned, whether the term of his transportation has expired or not. *Sparrow v. Carruthers*, cited 2 Bla. Rep. 1197, 1 Term Rep. 7, 1 Bos. & Pull. 359; *Carrol v. Blencowe*, 4 'Esp. 27.

3. Where the husband is an alien, and has left the country. *Walford v. Duchesse De Pienne*, 2 'Esp. 554; *Franks v. Duchesse De Pienne*, 2 Esp. 587; *De Gaillon v. Victoire Harel L'Aigle*, 1 Bos. & Pull. 357, connected with the observation of *Heath, J.* in *Farrer v. Countess of Granard*, 1 New Rep. 80; *Burfield v. Duchesse De Pienne*, 2 New Rep. 380.

In Lord *Mansfield's* time it was held, that where a separation had taken place between the husband and wife, and a competent maintenance had been paid to her, she might be considered as a feme-sole. *Ringshead v. Lady Lanesborough*, lately reported in *Lawes on Pleading in Assumpsit*, 552; *Barwell v. Brooks*, reported also in the same book, p. 560; *Corbett v. Poelnitz*, 1 Term Rep. 5. It was soon afterwards held, that adultery of the wife, and separation without a separate maintenance, would not subject her as a feme-sole. *Gilchrist v. Brown*, 4 Term Rep. 766. But where the case does not fall within one of the three classes above specified, it is now perfectly settled, that though there has been a separation, and a competent maintenance paid to the wife, though she has appeared as a feme-sole, and contracted as such, and though the husband resides in a foreign country, the wife cannot sue or be sued as a feme sole. *Marshall v. Rutton*, 8 Term Rep. 545; *Mac Namara & uz. v. Fisker*, 3 'Esp. 18; *Marsh v. Hutchinson*, 2 Bos. & Pull. 336; *Farrer v. Countess Dowager of Granard*, 1 New Rep. 80.

(2) [In Pennsylvania, there is no *feme-sole-trading*, but such as is licensed and regulated by the Statute of February 22, 1718. (Purd. Dig. 471.) *Jacobs v. Featherstone*, 6 W. & S. 346. See also *Commonwealth v. Cullins*, 1 Mass. 116. *Gregory v. Paul*, 15 do. 31. *Abbott v. Bayley*, 6 Pick. 89, for the rule in Massachusetts.—W.]

ancient common king's highways respectively situated within the said respective townships as would otherwise be repairable by the inhabitants of the said parish at large. That *part* of the said part of the said king's common highway in the indictment specified, and thereby supposed to be ruinous, now is, and during all the time in the indictment mentioned *hath been situate in the said township of Great Broughton* in the said parish, and during all that time was, and still is, a king's common highway, which but for the said prescription or usage would have been and would be repairable by the inhabitants of the said parish at large: and that *the residue of the said part* of the said king's common highway in the said indictment specified, &c. is, and during all the time, &c. hath been situate within the said township of *Little Broughton* in the said parish, &c. And by reason of the premises the inhabitants of the said parish at large ought not to be charged with the repairing the said *part*, &c. of the highway in the indictment specified; but the *respective parts thereof*, situate in the said respective townships of *Great Broughton*, and *Little Broughton*, ought to have been and still ought to be repaired by the respective inhabitants of these respective townships independent of the rest of the inhabitants of the said parish, &c. To this there was a special demurrer, because the plea did not set forth or distinguish *what part* of the highway alleged to be ruinous lies within the township of *Great Broughton*, and *what part* within the township of *Little Broughton*.

Holroyd argued in support of the demurrer, that the inhabitants of the parish at large, being liable at common law to the repair of all highways within it, could only discharge themselves by shewing with certainty on whom the burthen lay, and in what right. For which he cited *Rex v. Sheffield*, 2 Term Rep. 106; *Rex v. Penderryn*, ib. 513, and *Rex v. Great Broughton*, 5 Burr. 2700. The plea therefore should have stated, that such a part of the highway, specifying it, was situate within the township of *Great Broughton*, the inhabitants of which township were immemorially bound to repair it: and that such other part, specifying it, (or the residue of the highway stated in the indictment) was situate within the township of *Little Broughton*, and that the inhabitants of that township were immemorially bound to repair such other part.

The Court were decidedly of opinion, that this objection was well founded. That the parishioners must necessarily know the limits of the several townships within it; and were bound to shew with certainty the parties who were liable to repair every part of the highway indicted, and in what right they were so bound. But the Court offered to give *Littledale*, who was counsel for the defendants, leave to amend before argument; which he accepted.

The King v. Teal and Others.

11 East, 307. April 22, 1809.

All the defendants convicted upon an indictment for a conspiracy must be present in court when a motion for a new trial is made on behalf of any of them.

A witness admitting herself to have before sworn falsely upon the particular point, but attributing it to the persuasion of the defendant, is not an *incompetent* witness against him on an indictment for a conspiracy: but the objection goes strongly to her credit.

Where a witness admitted herself to have been connected with different men, and the Judge thought it immaterial to hear witnesses tendered by the defendant to shew her connection with other persons; as leading merely to the same conclusion as to her character; the Court being satisfied that this could have had no influence on the verdict, refused a new trial on that account.

THIS was an indictment against *Thomas Teal*, *Hannah Stringer*, *G. Etherington*, and *Sarah Cumberland*, for conspiring falsely to charge the prosecutor with being the father of a bastard child born on the body of *Hannah Stringer*,

which indictment had been removed by writ of *certiorari*, at the instance of the defendants, into this Court. Before the trial a *noli prosequi* was entered as to *Hannah Stringer*; and at the last *York* assizes *Teal* and *Cumberland* were convicted upon four counts of the indictment, and *Etherington* was acquitted. On the fourth day of the last term, *Teal* appeared personally in Court, and *Cockell*, Serjt. on his behalf moved for a new trial, on the ground that improper evidence had been admitted on the part of the prosecution, and that other evidence tendered on the defendant's part had been improperly rejected.

The Court inquired if all the defendants who had been convicted were then in court; and being informed that *Sarah Cumberland* was not present, they said they could not entertain a motion for a new trial in her absence, of which, if granted, she must also have the benefit; because if such a precedent were once established, the person most criminal might keep out of the way, and take the opinion of the Court by putting forward one of the other defendants who had been convicted. They also inquired if the defendants had defended separately at the trial, which was answered in the negative; but *Cockell*, Serjt. added, that he was now only instructed by the defendant *Teal*, and that his client had no controul over *Sarah Cumberland*, and could not compel her attendance: and it would be very hard for him in a case where there was no pretence of any collusion, to be deprived of the opportunity of moving for a new trial by her absenting herself. But the Court said, that they could not permit the motion to be made, unless all the defendants appeared, or a special and separate ground were laid before them, for dispensing with the general rule. But they said they would bear in mind what passed now when the defendants were brought up for judgment. And the prosecutor not moving for *Teal's* commitment, he was not committed into custody.

Afterwards on the 6th of *May*, *Teal* and *Cumberland* being present in Court, Mr. Justice *Lawrence's* report of the evidence on the trial was read; and *Cockell*, Serjt. would then again have moved for a new trial: but the Court said, that the four days being now expired, he was not entitled to make such a motion; though they would hear any arguments which he had to suggest upon the report, in order to satisfy them in the performance of their own duty, that justice had not been done upon the trial: and if they were of opinion, on hearing those arguments, and considering the learned Judge's report, that there ought to be a new trial, they would of their own accord award it. And they referred to *The King v. Holt*, 5 Term Rep. 436, and to *The King v. Atkinson*, there cited. The defendant's counsel accordingly stated the grounds upon which he impeached the former trial, and the Court said they would consider of them; and in the mean time the Court committed the defendants to the custody of the marshal, without making any rule for a new trial.

And now in this term Lord *Ellenborough*, C. J. said, that the Court had considered the objections which had been made to the trial, and though not in the form of a motion for a new trial, yet with the same benefit to the parties concerned: and they were of opinion that there was no foundation for either of them. After this, affidavits in mitigation were put in by the defendant's counsel and read, and the defendants were directed to be brought up for judgment on *Monday* the 19th of *June*, when the Court, taking into consideration the imprisonment they had already suffered, and the expences of the prosecution, sentenced *Teal* to six months, and *Cumberland* to two months imprisonment in *York* gaol.

The objections which *Cockell*, Serjt. urged on the 6th of *May*, against the verdict were, 1st, that *Hannah Stringer*, who was examined at the trial on behalf of the prosecution, was an incompetent witness. The general purpose for which she was called was to prove that she had before sworn, at the instigation of the defendant *Teal*, to the prosecutor having been the father of her bastard child; but that in truth the defendant *Teal* was the father; and consequently, she was to prove herself forsworn. It was therefore objected on the

part of the defendant, not only that she was incompetent to contradict the facts she had before sworn to; which seemed to be admitted, he said, by the learned Judge; but that she was an incompetent witness for any purpose, on the ground of her acknowledged perjury and infamy. It was urged, that if she had been convicted of perjury at common law, she could not have been examined at all unless restored to credit by the King's pardon; or in the case of felony, by burning in the hand, which operates as a statute pardon: and that it was not the *punishment* which worked the infamy, but the *crime*, as stated by Ld. Ch. B. *Gilbert*, Gilb. L. of Evid. 127, and *Hawkins*, 2 Hawk. ch. 46. s. 19, &c. That it made no difference whether the infamy were found by verdict, or by the confession of the party tendered as a witness; for there could not be more certain evidence of the fact than the confession of the party in open court. Being asked by the Court what he had to say to the common case of an accomplice giving evidence, though admitting himself guilty of a fact, such as treason, which, if convicted of it, would render him incompetent? he answered, that there the accomplice did not admit himself guilty of the very *crimen falsi* which shewed him unworthy of being believed. [*Le Blanc*, J. observed from the report, that the learned Judge at the trial was of opinion that the woman might be examined on those counts, which did not state that she went before a magistrate and took the oath of filiation.] Objection was taken that evidence could not be received of what the woman had sworn before the magistrate, which had been taken down in writing, unless the deposition itself was produced: on which the magistrate, before whom it was taken, offering to put in the deposition, though that was put aside for the sake of regularity at the instant, the examination of the witness *Stringer* went on with reference to such deposition. He then insisted much upon the case of *Titus Oates*, 4 St. Tr. 47, where the evidence of a witness, that he had before perjured himself at the suggestion of the defendant, was rejected by this Court on a trial at bar; though the witness had not been convicted of perjury; and this decision was approved of in the case of *Elizabeth Canning*, 10 St. Tr. 390. Upon the same principle, one who admits himself to be an infidel is disqualified to be a witness. [Lord *Ellenborough*, C. J. An infidel cannot admit the obligation of an oath at all, and cannot therefore give evidence under the sanction of it.(1) But though a person may be proved on his own shewing, or by other evidence, to have forsworn himself as to a particular fact; it does not follow, that he can never afterwards feel the obligation of an oath: though it may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether. But still that would not warrant the rejection of the evidence by the Judge, it only goes to the credit of the witness, on which the jury are to decide.] Ld. Ch. B. *Gilbert*,(a) says, "another thing that derogates from the credit of a witness is, if upon oath he affirmed directly contrary to what he asserts, &c.; this takes from the witness all credibility, inasmuch as contraries cannot be true." And again he says, ib. 139, that "if the mother of a bastard child charge two persons, she loses her credibility, that she cannot charge either of them." [Lord *Ellenborough*, C. J. observed, that those passages, contrasted with others, pointed at the distinction between *competency* and *credibility*. And then called on *Cockell* to state his other objection on account of the rejection of evidence proposed.]

The other objection amounted to no more than this, that *Hannah Stringer*, the witness, having admitted that she had been connected with two or three persons, the learned Judge thought it immaterial to examine witnesses tendered on the part of the defendant to shew that she had been also connected at other times with several other persons; considering that by her own shewing she was a common woman. But it was now urged that the extent of her prostitu-

(1) Vide *Curtiss v. Strong*, 4 Day 51.

(a) P. 136, 6th edition.

tion might have shaken her credit in a greater degree. On this Lord *Ellenborough*, C. J. observed, when he afterwards delivered the opinion of the Court, as before mentioned, against the objections, that if the evidence had been admitted, it could have made no difference, at least it ought not to have made any difference in the verdict.

Doe, on the Demise of Spicer v. Lea.

11 East, 312. June 10, 1809.

A lease of lands by deed, since the new stile, to hold from the feast of *St. Michael*, must be taken to mean from *New Michaelmas*, and cannot be shewn by extrinsic evidence to refer to a holding from *Old Michaelmas*: and a notice to quit at *Old Michaelmas*, though given half a year before *New Michaelmas* is bad.

IN ejectment for lands in *Wiltshire*, the demise was laid on the 12th of *October* 1808, and it appeared that notice was given on the 24th of *March*, to quit on the 11th of *October*, *Old Michaelmas* day. The facts were, that the original tenant, who had under-let to the defendant, had in 1780 taken the farm by parol from old *Michaelmas*; but after holding for about three years, he took a lease of it for 13 years, to hold from the feast of *St. Michael*; and after the determination of that lease, which expired in 1796, the tenant had held on without coming to any new agreement. It was thereupon objected at the trial, on the part of the defendant, that the tenant must be taken to hold according to the terms of that lease; and that being to hold from the feast of *St. Michael* generally, must be taken to mean *New Michaelmas*, and could not be explained by parol evidence to mean *Old Michaelmas*; and then the notice to quit at *Old Michaelmas* was wrong. *Chambre, J.*, before whom the cause was tried, agreed that the terms of the lease concluded the holding to be from *New Michaelmas*: but that as the notice was served before *New Lady-day*, and the tenant had thereby had more than six months notice to quit, no injustice was done to him; and that the notice was sufficient; he therefore directed the jury to find a verdict for the plaintiff. But as the point was new, he gave the defendant's counsel leave to move to enter a nonsuit, if the Court should think the objection well founded. A rule *nisi* for that purpose having been obtained in the last term;

Jekyll and East now shewed cause against the rule, and contended, first, that the lease being from *Michaelmas* generally, though prima facie that must be taken to mean *New Michaelmas*, was capable of being shewn by extrinsic evidence, such as the fact of the previous holding, and the understanding of the parties, to mean *Old Michaelmas*. And they referred to *Forley d. The Mayor, &c. of Canterbury v. Wood*,^(a) *Kent, Sum. Assizes 1794*, Lord *Kenyon*, C. J., where the tenancy was from *Michaelmas* to *Michaelmas*, and the notice was given on the 20th of *March* 1793, to quit on the 10th of *October* following; which was objected to be insufficient, as it ought to have been to quit either at *Michaelmas* generally, or on the 29th of *September*. But Lord *Kenyon* permitted evidence to be given that by the custom of the county of *Kent* such a tenancy from *Michaelmas*, generally, was considered to be *Old Michaelmas*; and held the notice to be regular. [Being asked whether the holding there were by deed?] they said, that it did not so appear; but that would make no difference; for here the lease had expired, and the tenant only held by implication under the terms of it. 2dly, Supposing the evidence to be conclusive that the tenancy was from *New Michaelmas*, yet the notice was sufficient. The law required reasonable notice,^(b) which had been deemed in

(a) This was cited from *Runnington's Ejectment*, 112. The same case is reported in 1 *Esp. N. P. Cas.* 198, with some variation.

(b) Vide per *Wilmut, J.* in *Timmins v. Rowlinson*, 3 Burr. 1609.

these cases to be half a year's notice to quit before the end of the tenant's year : and here the tenant had had half a year's notice and more ; for the notice was given before *New Lady-Day* ; and therefore he could not complain ; for no prejudice could ensue to him from the excess of the time, and he had all the benefit of it, if he pleased to remain after *New Michaelmas*. It was therefore different from the case where a notice is given to quit at a different quarter or half year from the commencement of the tenant's holding ; for there he would have to pay additional rent, and be subjected to all the intermediate burthens of his tenure. But here no such inconvenience could ensue. They also wished to rely on evidence of a subsequent waiver ; but were answered, that that point was not reserved.

Lens, Serjt. and *Casberd*, contra, were stopped by

The Court, who were of opinion, on the first point, that no extrinsic evidence could be given to explain the time of holding stated in the deed, which must be taken to be from *New Michaelmas*, since the act of parliament for altering the stile : unless, as Lord *Ellenborough* observed, there had been any reference in the deed itself to the prior holding. And nothing having been shewn, subsequent to the expiration of the lease, from whence a new time of holding could be inferred, the tenant must be taken to have held on under the terms of that lease. They were also of opinion with the defendant on the second point ; that considering the tenant's year to end at *New Michaelmas*, the notice to quit at *Old Michaelmas*, though given half a year before *New Michaelmas*, was bad ; for the notice must be to quit at the end of the tenant's year ; and if it might be given to quit 12 days afterwards, it might as well be at any other time. That the landlord could not alter the period of quitting by his notice ; and this was given specifically as a notice to determine the tenancy at *Old Michaelmas*, and not as a liberty to the tenant to remain at his option for so long after his tenancy expired.

Rule absolute.

Taylor v. Forbes.

11 East, 315. June 12, 1809.

Affidavit of debt, stating that defendant was indebted to the plaintiff in so much for goods sold and delivered (not saying by the plaintiff) to the defendant, is insufficient.

THE affidavit of debt made by the plaintiff to hold the defendant to bail stated that the defendant was *indebted* to the plaintiff in so much, for goods sold and delivered to the defendant, (not saying " sold and delivered by the plaintiff to the defendant.") On which *Burrough* obtained a rule calling on the plaintiff to accept common bail, upon the insufficiency of such affidavit : and cited *Mackenzie v. Mackenzie*, 1 Term Rep. 716 ; *Perks v. Severn*, 7 East, 194, and *Cathrow v. Hagger*, 8 East, 106, as in point. *Marryat* now shewed cause, and said that *Cathrow v. Hagger* went further than the former cases, and was decided without reference to *Coppinger v. Beaten*, 8 Term Rep. 338, which was contrary to it. And that the meaning of this affidavit being obvious, the Court would not, as they had declared in the last-mentioned case, entangle the suitors in unnecessary niceties. But by

LORD ELLENBOROUGH, C. J. The strictness required in these affidavits is not only to guard defendants against perjury, but also against any misconception of the law by those who make the affidavits. And the leaning of my mind is always to great strictness of construction where one party is to be deprived of his liberty by the act of another.

Per Curiam,

Rule absolute.

Sprang v. Monprivatt.

11 East, 316. June 12, 1809.

Where a writ of error is allowed before the expiration of the time permitted to the bail to render their principal, the bail are entitled to stay the proceedings against them pending the writ of error, on the terms of undertaking to pay the damages recovered, or to surrender the defendant within four days of the determination of the writ, if determined in favour of the original plaintiff.

WIGLEY obtained a rule on the plaintiff to shew cause why the proceedings against the bail upon the writs of *scire facias* should not be stayed pending the writ of error; the bail undertaking to pay to the plaintiff the damages recovered, or to surrender the defendant within four days of the determination of the writ of error, in case it should be determined in favour of the original plaintiff. (a) This was now opposed by **Marryat**, unless the bail undertook to pay the damages and costs in the original action, the costs of proceeding against them, and of this application, and also the costs in error, within four days after the determination of the writ of error, if determined in favour of the original plaintiff. And the question was, on which of these conditions the proceedings were to be stayed.

The writ of *capias ad satisfaciendum* issued, and was lodged in the sheriff's office on the 25th of April, returnable on the 3d of May; on which *non est inventus* was returned. The writ of error was tested on the 6th, and allowed on the 9th of May. The *scire facias* against the bail issued on the 8th of May, was lodged with the sheriff on the 9th, and was returnable on the 15th of May. The *alias scire facias* issued on the 25th, was lodged with the sheriff on the 26th, and was returnable on the 2d of June, the first day of this term: on which last day the rule to appear to the writs of *scire facias* was given.

Marryat, against the rule, urged, that though a writ of error was a *superseas* as to the principal, it was not so as to the bail; which was proved by the necessity the bail were under to apply to this Court to stay proceedings against them, pending the writ of error: and therefore, coming to ask a favour of the Court, they must submit to fair terms. The case of *Capron v. Archer*, indeed, seems to have proceeded on the ground that the allowance of the writ of error was a *superseas* even as to the bail: and that it was enough that the allowance was before the time indulged to the bail for rendering, though notice of the allowance were not given till afterwards: but that was decided by only two Judges in court, and stands alone. Whether the writ of error there were sued out before or after the *capias* does not appear: but here the writ of error was not sued out till after the return of the *capias ad satisfaciendum*, and the bail did not apply to stay the proceedings till the time for rendering their principal was out: in which case, it was said by the Court, in *Richardson v. Jelly*, 2 Stra. 1270, that they would not give the bail any time for that purpose, but only four days to pay the money in, after the judgment was affirmed.

Wigley, contra, relied on the case of *Capron v. Archer*, where a similar rule was granted on the ground, as it is expressed in the report, that the defendant's writ of error was allowed before the time was expired within which the bail had indulgence to surrender the principal. That must mean after the first *scire facias*; and shews that the allowance of the writ of error was not till after the *capias ad satisfaciendum*: and the notice of the allowance there could not have been given till after the expiration of the time for rendering; because the report states, that the writ of error was allowed before the time expired within which the bail had indulgence to surrender. Here the allow-

(a) This is according to the form of the rule in *Capron v. Archer*, 1 Burr. 340, which was referred to on moving for the rule.

ance of the writ of error, which was on the 9th of *May*, was clearly before the issuing of the second *scire facias*,^(a) and therefore within the precedent of *Capron v. Archer*, 1 Burr. 340, and *Buchanan v. Alders*, 3 East, 546, where further terms were imposed upon the bail, went upon the ground that the bail were fixed before the writ of error was sued out; which recognizes the same principle. [*Le Blanc*, J. asked if he were aware of the case of *Copons v. Blyten*, 1 New Rep. 67, which seems to have proceeded on the time within which the bail applied for the indulgence, and not upon the time of the allowance of the writ of error. To which it was answered, that the practice was different in C. B.] And

Lord ELLENBOROUGH, C. J., after consulting with the rest of the Court, said, that they were of opinion that consistently with the cases which had been decided in this court, the time to be looked to was when the writ of error was allowed, and not when the indulgence was applied for; and therefore, in this case the writ of error having been allowed before the time allowed for rendering the principal was out, the rule must be made absolute on the terms in which it was moved.

Fricker v. Eastman.

11 East, 319. June 12, 1809.

A Judge's order, "that upon payment of debt and costs by a certain day all proceedings should be stayed," is only conditional on the defendant.

A RULE was obtained on the defendant to shew cause why a Judge's order, dated the 17th of *May* last, ordering "that upon payment of 62*l.* 14*s.* the debt, and the costs to be taxed by the master, on or before *Wednesday* next, all proceedings should be stayed," should not be made a rule of Court; and why the master should not be directed to tax the plaintiff his costs: the plaintiff intending afterwards to move for an attachment upon this rule. On the 15th of *May*, an order for time to plead expired. On the 16th, the defendant took out a summons for the plaintiff to shew cause why, on payment of the debt and costs within a week, further proceedings should not be stayed; on which the plaintiff's attorney consented to the order in question, which was accordingly obtained on the 17th; and but for this order, the plaintiff would have been entitled to sign judgment for want of a plea on that day. Notwithstanding this, the defendant waited till the 24th of *May*, when the order for the payment of the debt and costs was out; and then he pleaded the general issue; which the plaintiff refused to accept, and applied to the master to tax the costs: the master however refused to do so, considering that order to be conditional: whereupon the plaintiff obtained the present rule; and the question was, whether such an order were *conditional* or *peremptory*?

Barrow resisted the rule, relying upon the general understanding in the master's office and amongst the practitioners, that such orders were only conditional in this court, though peremptory in C. B.^(b) and such he insisted was the grammatical construction of the words of it.

Holroyd, contra, insisted that as the effect of such an order was to stay the plaintiff from proceeding in the mean time, it must in its nature be considered

(a) It seems from 1 Tidd, 145, 6. (2d edit.) and the result of the cases, that as matter of right, the bail cannot render their principal after the return of the *capias ad satisfaciendum*. But by the indulgence of the Court, where the proceedings are by bill, the bail may render any time before the rising of the Court on the return-day of the second *scire facias* or of the first *sci. fa.*, where a *scire feci* is returned. Where the proceedings are by original, they may render at any time before the rising of the Court on the appearance-day, or *quarto die post* of the return of the second *scire facias*, or of the first, where a *scire feci* is returned.

(b) Vide Barnes, 263. Pr. Reg. 259.

as peremptory; and also by analogy to rules of court drawn up on payment of a sum of money, which are always deemed to be compulsory, (a) except in the common case of paying money into court, where there is no stay of proceedings.

LORD ELLENBOROUGH, C. J. It is true that the order procured for the defendant an immediate stay of proceedings up to the 24th, by which he has secured to himself an advantage without any equivalent to the plaintiff, unless the order be considered as absolute: but this ought not to be taken by implication when the plaintiff might have required words of obligation to be inserted in the order, as is very frequently done. But as the order is now drawn up, the strict construction of the words is only to make it conditional: and such has been the general understanding in the profession.

Per Curiam,

Rule discharged.

Hill v. Jones.

11 East, 321. June 12, 1809.

If bail to the sheriff be put in above, and exception taken *before* an assignment of the bail-bond, they are bound to justify notwithstanding such assignment.

THE defendant was arrested on the 1st of *May*, above 60 miles from *London*, and gave a bail-bond to the sheriff: on the 6th, the same bail were filed above: on the 10th, exception was taken to the bail; and they not having justified by some mistake, the plaintiff ten days afterwards took an assignment of the bail-bond, and commenced proceedings thereon. In the mean while the defendant had obtained further time for justifying his bail, and then applied to set aside the proceedings for irregularity: and *Phelps*, on his behalf, contended that the plaintiff having taken an assignment of the bail-bond had thereby precluded himself from objecting to the sufficiency of the same bail, and waived his exception; upon the same principle that he could not have excepted to them *after* he had taken an assignment of the bail-bond, (b) *Espinasse*, contra, insisted on the necessity of justifying the bail, the exception having been well taken at the time. That bail regularly excepted to, and not justified, are considered as no bail: and the plaintiff is thereupon entitled to take an assignment of the bail-bond: and that he ought not to be placed in a worse condition by the defendant's having put in the same bail above.

The Court directed the matter to stand over: and on this morning, *Le Blanc*, J. said, that they were of opinion that the exception to the bail having preceded the assignment of the bail-bond, the defendant was bound to justify them. But under the circumstances, they gave leave to the defendant to justify his bail after the usual time. (1)

(a) *King q. t. v. Clifton*, 5 Term Rep. 257.

(b) 1 Tidd, 133, cites 1 Salk. 97, and 7 Mod. 62.

(1) [*See Fuller v. Bryson*, 6 W. & S. 566.—W.]

Doe, on the Demise of the Earl and Countess Cholmondeley
v. Weatherby and Others.

11 East, 323. June 13, 1809.

A remote reversion of a settled estate will pass by the general words of a residuary clause in a will, by which the testator, having before devised certain other real estates in strict settlement, and given annuities for life to *A. B.* and *C.*, which annuities he charged upon "all and singular his manors, lands, tenements and hereditaments, &c. not before disposed of;" devised "all and singular his said manors, lands, &c. and other his real estate so charged with and subject to the said three several annuities as aforesaid: although one of the annuitants had a prior life-estate in the property, the reversion of which was in the testator. For general words in a residuary clause will carry every estate or interest which is not expressly, or by necessary implication, excluded from its operation; and no intention of the testator to exclude the reversion is necessarily to be implied from the circumstance that the charge of one of the annuities could not attach upon this reversion; as the other two might; and the clause will be construed *reddendo singula singulis*.

THIS ejectment was brought in right of Lady *Cholmondeley*, as co-heiress with Lady *Willoughby* of *Robert Duke of Ancaster*, to recover possession of an undivided moiety of certain lands in *Westminster* for life, included in the marriage settlement hereafter mentioned. A verdict was taken for the plaintiff, subject to the opinion of the Court on this case.

By indenture of the 6th of *January 1767*, made between *Thomas Panton* the elder, *Priscilla* his wife, *T. Panton* their only son, *Elizabeth Bird* and others; being the marriage-settlement of *T. Panton jun.* with *Elizabeth Bird*; and by a fine levied in pursuance thereof; divers manors, lands, &c. in *Cambridgeshire*, *Hants*, *Leicestershire*, and *Middlesex*, were conveyed and settled to certain uses, which, with respect to the premises in question, were as follows: after the marriage, to the use of *T. Panton* the elder for life; remainder to secure a jointure of 800*l.* per annum to *Mrs. Priscilla Panton* for life; remainder to the use of *T. Panton* the younger for life; remainder to secure a jointure of 700*l.* a year to *Elizabeth Bird* for life; remainder to trustees for 500 years, to raise 10,000*l.* for portions of younger children; remainder to the use of the first and other sons of the marriage successively in tail male; remainder to the use of the first and other sons of *T. Panton* the younger by any subsequent wife successively in tail male; remainder to the use of all the daughters of the marriage, and of any subsequent marriage or marriages of *T. Panton* the younger, as tenants in common in tail general; remainder to the use of other trustees, during the life of *Mary* the Duchess of *Peregrine Duke of Ancaster*, and daughter of *T. Panton* the elder, upon trust during her life to pay the rents, &c. to her sole and separate use, &c.; remainder to the use of the said *Peregrine Duke of Ancaster* for life; remainder to the use of *Robert Marquis of Lindsay*, their son, in fee. On the 12th of *August 1778*, *Peregrine Duke of Ancaster* died, and was succeeded by his son *Robert Duke Peregrine* also left two daughters by the said Duchess, namely, Lady *Willoughby*, the wife of Lord *Gwydier*, the defendants, and Lady *Cholmondeley*, one of the lessors of the plaintiff. Duke *Robert*, by his will of the 29th of *May 1779*, devised all his freehold and copyhold manors, rectories, advowsons, messuages, lands, tenements, tithes, rents, hereditaments, and other his real estate whatsoever and wheresoever, and all his estate and interest therein, in manner hereinafter mentioned, (that is to say,) as to his capital mansion-house at *Grinthorpe* in *Lincolnshire*, &c. (describing various estates, by name, in that county, subject in part to a certain mortgage to *Welby*) to *Denshire* and *Parker* in fee, upon the several uses declared, viz. as to the said hereditaments and premises not in mortgage to *Welby*, to the use of *James* and *Wm. Cecil*, for the term of 3000 years, upon the trusts after mentioned. As to the premises so in mortgage, under and subject to the said mortgage; and as to the said premises so limited to *Js.* and *Wm. Cecil* for 3000 years: to

the use of Lord *Brownlow Bertie*, (late Duke of *Ancaster*,) for life ; remainder to trustees, &c. ; remainder to the first and other sons of *Brownlow Duke of Ancaster* in tail male ; remainder to the use of Lord *Robert Bertie* for life ; remainder to trustees, &c. ; remainder to the use of the first and other sons of the said Lord *Robert Bertie* successively in tail male ; remainder to the use of the testator's sister (the now Lady *Willoughby*) for life, sans waste ; remainder to trustees, &c. ; remainder to the use of her first sons successively in tail male ; remainder to the use of her first and other daughters successively in tail male ; remainder to the testator's sister (the now Lady *Cholmondeley*) for life, sans waste ; remainder to trustees, &c. ; remainder to the use of her first and other sons successively in tail male ; remainder to the use of her first and other daughters successively in tail male ; remainder to the testator's own right heirs forever. And the trusts of the term of 3000 years were by mortgage, sale, &c. to raise 2000*l.* to be paid to his executrix and executors named ; which sum he gave, together with the rest and residue of his goods chattels, and personal estate, to his executrix and executors, upon trust to discharge all mortgages, (except the mortgage to *Welby*,) and all other his just debts and legacies. And he gave one clear annuity of 1300*l.* to his mother the said *Mary Duchess Dowager of Ancaster*, during her life, over and above all annuities or other provisions she might be entitled to receive out of any part of his real estate. And he also gave two other life annuities therein specified ; and charged the said three annuities upon and directed the same to be payable out of the rents, issues, and profits of all and singular his manors, messuages, lands, tenements, tithes, rents, and hereditaments, whatsoever and wheresoever, not thereinbefore particularly devised and disposed of, to the said *Brownlow Duke of Ancaster* for life, with remainders over as aforesaid. And he gave to the several annuitants the usual powers of distress and entry, and perception of the rents and profits of the premises so charged with the payment thereof. And as to, for, and concerning all and singular his said manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, rents, hereditaments, and other his real estate, whatsoever and wheresoever, not therein before devised and disposed of, so charged with and subject to the said three several annuities aforesaid, he thereby devised the same unto *Denshire* and *Parker* and their heirs, on the several uses declared, viz. To the use of *James* and *William Cecil*, for a term of 5000 years, sans waste, upon the trusts thereafter mentioned : and after the determination of the said term, and subject thereto, and to the trusts thereof, in the mean time to such person and persons, and for such estate and interest therein, and upon such uses as are thereinbefore particularly declared concerning the premises first thereinbefore devised, in case of failure of issue male of Lord *Robert Bertie*, viz. To the use of his sister (the now Baroness *Willoughby*) for life, sans waste ; remainder to trustees, &c. ; remainder to her first and other sons successively in tail male ; remainder to her first and other daughters successively in tail male ; remainder to his sister (the now Countess *Cholmondeley*) for life ; with like remainders in strict settlement to her sons and daughters in tail male ; remainder to his, the testator's, own right heirs. And he declared that the term of 5000 years so limited to *James* and *Wm. Cecil* was upon trust, by mortgage or sale of the premises comprised in the said term, to raise, in aid of his personal estate, &c. sufficient to pay off the residue of his mortgages, (except the mortgage to *Welby*,) and all other his debts and legacies, and the portion of 20,000*l.* provided for the now Countess *Cholmondeley*, &c. and then the term to cease. And he gave, among other legacies, 10,000*l.* to his sister (the now Lady *Cholmondeley*,) in addition to her portion. *Robert Duke of A.* died July 8th 1779, leaving his mother *Mary Duchess Dowager of A.*, his said two sisters, and *T. Panton* the elder and *T. Panton* the younger, him surviving ; and being seised in possession in fee, at the time of making his will, and at his death, of very considerable estates in the county of *Lincoln* and in *Wales*, besides those specified in the first part of his will, and

therein mentioned to be in mortgage to *Welby*. *T. Panton* the elder died in *Dec.* 1782, leaving his son *T. Panton* the younger, his daughter the said *Mary* Duchess Dowager of *A.*, and two grand-daughters, the said Lady *Willoughby* and Countess *Cholmondeley*, him surviving. *Mary* Duchess Dowager of *A.* died in 1793. Lord *Robert Bertie* died without issue in the lifetime of *Tho. Panton* the younger, who died *November* 30th 1806, without having ever had issue; leaving Lord *Brownlow Bertie*, afterwards Duke of *Ancaster*, him surviving, who died in 1809, without issue. The defendants are in possession of the premises for which this ejectment is brought. If the lessors of the plaintiff were entitled to recover the moiety of the premises, the verdict was to stand; if not, a nonsuit was to be entered.

Scarlett, on behalf of Lady *Cholmondeley*, contended that the ultimate remainder in fee in the estate in question did not, on the death of *Thomas Panton*, jun., pass to Lady *Willoughby*, under the general residuary clause in the will of *Robert* Duke of *Ancaster*, but descended as a reversion undisposed of to his co-heiresses, the Ladies *Willoughby* and *Cholmondeley*. He admitted, that the words of that clause, "all his lands, tenements, and hereditaments," &c. were large enough to pass any species of interest which the Duke had either in possession or reversion, if nothing expressly appeared in the will or were necessarily to be collected from it, to shew that his intention was confined to pass other specific estates and interests, and therefore to exclude this reversion. And he also admitted, that it was not necessary for the devisee to shew that her testator had this specific reversion in contemplation when he used general words sufficient in themselves to comprehend it, and where his apparent intention upon the face of the whole will was to pass all he had. But he contended, that where such general words were followed by others which shewed that the intention of the testator in using them was confined to particular parts only of his property, the construction must be narrowed and confined to the parts so defined. Now here the Duchess, his mother, had an estate for life secured to her in the property in question, and the other settled estates under the marriage settlement of 1767, before the reversion could descend upon Duke *Robert*. So circumstanced, he first disposed of certain estates in *Lincolnshire* in strict settlement on different members of his family, including the Ladies *Willoughby* and *Cholmondeley*. Then he gives an annuity of 1300*l.* to the Duchess Dowager his mother for her life, over and above all annuities and other provisions she was entitled to out of any part of his real estate, and charged this annuity upon all his other lands, &c. not before particularly devised. From this description he must have meant to exclude those lands in which she had before a settled life estate: for it would be absurd to impute to him an intention to give his mother a limited annuity for her life in an estate, the whole of which she was already entitled to for her life. And excluding that estate from his contemplation, the estates intended to pass by the residuary clause must be confined to the other estates which he meant to charge with the additional annuity of 1300*l.* to his mother and the two other annuities: for he thereby only disposes of "all his manors, lands, &c. and other his real estates," not before specifically devised, "so charged with and subject to the said three several annuities as aforesaid." And as this reversion never could have been charged with his mother's annuity, as it never could have come to him till after her death, it follows that it could not pass by these words to Lady *Willoughby* and the other devisees under the residuary clause. [Lord *Ellenborough*, C. J. objected that this argument was raised upon too narrow a basis; for it did not apply to the other two annuities which were charged on the residuum.] It equally shews the intention of the testator to exclude the settled lands in which his mother had a life estate, as he only meant to pass such estates as were charged with all the three annuities. He then distinguished this from *Wheeler v. Watroone*, *Alleyne*, 28, and *Willows v. Lydcot*, 2 Vent. 285; because there appeared no intention in either of the

wills to exclude the reversions in question, which were created by the testators themselves, as was also the case in *Chester v. Chester*, 1 Eq. Cas. Abr. 211, and must therefore probably have been in their contemplation. But this reversion, which was remote, was created by the prior settlement. And he relied on *Cook v. Oakley*, 1 P. Wms. 302, where a devise to one of a red box, and all things not before bequeathed, was held not to pass part of a considerable leasehold estate, which had come to the testator by the death of his father, but of which he was ignorant at the time. [Lord Ellenborough, C. J. The things before bequeathed were rings, buttons, and a chest of clothes; and it was reasonable to suppose that he meant by the words of bequest such like trifling articles, as he had before specifically mentioned.] In *Roe d. Reade v. Reade*, 8 Term Rep. 118—122, Lord Kenyon observed, that undoubtedly the words were sufficiently comprehensive to pass the estate in question, "if it could be collected from the will that the deviser intended that it should thereby pass." In *Strong v. Teatt*, 2 Burr. 912, this Court, and afterwards the House of Lords, held, that general words in a will might be restrained in cases where it appeared that the deviser did not intend to use them in their general sense. That case illustrates the present: the question was whether the reversion of an estate settled on the marriage of the deviser's eldest son passed under a devise of "all other his lands, tenements, and hereditaments," &c.; which lands were devised to his three younger sons in succession. And there was a provision, that if the settled estate should come to the third son by the death of the two elder without issue made in his life-time; then he should not take any interest or estate in the lands before devised to him by the residuary clause, but the same should go over to the fourth son. And then the argument was, that if the reversion of the settled estate passed by the residuary clause, the third son never could get it, if the settled estate came to him; an absurdity which was relied on to shew that the testator could not have contemplated that reversion, but only the lands of which he was seised in fee in possession. Now, that argument did not shew that he contemplated the reversion and intended to exclude it, but that he specifically contemplated something else, and therefore that the reversion must be excluded. So in *Goodtitle v. Miles*, 6 East, 494, one having the reversion of lands settled on him for life, remainder to his issue in tail, and having only two daughters; devised to his eldest daughter in tail his unsettled estates by name, and all other his lands which were not settled in jointure; remainder to his other daughter for life; remainder to her children, &c. charged, &c.; remainder to his nephew in fee. And it was held, that the reversion of the settled lands did not pass, but were excepted out of the general clause by the restrictive words "and which are not settled in jointure," and because of the incongruity of imputing to the deviser an intention of devising estates tail and for life to his daughters in lands which were before settled on them in tail general. And that decision was the stronger, because it did not appear that the deviser had any other real estate on which the general clause could operate except the reversion of his settled lands. In *Chester v. Chester*, 1 Eq. Cas. Abr. 211, the reversion was not settled, and therefore when the testator devised all his lands, &c. not formerly settled, those words clearly comprehended the reversion, if that alone would have sufficed to pass it, where no such intention appeared. Upon the whole of this will, it appears that the Duke of Ancaster did not mean to pass any estates by the residuary clause, except such as were charged with the annuity of 1300*l.* to his mother: he could not therefore have meant to pass this reversion which could not be subject to that charge, because she had already an estate for life in the whole property; but he must have meant to confine the devise to such estates as he had in possession. [Lord Ellenborough having asked whether he had attended to the case of *Goodright d. the Earl of Buckinghamshire and Others against the Marquis of Downshire*, 2 Bos. & Pull. 690, where the governing principle of all these cases was well laid down by

Lord *Alvanley*;] he observed, that (supposing the words "*then and in such case*," which were not noticed in the argument or judgment, did not make the devise of the residue of the real estate depend on a condition^(a) which did not happen) the case only came to this question, whether a devise of "all the rest and residue of real estates," would pass a reversion not before disposed of; concerning which there could be no doubt, if there were no other words to restrain the generality of their meaning: and Lord *Alvanley's* judgment is not inconsistent with the construction contended for upon the effect of the restraining words in this will.

Dampier, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. *Referendo singula singulis*, the charges of the three annuities on the several estates devised by the residuary clause, there is nothing in the objection founded upon one of the annuitants having a prior life estate in the property in question, the reversion only of which was in the testator. This case is completely decided by that of *Goodright v. The Marquis of Downshire*, where Lord *Alvanley*, in delivering the judgment of the Court of C. B. lays it down, that the operation of a residuary clause of real estate carries every real interest of every kind whatsoever, whether known or unknown to the testator, unless it be *manifestly excluded*. How then can we say that this reversion, which it is admitted would pass by the general words, is manifestly excluded, because the devise of the residuum is charged with the payment of three annuities for lives, two only of which could attach upon this particular estate. All the antecedent cases bearing upon this point were fully considered in the former case; amongst others that of *Strong v. Teatt*, which has been relied upon in the argument. But that case went on the ground stated by Mr. Justice *Wilmot*, that the intention not to pass the reversion was as clear upon the whole tenor and complexion of the will as the *strongest express negative* clause could have made it. And so Lord *Mansfield* considered the case; that there were plain expressions in the will to shew that the testator did *not* intend to devise the reversion of his settled estate: that there were in effect negative words to exclude it from the operation of the general words of the clause. Now here, by referring the charges of the three annuities to the several properties devised in the residuary clause, *singula singulis*, the devise will attach on all the estates as to two of the annuities, and upon all but this reversion, as to the three annuities: and there is not a *scintilla* of intention upon the face of the will to shew the contrary, which by all the authorities is necessary to except the reversion out of the general words of the residuary clause.

GROSE, J. declared himself of the same opinion.

LE BLANC, J. The question is, whether we can see such an evident intention of the testator *not* to pass this reversion by the general words of the residuary clause as to take the case out of the general rule. He subjects all other his real estates not before disposed of to the charge of *all* the annuities; and the argument is, that this reversion cannot pass because it could not be subject to the charge of *one* of the annuities: but that is not a sufficient reason for excluding it as to the other two.

BAYLEY, J. There must be something in the will either expressed or necessarily to be implied shewing an intention in the testator to exclude this reversion, in order to prevent the general words of the residuary clause from passing it: but here there is nothing of that sort expressed, nor is it necessary to imply any such intention upon the face of this will, in order to give it effect.

Postea to the Defendants.

(a) *Quære* the punctuation of the will in p. 603, of the printed report; and whether the residuary clause were not read as commencing with the disposition of the residue of his real estates; making the preceding sentence end with the words "*for her life only*;" particularly, as the last sentence concludes with devising the subject matter to the wife, "*her heirs, executors,*" &c.

Goodtitle, on the Demise of Miller, Clerk v. Wilson and Others,
Executors of Drew.

11 East, 334. June 13, 1809.

Where a prescriptive ecclesiastical corporation of vicars coral of the cathedral of *Chichester* had, besides other estates in common, four vicarial houses with their appurtenances, which had always been appropriated to the several use and residence of the four vicars; and by ancient custom, upon every vacancy, the vicars, according to seniority, made their option of taking in severalty any one of such vicarial houses with the appurtenances, of which option an entry was made in the corporation *act book* and signed by the vicars; held, that a new vicar having made an option, which was entered in the *act book* and signed by all, to take one of the vicarial houses, with certain appurtenances, then in the possession of *J. S.*, which were not all the appurtenances formerly annexed to and enjoyed with the same house by his predecessors therein, could not maintain an ejectment for the other appurtenances, such as part of the ancient garden which had been leased off by the corporation before his appointment. For supposing him entitled to make an option of the entire premises, and to have it entered in the *act book*, as against the corporation; yet no such option having been made and entered in the *act book* according to the custom, he had no separate legal title to the premises in question, on which he could maintain an ejectment.

THIS ejectment was brought to recover a dwelling-house, and other buildings, with a garden and curtelage, in the close of the cathedral of *Chichester*; and the demise was laid on the 6th of *April*, 1808. At the trial at the last assizes for *Sussex* a verdict was found for the plaintiff, subject to the opinion of the Court on this case.

Mr. *Miller*, the lessor of the plaintiff, in 1807, became one of the members of a prescriptive ecclesiastical corporation, called "the Vicars Choral," and in their endowment "the principal and commonalty of the vicars of the cathedral church of the *Holy Trinity* of *Chichester*," and has done all necessary acts to render himself an efficient member thereof. This corporation has a common seal, and consists, when full, of four clergymen, who have certain clerical duties to perform in the services of the cathedral: and has besides other estates in common, four separate vicarial houses with the appurtenances in the cathedral close, which have constantly been appropriated to the use and residence of the said members; each of them regularly enjoying one, and either residing in or letting the same. It has been a constant custom in this corporation, that whenever a vacancy has occurred by death or otherwise, the members for the time being, according to their seniority as such, have had and exercised an option or election of taking and enjoying in severalty any one of such vicarial houses with its appurtenances, which, through death, or the exercise of any new option, had become vacant: an entry of every such option being made in the corporation *act book* and signed by the members. In 1759, *Wm. Waring*, clerk, then one of the corporation, and as such enjoying in severalty one of the four houses, with the garden and appurtenances anciently attached to it, being desirous of annexing to it a stable, and also a piece of garden or gate-room which belonged to the corporation in fee, but was then held under a lease from the corporation to *T. Yates* for an unexpired term of 11 years, made such proposal to the other members, and obtained such consent, as is thus stated in their *act book*: "at this meeting, Mr. *Waring* informed his brethren that he proposed to purchase the stable late belonging to Mr. *Yates*, adjoining to Mr. *Waring's* garden, for the residue of the term granted by the principal and commonalty of vicars aforesaid, upon condition that the body would consent that the stable should, from the time of such purchase, be annexed to and enjoyed as part of the vicarial tenement now in the possession of the said *W. Waring*: and the said body do hereby agree, that if Mr. *Waring* shall make such purchase, the said stable shall and may be enjoyed from time to time, and at all times from and after such purchase, as part of the

" vicarial premises now enjoyed by the said *W. Waring*." Dated 26th *January* 1759, and signed by the 4 vicars. Mr. *Waring* accordingly completed the purchase; and on the 27th *June* 1760, the personal representative of Mr. *Yates*, in consideration of a sum paid by Mr. *Waring*, by his direction, executed a deed-poll of surrender to the corporation, who accepted the same, of the said stable and piece of garden or gateroom, to the intent, as expressed in the deed, " that the same might be annexed to and made part of the vicarial dwelling house or tenement then possessed and enjoyed by the said *W. Waring*, and should from time to time, and at all times forever thereafter, be occupied and enjoyed therewith, as part and parcel thereof, and belonging thereto, according to an act or agreement of the said principal and commonalty of vicars, passed and made at a meeting held on the 26th of *January* 1759, and then entered on their act book." At the next meeting of the principal and vicars, on the 3d of *December* 1760, the following entry, of that date, was made in their act book: " Stable near Mr. *Waring's* vicarial house to be enjoyed therewith—At this meeting, the Rev. Mr. *Waring* produced a surrender and conveyance of the stable and gateroom in the *Canon-Lane*, late belonging to Mr. *Yates*, &c. And it is agreed between Mr. *Waring* and the rest of the commonalty of vicars aforesaid, that the said stable and gateroom should be, from the date of the said conveyance annexed to the vicarial tenement now enjoyed by the said Mr. *Waring*, and be from thenceforth used and enjoyed by the said Mr. *Waring* and such future vicars as shall be legally possessed of the same premises, without paying any rent or other consideration for the same, and free of all arrears of rent reserved on any demise of the said stable and gateroom." Mr. *Waring* died in 1779, having from 1760 till his death enjoyed the same vicarial house with the stable and ground so annexed to it, and a coach-house and loft built on part of such ground, by actually occupying them himself during part of the time, and by receiving rent of a tenant to whom he let them during other part of it. Soon after Mr. *Waring's* death, Mr. *Shenton*, then one of the members, at a corporate meeting made choice of the said dwelling-house with its appurtenances; and an entry of such option of his was made and duly signed in their act book: " At a meeting of the principal and commonalty of vicars aforesaid on the 23d of *August* 1779, the dwelling-house with its appurtenances, late the Rev. *W. Waring's*, being declared vacant by his death, the Rev. Mr. *Shenton* does hereby make an option thereof for his dwelling-house." Mr. *Shenton*, in right of his said office and option, continued in the exclusive enjoyment of the said vicarial house, and the said annexed stable, coach-house and premises, by letting and receiving the rents of them for his own separate benefit, until his death on the 30th of *October* 1785: he occupying another house himself. The Rev. *Moses Toghill*, another member of the corporation, rented the said stable, coach-house, and ground, as tenant to Mr. *Shenton* at the time of his death. 70l. had been laid out in repairing Mr. *Toghill's* own vicarial house, which money had been borrowed for that purpose from the Dean and Chapter of *Chichester*, to be repaid to them out of the share arising to him or his successors in that house from certain annual profits called bread money payable to the Dean and Chapter, and divisible in certain proportions amongst the vicars, and other members of the cathedral. This was the usual method of defraying the expence of repairing the four vicarial houses. Mr. *Toghill* and Mr. *Moore*, the members who succeeded Mr. *Shenton*, came to an arrangement for their mutual accommodation, that Mr. *Toghill*, instead of making a new option of the house, stabling and premises, which had become vacant by Mr. *Shenton's* death, should continue the house he had so repaired, and have the beforementioned stable, &c. with that house so long as Mr. *Moore* should have the dwelling-house and rest of the premises so vacated by Mr. *Shenton*. The following entry in the act-book was made and signed by the four members at their next corporate meeting, on the 21st of *April* 1786. " It is agreed

“that the four vicarial houses, including the buildings and gardens now holden with the same respectively, shall during the joint lives of the present members of the body be enjoyed as follows; viz. that the house, buildings and gardens now in the possession of Mr. *Toghill* shall continue to be enjoyed by him, and that in consideration of his having expended a considerable sum of money in the repairs of such house, he shall have and enjoy therewith the stable, coach-house, hay and straw lofts, and yard, in the *Canon-Lane*, now also in his possession. That the house, buildings, and garden, late in the occupation of the said *Moses Toghill*, and now of *Sarah Joes* widow, or her under-tenants, shall be enjoyed by Mr. *Walker*. That the house and buildings (except the said stable, coach-house, hay and straw lofts, and yard) and the garden to such house and buildings belonging heretofore, in the occupation of *Duke*, spinster, shall be enjoyed by Mr. *Moore*: and that the house, buildings and garden, late in the possession of the Rev. *R. Shenton*, and now of *Susannah Newhouse*, widow, shall be enjoyed by Mr. *Middleton*.” In 1790, Mr. *Toghill* ceased to be a member; and thereupon a new option took place conformably to the following entry made and duly signed in the act book. “At a meeting of the principal and commonalty of the vicars at the common room aforesaid on the 16th of *November* 1790; the Rev. Mr. *Toghill* having quitted the body, the Rev. Mr. *Walker* made an option of the house, buildings and garden, now in the occupation of Mr. *Toghill*. And the stable, which at a former meeting it was agreed the Rev. Mr. *Toghill* should enjoy with the above-mentioned house and premises, it was now agreed should be enjoyed by the Rev. Mr. *Moore*, as appurtenant by right to the house and buildings and garden now held by the Rev. Mr. *Moore*. And it was also agreed that the Rev. Mr. *Newman* (the newly elected member) shall enjoy the house, buildings and garden in the occupation of Mrs. *Heath*, relinquished by Mr. *Walker*.” From the date of this entry till *Sept.* 1806, Mr. *Moore*, in virtue of such option and act, continued to hold and enjoy by himself or his tenants the vicarial house, garden and appurtenances held by Mr. *Waring*, with the additional stable and premises so purchased and annexed thereto as already stated. Shortly before the 2d of *Sept.* 1806, an agreement was framed for a lease to the late Mr. *Drew*; and accordingly a lease under the corporation seal was executed on that day, of a part of the ancient garden of such vicarial house, which had never been leased before, together with the said additional stabling and premises on the north side of *Canon-Lane*, within the close of the cathedral church aforesaid, containing in breadth from north to south 19 feet and a half: to hold to Mr. *Drew* for 40 years from the preceding *Midsummer*, at the yearly rent of 8s. On the same day the following entry was made and signed in the corporation act book; which, after mentioning the execution of such lease, states the true arrangement under which it was executed. “*September* 2d, 1806. Agreement relative to Mr. *Drew's* fine, and all subsequent fines. And it was at this meeting agreed, that as such stable and piece of ground were always considered as attached to the messuage in the same close, belonging to the same principal and commonalty of vicars, now enjoyed by the Rev. Mr. *Moore*, the present fine shall be wholly received by him: and that all future fines, as well as the quit rent reserved, shall be paid to him during the whole time he shall continue in the enjoyment of the same house. But that after such period, such fine shall be for the mutual benefit of the body.” The fine on granting the said lease, amounting to 30*l.*, was accordingly paid to Mr. *Moore*. Mr. *Drew* shortly afterwards took down the old stable; and upon the scite where it had stood, and upon that part of the ancient garden-ground of the vicarial house, which was included in the said lease to him, built a new dwelling-house and offices, with a small garden attached thereto; and these premises were carried by Mr. *Drew* into the ancient garden of Mr. *Moore's* vicarial house, to the extent, from *Canon-Lane*, of 20 feet 6 inches, at the narrowest part, to 23 feet 6 inches, at the broadest part;

being 4 feet more than had been leased to him by the said corporation as aforesaid. Mr. *Drew* died in the commencement of the year 1808, leaving the defendants his executors; who were at the date of the demise, and still are, in the receipt of the rents and profits thereof. On the 29th of *August* 1807, the Rev. Mr. *Walker*, one of the said vicars, resigned his office; and on the same day the lessor of the plaintiff was duly appointed in his stead. At a corporate meeting on the 30th of *October* in the same year, Mr. *Moore* having made option of another vicarial house, which was vacated by the said Mr. *Walker*, the plaintiff's lessor made option of the premises relinquished on that occasion by Mr. *Moore*, and the following entry thereof was made in the act book, and also signed by the several then members. Neither this nor any of their other acts before stated were under their corporate seal, except the lease to Mr. *Drew*. "At this meeting it was also agreed, that the Rev. Mr. *Miller*, the newly elected member, should enjoy the house and garden now in the occupation of Mrs. *Riley*, and relinquished by the Rev. Mr. *Moore*."

Mr. *Miller*, having since become acquainted with the before-mentioned facts concerning Mr. *Drew*'s lease, brought this ejectment for the recovery, as well of the before-mentioned parts of the ancient garden of his vicarial house, as also of the scite of the stable so leased to Mr. *Yates*, and surrendered as above set forth: together with the new erections on the same respectively. Mr. *Miller*, at the time of the demise laid in the ejectment, was not in the actual occupation of the said vicarial house and premises, of which he made option as aforesaid, or any part thereof; but the same were at that time, and at the time of the trial, in the possession of Mrs. *Riley*, who had been tenant from year to year to Mr. *Moore* at the time of his resignation, and had never received any notice to quit.

The question for the opinion of the Court was, Whether under these circumstances the plaintiff's lessor were entitled to recover the whole or any part of the premises in question? and the postea and judgment were to be entered according to that opinion.

Marryat, for the lessor of the plaintiff, stated that he claimed by this ejectment three distinct parcels; 1st, the encroachment made by Mr. *Drew* of 4 feet in the vicarial garden anciently attached to the vicarial dwelling-house with its appurtenances, of which the lessor had made option; 2d, that part of the same vicarial garden which was included in the lease to *Drew*; 3d, the scite of the stable and coach-house, part of the freehold originally belonging to the corporation which had been leased to *Yates*, and purchased by Mr. *Waring* for the purpose of being annexed to the same vicarial house, now the property of Mr. *Miller*, and which had been accordingly so annexed by the corporation, and which had been enjoyed by the predecessors of Mr. *Miller* in his vicarial house as annexed thereto since 1750. He then contended, that by the prescriptive custom of this body the freehold of their estates, which, before any option made according to the custom, was vested in the whole corporate body, by such option made and entered in the act book became vested in the individual vicar choral to whose use it was appropriated. And that the possession of Mrs. *Riley*, who took the vicarial house and premises of Mr. *Miller*'s predecessor, as his tenant, was the same as his own individual possession. To shew the nature of this interest in the vicars choral, and that after the option made, the lessor of the plaintiff had such a freehold interest in every part of the premises appropriated to his dwelling-house as would enable him to maintain this ejectment on his own demise, he referred to Co. Lit. 4. a, where it is said, that though land be the most fixed inheritance, and fee-simple the highest and most absolute estate that a man can have, yet may the same at several times be moveable, sometimes in one person, and *alternis vicibus* in another; nay sometimes in one place and sometimes in another: as if there be 80 acres of meadow used time out of mind to be divided between certain persons, and that a certain number appertain to each: *e. g.* to A. 13 acres to be yearly assigned

and lotted out; so as sometimes the 13 acres lie in one place, sometimes in another: and so of the rest: *A.* hath a moveable fee-simple in 13 acres. The nature of this estate is like that of a Dean and Chapter, where there are not a sufficient number of houses for the canons and prebendaries, who then occupy them in succession: during a vacancy, the freehold is in the Dean and Chapter; but when the house is appropriated, the freehold is in the residentiary canon or prebendary. Here, then, by the appropriation of the ancient vicarial house to *Mr. Miller*, which had been formerly held by *Mr. Waring*, the freehold of that and of the ancient garden, and of all other the premises annexed to the occupation of that dwelling-house, became absolutely vested in *Mr. Miller*; and therefore as to that part of the premises sought to be recovered which was part of the ancient garden belonging to the dwelling-house, and which is not included in the vicarial lease to *Mr. Drew*, there can be no doubt that the lessor is entitled to recover. 2dly, As to that part of the ancient vicarial garden under the vicarial lease, though the stat. 14 Eliz. c. 11. s. 17, controuls the restraining statute of the 13 Eliz. c. 10, so as to enable ecclesiastical bodies of this description to lease houses belonging to them for 40 years; yet they are restrained by the latter statute from leasing dwelling-houses for the habitation of such persons, and are required to reserve the accustomed yearly rent at least; which latter stipulation would prevent them from leasing that which had never been leased before, as well as the prohibition to lease houses for the habitation of the ecclesiastical members of the body, which would extend to ancient gardens annexed to such residentiary houses. And though these houses have been leased, yet that has been by the individual vicars choral to whom they were appropriated.

The Court here interposed, and suggested to *Marryat*, that supposing *Mr. Miller* were entitled to demand from the corporate body the appropriation of all that he now sought to recover; yet having agreed at a corporate meeting of the whole body to take only that which was then in the possession of *Mrs. Riley*, of which the parcels sought to be recovered formed no part: and the custom being stated in the case to be that the members, according to seniority, exercised an option to take and enjoy in severalty the several vicarial houses with their appurtenances; of which an entry is made in the corporation act book and signed by the members; the difficulty was to shew that the lessor of the plaintiff could not relinquish his option to take any particular part of that which had been enjoyed by his predecessor: and that though he had not made his option to take those parts in severalty, he could nevertheless maintain an ejectment for them, as if he had a several freehold in them.

Marryat then contended, that the vicars could not relinquish the rights attached to their vicarial houses; and that the lessor having made his option of his present vicarial house, the right to every thing appurtenant to it was necessarily vested in him in virtue of his office. That his ignorance of what were his rights, at the time when the choice was proposed to him and he made his option of that which was proposed, could not bind him when he was afterwards better informed of what his rights were. That no agreement of the individual nor even of the whole body could alter or abridge the rights of the vicar choral: and therefore no such agreement could abridge his right of occupation attached to his office: these were the original separate freeholds of each; they could not even amongst themselves carve out their possessions differently from that which had been anciently separated and occupied together by each vicar choral; for otherwise a majority might assume to share the whole amongst themselves exclusively of the rest.

Lord ELLENBOROUGH, C. J. The members of this corporation have estates in common; and they appropriate from time to time certain vicarial houses with their appurtenances to be enjoyed by each in severalty. Then granting for argument sake, that the lessor of the plaintiff may insist on the appropriation to himself of the entire house and garden as held before by his predeces-

sors; yet if he agree to take less than he is entitled to, why may he not do so? and how can he maintain an ejectment for that which has not been appropriated to him in severalty? What separate legal title can he have to that part before any appropriation? By his own shewing there must be an option made by him and entered in the act book, in order to give him the right: and no such option has been entered: but on the contrary, the entry is of an option by him to take something less, and not that which he now claims. The option must be made and entered to take the entire thing, in order to give him a separate right to the entire thing. He has not therefore brought himself within the terms of his own custom as stated in the case. When he claims his entire rights, and does not accede to an agreement to take less, and when the body stands out hostilely against such a claim, we will try that right, but we cannot do it on this case, where he states that an option has been made by him to take less, and he does not bring himself within the custom.

GROSE, J. agreed.

LE BLANC, J. Suppose no option had been made amongst them of any sort, could Mr. Miller, on being appointed a vicar choral, have brought this ejectment? He could not have set up a separate right to this property without an option of it duly made and entered; for when the body came to make their options, any one who was his senior might have taken it.

BAYLEY, J. The very custom relied on by the lessor of the plaintiff shews that something was necessary to give him a legal title to this particular property, which it appears has not been done in this instance; namely, that he should have made an option to take it, which is to be entered in the corporation act book.

Postea to the Defendant.

Laves was to have argued for the defendant.

Cormack v. Gladstone.

11 East, 347. June 13, 1809.

A ship from *Stockholm* to *New-York* was by the course of the voyage to touch at *Elsineur* for convoy, and to pay the *Sound* dues: and the owner of sheep on board took in a short stock of provender for them at *Stockholm*, and laid in the rest at *Elsineur* before the *Sound* dues could be paid: held that the voyage not being thereby delayed, though the occurrence was foreseen and intended, the policy was not avoided, but the underwriters were liable for a subsequent loss of the ship by the perils of the sea.

THIS was an action on a policy of insurance on the ship *Bess*, valued at 1200*l.*, and on the captain's books, cloaths and instruments, valued 100*l.*, "at and from *Stockholm* to *New York*." The interest in the ship was alleged and proved to be in the Earl of *Selkirk*, and the interest in the books, cloaths and instruments, in the captain. The loss was alleged to be by the perils of the sea. At the trial before Lord *Ellenborough*, C. J. at *Guildhall*, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

In August 1803, the ship *Bess*, being at *Stockholm*, took in a cargo of 62 live sheep to be carried on the voyage insured, and sailed from thence on the 14th of that month. An agent of Lord *Selkirk* sailed in the vessel to take care of the sheep. Understanding that the vessel was to touch at *Elsineur*, he did not take in sufficient provender for the sheep at *Stockholm* for the voyage to *New York*. The ship in the regular course of her voyage touches for convoy, and to pay the *Sound* dues, at *Elsineur*, where sufficient provender was taken on board for the voyage: but the ship was not thereby delayed at all in her course; the whole additional provender being on board before the *Sound* dues could be paid. In all other respects, the ship had sufficient water and provisions for the voyage from *Stockholm* to *New York*. The ship proceeded

immediately under convoy from *Elsineur* on the voyage insured, but was lost by the perils of the sea. If the Court should be of opinion that the plaintiff was not entitled to recover, a nonsuit was to be entered; if he were so entitled, the verdict was to stand.

Scarlett for the defendant, having been called upon by the Court to begin, attempted to distinguish this from the case of *Raine v. Bell*, 9 East, 195, because there the ship had been originally fitted out with every necessary for the voyage which could be procured at her lading port, and it was unavoidable necessity within the perils insured against which compelled her to put into another port during the voyage. But here it appears, that the vessel left her lading port without a sufficient stock of provender for the sheep, which she might have laid in there; and therefore she sailed with a necessity imposed upon herself of stopping somewhere in the progress of her voyage to get more; and if she had not found an adequate stock at *Elsineur*, she must have touched at some other place to obtain it. In *Delaney v. Stoddart*, 1 Term Rep. 22, there was a usage of the trade to protect the taking in an additional cargo at the place into which the ship was driven by stress of weather; without which it would have been considered as a deviation. But here there was no such usage, and the underwriters could not calculate upon the ship going into *Elsineur* for such a purpose.

LORD ELLENBOROUGH, C. J. The not taking in sufficient provender for the sheep at *Stockholm* for the whole voyage is not like neglecting to take a sufficient crew, or tackling, or other necessary relating to the equipment or navigation of the ship; but this omission only affected the safety of the cargo of sheep: and while the vessel was staying for other necessary purposes at *Elsineur*, the provender was laid in without any delay of the voyage; which brings the case within the principle of the former decision.

GROSE, J. agreed.

LE BLANC, J. The vessel left *Stockholm* with the foreknowledge of the agent that she must go into *Elsineur* for other purposes in the regular course of her voyage, when he might complete his stock of provender during the performance of those other purposes.

BAYLEY, J. It does not follow that the master might or would have gone elsewhere for provender, if he could not have procured it at *Elsineur* without delaying the voyage. The sheep might have been thrown overboard.

Postea to the Plaintiffs.(1)

Puller was to have argued for the plaintiff.

Thornhill v. The Men inhabiting the Township of Huddersfield.

11 East, 349. June 13, 1809.

An action on the case lies upon the stat. 6 Geo. 1. c. 16. s. 1, by the party grieved, to recover damages against the inhabitants of the adjoining township for trees, coppice, and underwood, unlawfully and feloniously burnt by persons unknown; though the clause directs the party grieved to recover his damages in the same manner and form as given by the stat. 13 Ed. 1. st. 1. c. 46, for dikes and hedges overthrown by persons in the night; upon which the usual course of proceeding has been by the writ of *noctanter*.

THE plaintiff declared in case, and stated in his first count, that some person or persons to him unknown, on the night of the 16th of April, 1807, with force and arms, at *Huddersfield*, in the county of *York*, did, wilfully, unlawfully, and feloniously set fire to, burn and destroy, 500 oak trees, &c. of the plaintiff, standing, growing, and being in the township aforesaid, of the value of 300*l.* and certain coppice wood, and certain under-wood growing on

(1) Vide *Laroche & al. v. Orwin*, 12 East, 131. The *nisi prius* cases of *Stitt v. Wardell*, 2 Esp. 610, and *Sheriff v. Potts*, 5 Esp. 96, are no longer regarded as law.

ten acres of land in the said township, of the value of other 300*l.*, without the consent of the plaintiff the owner of the said several things so set fire to, burnt, and destroyed, or of the persons chiefly entrusted with the care and custody thereof; against the peace, &c. and against the form of the statute in such case made and provided; whereof the defendants had notice; and that six months had elapsed since the committing of the said offence; and that the parties committing the same were not within the said six months next after the committing the said offence, nor had hitherto by the defendants or otherwise been convicted thereof: yet the said defendants not regarding the statute, &c. had not, though requested, made any satisfaction or recompence to the plaintiff for the said damage by him sustained as aforesaid, but had thereto refused and still refused so to do. The second count was the same, except that it omitted the word *feloniously*: and the whole concluded to the plaintiff's damage of 400*l.* The defendants pleaded not guilty: and the cause was tried before *Lawrence, J.* at *York*, when a verdict was found for the plaintiff for 373*l.*, subject to the opinion of the Court on the following case.

The plaintiff, at the time of committing the offence mentioned in the declaration, and after mentioned, was sole owner and proprietor of a plantation situated in and surrounded by the township of *Huddersfield*. In the night of the 16th of *April*, 1807, the same was wilfully set on fire by some person or persons unknown to the plaintiff, and five acres thereof were burnt and destroyed, without the consent of the plaintiff, or of the persons chiefly entrusted with the care and custody thereof. The fire began and terminated in the township of *Huddersfield*, and the agents of the plaintiff used every means to discover the offender or offenders, without success. It was proved, that the person or persons committing the offence was and were not within six months after committing the same, nor had thitherto by the defendants or otherwise been convicted thereof. That the value of the trees, wood, and underwood, destroyed by the fire, amounted to 372*l.*; and that the action was not brought by the plaintiff against the defendants till more than six months had elapsed after the fire. The question was, Whether the plaintiff were entitled to recover?

Ainslie for the plaintiff began by referring to the statutes giving the remedy, and on which the action was framed. The stat. 6 Geo. 1. c. 16, for protecting the species of property, and for providing satisfaction for the damages the respective proprietors thereof shall sustain by the unlawful acts there stated, enacts, that if any persons shall by day or night, take, destroy, or burn, &c. any trees, underwoods, coppice woods, &c. without consent of the owners, &c. such owners, &c. damaged thereby, shall have such remedy, and have and receive such satisfaction and recompence of and from the inhabitants of the parishes, towns, hamlets, villages, or places adjoining on such wood grounds, &c. and recover such damages against the parish, &c. or places aforesaid, and in the same manner and form as for dikes and hedges overthrown, &c. as by the stat. 13 Ed. 1. st. 1. c. 46, is set forth or provided;" unless the offenders shall by such parish, &c. be convicted of such offence within six months from the commission of it. The statute of Ed. 1, to which reference is made merely states that when "the men of the towns near will not indict such as be guilty of the fact, the towns near adjoining shall be distrained to levy the hedge or dyke at their own cost, *and to yield damages.*" Upon these acts, he contended, that the general principle attached, that where a statute prohibits a wrong and gives a remedy to the party grieved, without prescribing the mode of it, the common law intervenes and supplies the form of action; of which instances are given by Lord *Coke*, 2 Inst. 55, and 118, in his comments on *Magna Charta* and on the Statute of *Marlebridge*. Also in his Comment, ib. 476-7, on the statute 13 Ed. 1. c. 46, as to the remedy of the party grieved; having first said, that by the indictment of the towns against the misdoers the lord shall know against whom to bring *his action*;

he says, that if the bordering town do not indict within time, then shall the lord or other party grieved *bring his action upon this branch* against the towns bordering round, &c. and judgment shall be given, that they shall at their proper costs make the ditch or hedge, &c. and yield damages; and so it was holden in H. 14 Jac. Sir *Wm. Mallorie's* case. That case is reported in 1 Rol. Rep. 365, and there Lord *Coke* says, that he had seen an ancient reading upon this statute, that if the vill do not indict the offenders within the time, the party grieved shall have *an action upon this statute*, as a man who is robbed shall have upon the statute of Winton against the hundred: and that, in the time of Ed. 4, *Pigott, J.* had held accordingly. The reporter adds his own approbation of this law, and says, that the Lord Chancellor afterwards agreed particularly to every thing which was said by Lord *Coke*. Now, the statute of Winton, 13 Ed. 1. st. 2. c. 2, does not prescribe any particular form of action, but only says that the hundred shall be answerable in damages for the robbery: yet the common law has given the action on the case: and Lord *Coke* would not have compared the two statutes together in this respect, if he had conceived that the statute in question had only afforded a special mode of proceeding, as by the writ of *noctanter*: it rather appears by the authorities mentioned, that Lord *Coke's* notion of the remedy was by action on the case. If then the plaintiff's remedy in this form of action be not fettered by the cases in which another mode of proceeding upon the statute of Ed. 1, by the writ of *noctanter*, has been adopted, the principle and general authorities on which it is supposed must decide the point in favour of the action; especially as it is founded in general convenience; and no particular inconvenience can arise from it, as the plaintiff must state every thing in his declaration to bring himself within the stat. 6 Geo. 1. [Lord *Ellenborough, C. J.* How is the writ of *noctanter* to be applied generally to the stat. 6 Geo. 1, which gives the remedy whether the offence be committed by day or by night?] He then referred to the cases treating of that writ. First, the case of *Dean forest, Cro. Car. 280*, which states the original writ of *noctanter* sued out of Chancery to the sheriff, commanding him to inquire, by a jury of the county, who were the malefactors who threw down the hedges and dykes of *J. G. noctanter, &c.* and to bind them to answer, &c.: the sheriff's return, stating the facts of the grievance committed, but that the offenders were unknown: the writ of *distringas*, which issued thereon, reciting the first writ and return and commanding the sheriff to inquire of and distrain the inhabitants of the adjacent towns to make good the damage: on which the sheriff certified the names of the adjacent vills, and finally returned an inquisition annexed, finding that the party grieved had sustained damage to the amount of 200*l.* And after some exceptions taken to this return, which were over-ruled, *Noy, Attorney-General*, prayed for and obtained a new *distringas* to distrain the adjacent vills to repair: upon the authority of a record which he shewed of T. 15 Ed. 1. Another case is that of the inhabitants of *Epworth* and 15 other vills, *Cro. Car. 439*, where the course of proceeding was nearly the same. In another instance, a *distringas* for the like purpose was prayed for by the Attorney-General against the circumjacent vills of *Dorling, ib. 580*: but the Court doubted whether he should have it without a *scire facias*(a) sued to answer, and what process he should have: on which they took time to advise: the result does not appear. In *Malabar v. The Inhabitants of Lakenheath*(b) all the proceedings upon the writ of *noctanter*, varying in some respects from the former cases, are set out at length, with the pleadings upon the merits of the case, and the record of the trial, verdict, judgment, and execution thereupon. But there is nothing

(a) In the case in *Lutw.*, next cited, (p. 157.) the Court solved the doubt, by saying that the writ of *distringas* ought to contain in itself a *scire facias*.

(b) 1 *Lutw.* 141, other cases are referred to, in this report of proceedings on the same writs.

in any of these cases, or in the words of the statute of Ed. 1, which excludes the ordinary remedies given by the common law; nor does the statute even point to such a remedy as the writ of *noctanter*, which is an inquisition on the crown side of the court. (a)

Holroyd, contra. This is a novel attempt to sustain an action by the party grieved against the inhabitants of the township: for notwithstanding what is stated in the report of *Procter v. Mallorie*, in Rolle P. 365, there is no instance since that of any other proceeding upon the stat. of Ed. 1, than by the writ of *noctanter*, nor of any proceeding under the statute of Geo. 1. It is a clear principle recognized in a modern case of *Russel v. The Men of Devon*, 2 Term Rep. 667, that no action lies against an indefinite body of men, not incorporated, unless given expressly by statute, or at least by necessary implication; as where a statute (such as that of *Winton*) gives damages *generally* to the party grieved, which can only be recovered by action. But the stat. 6 Geo. 1, does not give to the party grieved damages *generally*: it only gives to him specifically such remedy, satisfaction, and recompence, and enables him to recover such damages against the parish, &c. *in the same manner and form*, as for dikes and hedges overthrown in the night, &c. by the 13 Ed. 1. Then, as that statute only directs, that "the towns near adjoining shall be *distraigned* to levy the hedge or dyke at their own cost *and to yield damages*;" and as the mode of proceeding under it has always been by the writ of *noctanter* on which the *distingas* issues to compel the inhabitants to levy the hedge, &c. and to yield damages to the party grieved; and as this mode of proceeding was the known course pursued at the time of passing the act of the 6 Geo. 1; it seems as if that were the remedy specifically intended by the legislature in framing the latter statute. It is also to be observed, that the particular remedy is pointed out by the same clause which gives the damages; which is always a material circumstance in the construction of statutes. For if a thing be prohibited, or damages given generally, in one clause, an indictment in the one case, and an action in the other, will lie upon the general cause, though a subsequent clause may give a particular remedy; if there be no words of exclusion of any other. It is no objection to this construction, that the remedy by the writ of *noctanter* and *distingas* is of a criminal nature; because it grows out of the neglect of a public duty, the not discovering and indicting the offenders; and the object of the proceeding is not only to recompence the party grieved, but to compel the repair of the fences, &c. thrown down, which could not be enforced by action. And there is this further advantage in proceeding upon the writ of *noctanter*, that the *distingas* issues against the very persons inhabiting in the adjoining parish at the time, who are guilty of the neglect; whereas the damages recovered in an action may be levied upon those who come to inhabit afterwards. [Lord *Ellenborough*, C. J. The same objection would apply to an action against the hundred on the statute of hue and cry. But the *distingas* under the writ of *noctanter* would, I presume, go against the inhabitants generally, and would not be confined to such as were inhabiting at the time of the damage done. Have you any authority to shew that it ought to be so confined?] It should seem on principle to be confined to those who were guilty of the neglect. The writ of *noctanter* also directs the sheriff to inquire of the inhabitants of the neighbouring vills who are liable and those being ascertained, the *distingas* issues against them accordingly: in some of the cases in Cro. Car. several townships are included. But, without this previous inquiry, how is the party grieved to know against whom he is to proceed in his action? Nor could it have been intended to leave it to his election to proceed against a larger or smaller district; for that would vary exceedingly the shares of the damage to be sustained by individuals. [*Bayley*, J. The same difficulty occurs upon a *distingas*: though it be directed

(a) *Rez v. St. Gregory*, in *Sudbury*, 1 Stra. 622, and *Rez v. Glassenby*, 2 Stra. 1069, and Bull. N. P. 217.

against all, yet it may be executed against any inhabitant.] But as the inquisition first returned by the sheriff under the writ of *noctanter* ascertains what villas are liable, the individual distrained upon knows against whom he may apply for contribution.

Ainslie, in reply, observed, that the difficulty suggested as to the change of inhabitants could not be avoided: for even the stat. 6 Geo. 1, postpones the remedy for six months, in order to give time to the parish, &c. to convict the offenders. He concluded by stating that other gentlemen at the bar had taken notes, for a second argument.

The Court having consulted together for some time, Lord *Ellenborough*, C. J. said, that Lord *Coke's* authority was so strong in support of the action, and as it was not probable that more light could be thrown upon the subject, there did not appear to be any necessity for hearing a further argument; the Court being of opinion upon that authority, that the action was well brought. But that if any thing occurred to them before the end of the term to raise a doubt upon the subject, they would hear it argued again. That the only other remedy suggested for the party grieved was an inconvenient and cumbrous mode of proceeding, which involved all the difficulties urged against the present action. And that as to the difficulty of ascertaining against whom the plaintiff was to bring his action, the plaintiff must at his peril take care to sue the proper persons, otherwise he would fail in his suit.

No further mention was made of the case in Court; and the *postea* was delivered to the plaintiff.

Kemp v. Filewood, Clerk.

The Same v. The Same.

11 East, 358. June 13, 1809.

Due notices having been given to the parson of the setting out the tithes of fruit and vegetables in a garden, which were accordingly set out on the days specified; and the tithes not having been removed at the distance of a month afterwards, when they had become rotten; a notice then given by the owner, to remove the tithed fruits and vegetables within two days, otherwise an action would be commenced against the parson, is sufficient notice of their having been set out, whereon to found an action, if they be not removed. And due notices having been given of setting out tithes of garden vegetables and field barley on certain days between the 11th and 16th of September, a general notice on the 17th to the parson, to take away all the tithes of his, (the plaintiff's,) lands within two days, is sufficient whereon to found the like action.

THESE were two actions on the case; the one brought by the plaintiff, who, in 1805, was the occupier of a garden in the parish of *Syble Hevingham* in *Essex*, against the rector of the parish, for not taking away the tithes of the garden, which the plaintiff had duly set out. In support of this, the plaintiff at the trial before *Heath*, J. at *Chelmsford*, proved several notices given to the defendant in that year, that at the several times mentioned in such notices, the plaintiff would set out the tithes of fruits and vegetables growing in the said garden; and that the tithes of fruits and vegetables were accordingly set out, and were not taken away, but were suffered by the defendant to rot and perish on the ground. None of these notices, which were required by the custom of the parish, were given later than the 20th of August 1805. There was then proved a notice in writing, signed by the plaintiff, and dated 23d of September 1805, and served on the defendant, which was to the following effect:—To take the tithed fruits and vegetables from the plaintiff's garden on or before the 25th instant; or the plaintiff would commence an action against him. But *Heath*, J. was of opinion, that this latter notice was nugatory; not having a subject to which it might refer; for the tithes set out in August must, before

the 23d of *September*, be rotten, and mixed with the mould of the garden, and consequently not capable of being removed. And in consequence of such opinion, the plaintiff's counsel, having first offered to prove other notices to take away the tithe nearer to the times of the notices to set them out; which were rejected; because as only one notice to take away was laid in the declaration, one only could be proved; submitted to be nonsuited, to avoid a verdict against him.

The other was a like action on the case, brought against the rector, for not taking away the small tithes of the plaintiff's garden, duly set out: and also for not taking away the tithes of barley. And in this it was proved, that the tithes of the vegetables in the garden, and of the barley in the field, were duly set out by the plaintiff, and not taken away by the defendant. The notice given by the plaintiff to the defendant, to take the tithes away, was dated the 17th of *September* 1806, in order to entitle the plaintiff to maintain the action: and it required the defendant to take away *all the tithes of his* (the plaintiff's) *lands* on or before the 19th inst. It was agreed, that by the custom of the parish the occupiers of lands were bound to give a previous notice of setting out their tithes: and it was proved by the plaintiff, that he gave several notices of setting out tithes of vegetables growing in his garden, on the 11th, 15th, and 16th of *September*, and of tithing barley at another day, before the 17th. But *Heath, J.* nonsuited the plaintiff, because the notice to take away the tithes did not specify the tithes to be taken away, nor from what lands.

These nonsuits were moved to be set aside in the last term, by *Marryat*, who stated the principal points ruled at the trial in the manner before mentioned, and his objections to the nonsuits upon the grounds on which they had passed: in which objections the Court appeared to acquiesce. Then with respect to the evidence of the other notices, to take away the tithes, which had been rejected in the first action, on the ground that one such notice only was alleged in the declaration; and that one notice having been offered in proof, which the learned Judge thought insufficient for the reason stated, no other could be proved; he observed, that even if the plaintiff were precluded from offering in evidence a sufficient notice, because he had before proved one which was deemed insufficient; (which he denied) still he submitted that the form of the declaration did not warrant the objection; for it was laid that on the several days on which the tithes were set out, the defendant had notice, &c. *viz.* on such a day, &c.

Best, Serjt. now opposed the rules, and insisted upon the objections taken at the trial; in the first action, because the notice of the tithe having been set out, and requiring it to be removed, came above a month after the fruit and other vegetables were proved to have been set out, and was therefore nugatory for the purpose for which such a notice is required, as the things must have been rotten long before. It would, therefore, be in vain to send the case down to a new trial, unless indeed evidence of some other notice nearer to the time of setting out the tithes could be given. Then with respect to the objection in the other action; the notice was too general; specifying neither the nature of the tithe, nor the place from whence it was to be taken: and every notice must have a reasonable certainty with respect to the subject matter.

Lord ELLENBOROUGH, C. J. In the one case, the defendant had notice when the tithes would be set out; but a month and more passed, and he did not take them away. Then the notice of the 23d of *September* was given; the meaning of which plainly is, that the plaintiff had borne with the inconvenience long enough, and that if the defendant did not remove the nuisance within two days, the plaintiff would bring his action against him. What objection can there be to that? The person who is the wrong-doer is to look to the subject of the notice. If it be still fruit or vegetables, he is to take away those; if they have become rotten mould, he is to take away that. His lordship also thought the notice in the other action sufficiently plain with reference

to the prior notices recently given of setting out the tithes of the fruit, vegetables, and barley.

GROSE, J. agreed.

LE BLANC, J. agreed; and added, that the very object of giving the notice on the 23d of *September*, to take away the tithe, after it had been suffered by the defendant to continue on the ground for above a month, was that he might remove the inconvenience from the plaintiff.

BAYLEY, J. observed, that the notices in the second action of setting out the tithes were given so recently as the 11th, 15th, and 16th of *September*, before the general notice on the 17th to take all the tithes away.

Rules absolute.

Parker v. Staniland.

11 East, 362. June 13, 1809.

A contract by the owner of a close cropped with potatoes, made on the 21st of *November*, to sell to the defendant the potatoes at so much a sack; the defendant to get them out of the ground *immediately*; is not a contract for any *interest in land* within the 4th section of the statute of frauds, but the same as if the potatoes, which had done growing and were to be taken up immediately, had been sold in a warehouse from whence they were to be removed by the defendant.

THE plaintiff, declared, that the defendant was, on the 1st of *January* 1809, indebted to him in 500*l.* for a certain crop of potatoes of the plaintiff before that time *bargained and sold* by the plaintiff to the defendant at his request, and by the defendant under that bargain and sale before that time accepted, gathered, dug up, taken, and carried away: and being so indebted the defendant promised to pay, &c. There was another similar count on a *quantum meruit*, and other general counts for goods sold and delivered, &c. The defendant pleaded the general issue, and paid 22*l.* 1*s.* 9*d.* into court. It appeared, at the trial before Bayley, J. at *Nottingham*, that the plaintiff, being the owner of a close of about two acres, which was cropped with potatoes, agreed with the defendant on the 21st of *November*, to sell him the potatoes at 4*s.* 6*d.* a sack. The defendant was to get them himself, and to get them immediately. The defendant employed men to dig the potatoes on the 25th, 26th, and 27th of the same month, and got 21, 24, and 33 sacks full, and on the 4th of *December*, he got seven sacks more, and 14 about *Lady-day*, the value of which was covered by the money paid into court. But there remained about three roods of potatoes which were not dug up, and which were spoilt by the frost; and the action was brought to recover the value of these. The objection taken at the trial was, that this was an agreement for an interest in land, which, not having been reduced to writing, was void by the statute of frauds, 29 Car. 2. c. 3. s. 4. But the learned Judge overruled the objection, and permitted the plaintiff to take a verdict for the amount; reserving leave to the defendant to move to enter a nonsuit, if the Court should think the objection well founded. The motion was accordingly made by

Balguy, jun. in the last term, who referred to *Crosby v. Wadsworth*, 6 East, 602, where a contract for the purchase of a growing crop of grass in a close, for the purpose of being mown and made into hay by the vendee, was held to convey to him an interest in the land itself, and therefore avoided by the statute, if not reduced into writing.

LORD ELLENBOROUGH, C. J. observed, that there was this difference between the cases, that in *Crosby v. Wadsworth* the contract was made while the grass was then in a growing state, which was afterwards to be mown at maturity, and made into hay. Whereas here the contract was for the potatoes in a matured state of growth, which were then ready to be taken, and were agreed to be taken immediately. There was a delivery of the whole at the time, as

much as the subject matter was then capable of delivery, and the defendant did actually take away a great part of them. However, a rule *nisi* was granted for further consideration of this point. But with respect to another objection which was now started, that the money paid into court covered the value of all the potatoes which had been taken, and that the remainder, which were left in the plaintiff's ground, could not be recovered in value under counts, stating that they had been "bargained and sold, gathered, dug up, taken, and carried away," or "sold and delivered:" his Lordship answered, that the objection had not been taken at the trial; and that, besides, it was enough to prove that they were bargained and sold, without proving that they were taken away.

Clarke and *Hemming* now shewed cause against the rule, and contended that the potatoes were sold merely as goods in a warehouse ready for delivery at the time and to be taken immediately, though they were permitted to remain there till it suited the defendant's convenience to remove them. Potatoes are often kept in the ground. [*Grose*, J. That is, after they have been severed.] All benefit to them from the soil was at an end, nor was it contemplated by the contracting parties. This differs the case materially from *Wodington v. Bristow*, 2 Bos. & Pull. 452, and *Crosby v. Wadsworth*, 6 East, 602, where the continuing growth and nourishment of the hops in the one case, and of the grass in the other, were in contemplation. The right to the soil continued all the time in the plaintiff, and the defendant would have been a trespasser if he had meddled with it otherwise than for the special purpose of taking up the potatoes. The nature of the contract shews this; for the contract was merely for the potatoes, and they were to be sold by the sack. The defendant could not have maintained trespass against any person going on the ground: he himself had only an easement to take the crop.

Balguy, and *Balguy jun.* in support of the rule, contended that if the land had been devised in this state, the devisee would have taken the potatoes against the executor; which shews that the contract was for an interest in the land. Nor can this be distinguished in principle from *Crosby v. Wadsworth*, upon the presumption (probably not founded in fact) that the potatoes had done growing, and had ceased to derive any nourishment from the land: but it is enough that they were not severed from it when the contract was made, and therefore did not exist separately as goods: that is the only distinction recognized in the books. Larceny could not have been committed of them. This case is even stronger in one respect; for the crop could not be taken up without breaking the soil, which was to be done by the defendant; and therefore it cannot be considered as a mere easement. The defendant was entitled to the possession of the close until the crop was taken; for without that the contract could not have been executed; and therefore he must have been entitled to all the possessory remedies against a wrong-doer invading his possession.

Lord ELLENBOROUGH, C. J. It does not follow that because the potatoes were not at the time of the contract in the shape of personal chattels, as not being severed from the land, so that larceny might be committed of them, therefore the contract for the purchase of them passed an interest in the land within the 4th section of the statute of frauds. The contract here was confined to the sale of the potatoes, and nothing else was in the contemplation of the parties. It is probable that in the course of nature the vegetation was at an end: but be that as it may, they were to be taken by the defendant immediately, and it was quite accidental if they derived any further advantage from being in the land. This differs the present case from those which have been cited. The lessee *primæ vesturæ* may maintain trespass *quare clausum fregit*, or ejectment, for injuries to his possessory right: but this defendant could not have maintained either; for he had no right to the possession of the close; he had only an easement, a right to come upon the land, for the purpose of tak-

ing up and carrying away the potatoes; but that gave him no interest in the soil. I am not disposed to extend the case of *Crosby v. Wadsworth* further, so as to bring such a contract as this within the statute of frauds, as passing an interest in land.

GROSE and LE BLANC, Justices, agreed.

BAYLEY, J. I do not think that this contract passed an interest in the land within the meaning of the 4th section of the statute of frauds. In the cases of *Crosby v. Wadsworth*, and *Waddington v. Bristow*, the contracts were made for the growing crops of grass and hops, and therefore the purchasers of the crops had an intermediate interest in the land while the crops were growing to maturity before they were gathered: but here the land was considered as a mere warehouse for the potatoes till the defendant could remove them, which he was to do immediately; and therefore I do not think that the case is within the statute.(1)

Rule discharged.

Oliver v. Collings.

11 East, 367. June 14, 1809.

After the time was out for moving to set aside an award made a rule of Court, the Court granted an attachment for non-performance of it, and would not drive the plaintiff to his action on the submission-bond, on an affidavit disclosing that the arbitrators, after having appointed one umpire who refused to act, appointed another who accepted the authority; but that the defendant afterwards, and before the umpire had proceeded, having objected to his appointment, because of partiality, the arbitrators acceded to the objection, and each proposed another, but could not agree on the person to be substituted, and did not in fact substitute any other, though the respective attorneys agreed on a third person; in consequence of which, the umpire objected to was called on by the plaintiff's attorney to proceed, and made his award within time.

GASELEE moved to make a rule absolute for an attachment for non-performance of an award, which had been made a rule of Court.

East opposed it, on an affidavit, that by the bonds of submission *Rowe* and *Stephens* were appointed joint arbitrators, with a power to appoint an umpire, if they could not agree. That the arbitrators not agreeing, first appointed *Hambly* as umpire; who declining to act, they next appointed *Grigg* within the time limited. That as soon as *Grigg's* appointment was made known to the defendant's attorney, he objected to it on the ground of *Grigg's* being upon bad terms with the defendant, and therefore an improper umpire; to which the arbitrators assenting, each of them proposed a different person; and not agreeing upon either, the plaintiff's and defendant's attorneys met, and the former named a new person as umpire, which was acceded to by the latter; but (no further appointment having been made by the two arbitrators,) the plaintiff's attorney called on *Grigg*, before the time was out, to proceed with his umpirage; and then an appointment of him on stamp was signed by *Rowe* and tendered to *Stephens*, who refused to execute it; notwithstanding which *Grigg* made his award on the 30th of *January* 1808, within time, after notice given to him on the morning of that day by the defendant's attorney, that his appointment had been objected to, and was agreed to be revoked. He therefore contended, that, under these circumstances, the Court would not by granting this attachment preclude the defendant from disputing the authority of the umpire in an action by the plaintiff on the submission bond, if he meant to insist upon the award. That by the general rule any power given

(1) In *Bostwick v. Leach*, 3 Day 476, it was decided by the Supreme Court of Connecticut, that a contract for the sale of things annexed to the freehold, and which would pass by a deed of land under that description, but which are capable of separation without violence, and by the terms of the contract are to be separated, is not within the statute.

to another may be revoked before execution; and here the arbitrators who had power to appoint an umpire, and had once appointed *Grigg*, had agreed to revoke that appointment before *Grigg* had executed the umpirage, though they had not agreed in any new appointment; and that revocation was confirmed by the attorneys for both parties, who had, as far as lay in their power, agreed to substitute another. That *Grigg* having been appointed umpire by parol, his appointment might be revoked by parol before execution of his power. That though it was now too late for the defendant to move to set aside the award on the merits, or to impeach it on the ground of partiality or prejudice in the umpire; yet the Court had before refused attachments in cases where an objection to the award appeared upon the face of it, even after the time limited by the statute was out, for moving to set aside the award; because they would not preclude the party grieved from availing himself of the objection if an action were brought against him upon his submission bond for non-performance of the award. So here, for the same reason, where there is a serious question of law to try, and where there seems such probable ground for suspecting the justice of the award, the Court will not lend its summary assistance, but leave the plaintiff to bring his action, which will let the defendant in to insist on the nullity of the umpirage. He said it was even now *vezata questio*(a) whether arbitrators, having once executed their power in the appointment of an umpire, could afterwards appoint another: but supposing they could not, the objection would equally apply to the appointment of *Grigg*. [*Le Blanc*, J. said, that the defendant ought to have applied in time(b) to set aside the award upon the special circumstances of the case: and the Court would not, after the laches of the defendant, drive the plaintiff to his action merely to try a doubtful question of law, supposing this to be so.] To which it was answered, that the Court would not grant an attachment to enforce an illegal award, if no action could be maintained upon it.

LORD ELLENBOROUGH, C. J. We have lately held, that if an authority be once executed, it cannot be executed again.(c) Here the arbitrators had executed their authority by an effectual appointment of an umpire, who accepted and acted upon the authority so conferred on him: the consent or dissent of the parties themselves afterwards to such appointment signifies nothing.(d) So the subsequent tender of that appointment on stamp to one of the arbitrators was merely to serve as formal evidence of it. The arbitrators afterwards, in compliance with the wishes of the defendant, made an ineffectual attempt to appoint another umpire in the place of him they had appointed before; but they could not agree on the person to be substituted, and therefore the original appointment stood as before.

Per Curiam,

Rule absolute.

(a) Vide *Trippet v. Eyre*, 3 Lev. 263, and 2 Ventr. 113, and *Reynolds v. Gray*, 1 Salk. 70, 1 Ld. Ray. 222, and 12 Mod. 120. And vide the reasoning on these cases in *Kyd* on Awards 91, &c. It seems that the refusal of one umpire to accept the appointment does not preclude the arbitrators from naming another within time.

(b) This was prevented at the time it was intended by the illness of the defendant.

(c) Vide *Irwin v. Elnon*, 8 East, 54.

(d) Nor can even a parol agreement between parties to abandon an award made under bonds of submission be pleaded to an action on the bond. *Braddick v. Thompson*, 8 East, 344.

Ambrose v. Rees.

11 East, 370. June 14, 1809.

Notice having been given for the trial of a cause at *Monmouth* which arose in *Glamorganshire*, as being in fact the next *English* county since the stat. 27 H. 8. c. 26. s. 4, though *Hereford* be the common place of trial; the Court refused to set aside the verdict as for a mis-trial, on motion; the question being open on the record.

MARRYAT opposed a rule for setting aside the verdict obtained in this cause upon the ground of an irregularity in the trial. The venue was laid in *Glamorganshire*, and the cause was tried at *Monmouth*, as the next *English* county where the King's writ of *venire* runs: (a) but it was objected, that it ought to have been tried at *Hereford*, according to the general custom that all causes in which the venue is laid in any county in *South Wales* should be tried at *Hereford*. But the rule being that the cause should be tried in the next *English* county, and *Monmouth* being in fact the next *English* county to *Glamorganshire*, and more conveniently situated for the trial of the cause, there seems no solid ground for impeaching the validity of the trial; though the practice relied on is easily accounted for by the consideration that *Monmouthshire* was originally a *Welch* county, and till it became an *English* county in the 27th year of Hen. 8, *Herefordshire* was in fact the next *English* county to *Glamorgan*. And there is no reason for setting aside this verdict on the ground of surprize; for the defendant had not merely a notice of trial in the next *English* county, generally, which might have misled him by the notoriety of the practice, but a specific notice of trial at *Monmouth*, to which he made no objection at the time.

Abbott, in support of the rule, relied on the known practice which had always prevailed, as well since as before the statute 27 H. 8; and referred to *Morgan v. Morgan*, Hard. 66, where the question arose in 1656, upon an ejectment for lands in *Breknockshire*, which was tried at *Monmouth*; and afterwards judgment was arrested, on the ground of a mis-trial, as it ought to have been tried in *Herefordshire*; for that *Monmouthshire* was but made an *English* county by statute within time of memory; and that trials in the next *English* county of issues arising in *Wales* have been time out of mind and at the common law; so that a place newly made an *English* county cannot have such a trial. And he observed, that if this trial were good, all the judgments in causes out of *Glamorganshire*, tried at *Hereford*, have been erroneous.

Lord ELLENBOROUGH, C. J. If the question appear on the record, then the defendant cannot apply in this summary manner. And as he did not object at the time, we shall not relieve him upon motion.

Per Curiam,

Rule discharged.

Daniel v. North.

11 East, 372. June 14, 1809.

Where lights had been put out and enjoyed without interruption for above 20 years, during the occupation of the opposite premises by a tenant; that will not conclude the landlord of such opposite premises, without evidence of his knowledge of the fact, which is the foundation of presuming a grant against him; and consequently will not conclude a succeeding tenant who was in possession under such landlord from building up against such encroaching lights.

THE plaintiff declared in case, upon his seisin in fee of a certain messuage or dwelling house in *Stockport*, on one side of which there is and was, and of right ought to be, six windows; and stated that the defendant wrongfully erect-

(a) Vide 1 Term Rep. 313.

ed a wall 60 feet high and 50 in length near the said house and windows, and obstructed the light and air from entering the same, &c. At the trial before the Chief Justice of *Chester*, it appeared that the plaintiff's premises, which adjoined those of the defendant, were in 1787 altered by the then occupier, and the windows in question, (though somewhat altered since) were then put out towards the defendant's premises; and such windows then received the light and air freely over a low bakehouse, which was before that time, and continued till within the last three years to be, tenanted by one *Ashgrove*, under Sir *George Warrender*, from whom the present defendant claimed; upon the scite of which bakehouse the defendant, who succeeded *Ashgrove*, built the erection complained of, about two years ago, which was considerably higher than the old bakehouse, and darkened some of the plaintiff's windows; but would have been no injury to the plaintiff's premises, if they had continued in their original state, before the alterations which took place while *Ashgrove* rented under Sir *George Warrender* the premises now held by the defendant. There was other evidence given at the trial; but ultimately the question made then, and afterwards argued before this Court, was, whether Sir *Geo. Warrender*, the then reversioner of the premises occupied by *Ashgrove*, were bound by his tenant's acquiescence for above 20 years in the windows put out by the then occupier of the plaintiff's premises against the defendant's premises. It was insisted at the trial, that the defendant, standing in the place of the reversioner, was not bound by such acquiescence of the former tenant; but this was over-ruled by the Court below, and the plaintiff recovered a verdict.

Manley, Serjt. in the last term, obtained a rule *nisi* for a new trial, on the ground of the misdirection of the Court below: and before the case was argued by the plaintiff's counsel on this day, he referred to *Bradbury v. Grinsell* in this Court, M. 41 Geo. 3.(a) to shew that the possession of an easement for 20 years, in order to operate as a bar in an action on the case, must be with the acquiescence of him who was seized of an estate of inheritance; otherwise he who has the inheritance in remainder or reversion may, when it vests in possession, dispute the right to the easement. And he said, that at any rate where the premises are in lease, the landlord ought not, without notice, to be prejudiced by the laches or acquiescence of his tenant in that which is a prejudice to the inheritance.

Topping and *J. Williams* then shewed cause against the rule, and stated that it was left to the jury to presume a grant from the owner of the inheritance after 22 years uninterrupted possession of some of the lights by the plaintiff; it appearing that the steward of Sir *George Warrender*, the landlord, resided in the town of *Stockport*, and continually passed by these premises, where he must have seen the windows; and from thence they assumed the knowledge of Sir *George*, and presumed his acquiescence. [Lord *Ellenborough*, C. J. How can such a presumption be raised against the landlord, without shewing that he knew of the fact, when he was not in possession, and received no immediate injury from it at the time. That point was not put to the jury. The impression on our minds is founded upon the general principle, that a grant will not be presumed against an ignorant man, not in possession, at the time of that which is to give him knowledge of the fact, and from whence knowledge would be presumed.] There are many cases where presumptions are raised against owners of land without actual notice of the fact; as in cases of rights of way and rights of common. A tenant who is interested to resist the encroachment stands on the same interest as his landlord, and therefore the latter should be bound by his tenant's acquiescence, which may reasonably be presumed to have taken place with his knowledge and concurrence.

Lord *ELLENBOROUGH*, C. J. The foundation of presuming a grant against

any party is, that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant: and that cannot be presumed against him unless there were some probable means of his knowing what was done against him. And it cannot be laid down as a rule of law, that the enjoyment of the plaintiff's windows during the occupation of the opposite premises by the tenant of *Sir Geo. Warrender*, though for 20 years, without the knowledge of the landlord, will bind the latter. And there is no evidence stated in the report from whence his knowledge should be presumed.

GROSE, J. of the same opinion.

LE BLANC, J. The objection was taken at the trial, that the landlord was not bound by the acquiescence of his tenant, without his knowledge, though for 20 years: but that was overruled, and it was considered as a rule of law that the landlord was so bound. It is true, that presumptions are sometimes made against the owners of land, during the possession and by the acquiescence of their tenants, as in the instances alluded to of rights of way and of common; but that happens, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own, and to make common cause with him: but the same cannot be said of lights put out by the neighbours of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake.

BAYLEY, J. The tenant cannot bind the inheritance in this case, either by his own positive act or by his neglect. If indeed the landlord had known of these windows having been put out, and had acquiesced in it for 20 years; that would have bound him; but here there was no evidence that he knew of it till within the last two years.(1)

Rule absolute.(a)

(1) [See *Gloucester v. Beach*, 2 Pick. 60, note. *Medford v. Pratt*, 4 do. 222. *Sargent v. Ballard*, 9 do. 251.—W.]

(a) A question of this kind once arose incidentally in a case before Lord Kenyon; but it was not necessary in the result to sift the fact as to the knowledge of the land owners. It was an action of trespass brought by the trustees of the *Rugby* Charity against *Merryweather*, at the Sittings in *Middlesex*, on the 26th of May 1790, to try a right of way in dispute between the plaintiffs and the governors of the Foundling-Hospital. There were several pleas of justification on the record, amongst others, one stating that the *locus in quo* (which was *Lamb's Conduit-Street*) was a common highway, and that the supposed trespass was committed in removing an obstruction there. The evidence was, that the right of the soil was clearly in the plaintiffs; but there had been a common street there, though no thoroughfare, by reason of the houses at the end, for above 50 years. The plaintiffs accounted for not having put up a bar or the like, to denote that the way was not relinquished to the public at large, by shewing that the *locus in quo* had been in lease for a long term up to the year 1780. Lord Kenyon, C. J. asked what the plaintiffs had to say to the time from 1780 till about two years ago, when they had put up a bar. In answer it was said, that they had been in treaty with the Foundling Hospital, respecting the allowing them a right of way, which was finally broken off. Per Lord Kenyon. If this rested solely on the ground of a question of right between the plaintiffs and the Foundling Hospital, the former would certainly not have been barred by the time which elapsed from 1780 till the obstruction was put up, pending the treaty between them; but during all that time they permitted the public at large to have the free use of this way, without any impediment whatever; and therefore it is now too late to assert the right; for this is quite a sufficient time for presuming a dereliction of the way to the public. In a great case, which was much contested, six years was held sufficient. And as to this not being a thoroughfare; that can make no difference. If it were otherwise in such a great town as this, it would be a trap to make people trespassers. The Duke of Bedford preserves his right in *Southampton-street Covent-Garden*, by a bar set across the street, which is shut at pleasure and shews the limited right of the public. The jury found a verdict for the defendant upon the issue on the common highway.

Doe, on the Demise of Terry, v. Collier.

11 East, 377. June 15, 1809.

Under a devise of land to a trustee and his heirs, out of the rents and profits to pay an annuity to the testator's wife, and the overplus to his nephews; and after his wife's death to the use of his nephews and the survivor for their lives; remainder to the use of the trustee to preserve contingent uses and estates, &c. during their lives; and after their deceases in trust for the heirs male of the body and bodies of the nephews; and in default of such issue, then to the use of another in fee. Held, that the limitation in trust for the heirs male of the body and bodies of the nephews was executed by the statute, and therefore united with the prior use executed in them for life; and that a recovery suffered of the whole estate by the survivor of the nephews after the death of the other nephew without issue, and after the death of his own issue, bound the entail, and defeated the subsequent limitation in fee.

IN ejectment for certain messuages and lands at *Swanscombe* in *Kent*, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

Henry Peers, clerk, being seised in fee of the premises in question, consisting of three undivided fourth-parts of two houses, farms, and woodlands, at *Swanscombe*, by his will of the 27th of *January* 1787, devised "all and every "of my messuages, lands, tenements, and hereditaments, or part and parcel of "lands, &c. at *Swanscombe* to *Henry Vyvyan*, clerk, and his heirs, in trust to "and for the several uses intents and purposes after mentioned; viz. that the "said *H. Vyvyan*, his heirs, &c. shall out of the rents and profits pay to my "wife, *Elizabeth Peers*, 50*l.* yearly during her life, being settled upon her by "our marriage as a jointure; and to pay the overplus of such rents and profits "unto my two nephews, *John Consett Peers*, and *Daniel Letsom Peers*, and "their assigns, and to the survivor of them and his assigns, during the life of "my wife: and from and after the death of my wife, then to the use of the "said *J. C. Peers*, and *D. L. Peers*, during their lives, and the life of the "longest liver of them, without impeachment of waste: and from and after "the determination of that estate, to the use of the said *H. Vyvyan* and his "heirs, during the lives of the said *J. C. Peers*, and *D. L. Peers*, and the life "of the longest liver of them, upon trust to preserve the contingent uses and "estates, &c. but nevertheless to permit the said *J. C. Peers* and *D. L. Peers* "and the survivor of them during their lives, and the life of the longest liver "of them, to receive and take the rents and profits of the said lands and pre- "mises for their own use: and from and after the several deceases of the said "*J. C. Peers* and *D. L. Peers*, then in trust for the heirs male of the body "and bodies of the said *J. C. Peers* and *D. L. Peers*: and in default of such "issue, then to and for the use and behoof of my kinsman *Joseph Terry* and "his heirs." The testator died in 1793, leaving his widow and both his said nephews him surviving. The nephews entered into possession of the demised premises. The widow died shortly after the testator. *J. C. Peers*, one of the nephews, died in 1798, without issue; the other nephew *D. L. Peers*, survived him, and on his death entered into possession of all the premises, and had issue male one son only, who was born in 1792, and died in 1796, without issue. In *Easter* term 1805, *D. L. Peers* suffered a recovery of the premises, and in *April* 1807, he granted a lease of the premises to the defendant under which the defendant is in possession. *D. L. Peers*, by his will of the 15th of *April* 1807, devised the same premises to his daughter in tail general, and died before the date of the demise in this ejectment; leaving his daughter, and *Joseph Terry* the lessor of the plaintiff, and devisee in remainder under the will of the said *H. Peers*, him surviving. The question was, whether the lessor of the plaintiff were entitled to recover all or any part of the premises in question.

Marryat, for the plaintiff, contended that *D. L. Peers* had not a sufficient estate in him at the time to give effect to the recovery suffered by him. The two nephews of *Henry Peers*, the testator, took joint estates for life with several inheritances in tail male, from whence the Court would infer cross remainders: and the only question is, whether the estates to the heirs male be of the same quality as the estates for life of the nephews, without which they could not unite, as was settled in *Shapland v. Smith*, 1 Bro. Ch. Cas. 74, and *Sylvester v. Wilson*, 2 Term Rep. 444, so as to enable *D. L. Peers*, the survivor of the two nephews, to bar the entail by suffering the recovery. The testator's manifest intention was to prefer the heirs male of his nephews, and in default of such, then his kinsman *Joseph Terry*, the lessor, before the daughters of his nephews: the Court therefore will give such a construction to the will as the words may bear, so as best to effectuate that intent. It is clear that the estates for lives of the nephews, and the survivor of them, are legal estates. The only question is, whether the devise to the trustee and his heirs *in trust* for the heirs male of the bodies of the nephews be executed, so as to make that also a legal estate: for otherwise it could not unite with the legal life estate of the nephews. But to construe it so, would defeat the manifest intention of the testator; for he changes from legal to equitable and from equitable to legal estates, in carving out the several interests to the devisees, as it seems, for the express purpose of preventing the tenants for life from barring the entail by a union in them of the legal estate of inheritance. During the widow's life, the trustee, who was to pay her an annuity out of the rents and profits, took of course the legal estate. The next remainder is to the *use* of the nephews for their lives; that use was executed in them. The next limitation is to the use of the trustee to preserve contingent remainders, &c. which was of course executed in the trustee. Then the next is to him *in trust* for the heirs male of the bodies; which varies from the term made use of in limiting the legal estate for the lives of the nephews, which is to their *use*; and the last legal limitation to *Joseph Terry* is also to the *use* of him and his heirs.

J. Berens, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. The testator uses the words *trust* and *use* indifferently: both of them are within the operation of the statute; for a trust may be executed as well as an use. And nothing else is relied on but the change of these words in order to denote the testator's intention. In truth, in every case where a testator creates an estate tail by words of this description, unless he is perfectly cognizant of the technical rule of law, he does not intend to enlarge the life estate of the first taker to an estate tail: but the rule of law notwithstanding attaches to give the first taker an estate tail.

Per Curiam,

Postea to the Defendant.

The King v. The Inhabitants of Holm, East Waver Quarter, in the Parish of Holm Cultram.

11 East, 381. June 17, 1809.

An order of removal, merely adjudging that the person removed was *with child and unmarried*, without drawing the conclusion that she was *chargeable*, is bad; as the stat. 35 G. 3. c. 101, which first gives the general rule that no person shall be removed till actually chargeable; and then (s. 6.) says, that an unmarried woman with child shall be deemed to be chargeable within the intent of the act, only makes the fact of such pregnancy presumptive or *prima facie* evidence of her chargeability; which is open to be rebutted by evidence of her substance, or the like; shewing that she was not an object of the poor laws, or that she could secure the parish against the contingent charge of maintaining herself and her bastard.

AN order by two justices of the county of *Cumberland* for the removal of

Elizabeth Mitchinson, single woman, from *Oulton Quarter* in the parish of *Wigton*, to *Holm, East Waver Quarter* in the parish of *Holm Cultram*, having been confirmed on appeal to the sessions, was now removed into this court by certiorari, and after the usual direction, run thus: "upon the complaint of the churchwardens and overseers of the poor of *Oulton Quarter*, &c. unto us, &c. being two of his majesty's justices of the peace, &c. that *Elizabeth Mitchinson*, single woman, hath come to inhabit in the said *Oulton Quarter*, not having gained a legal settlement, nor produced any certificate owning her to be settled elsewhere, and that the said *E. Mitchinson* is with child and unmarried; we the said justices, upon due proof thereof made, &c. and likewise upon due consideration had of the premises, do adjudge the same to be true; and we do likewise adjudge, that the lawful settlement of the said *E. M.* is in the said *Holm, East Waver Quarter*, &c." And so it proceeds to direct the removal of the pauper from the one *Quarter* to the other.

The objection taken to the order below, which *Topping* was now prepared to support, was, that it was defective in not stating that the pauper was *actually chargeable*; and that it was not sufficient merely to state, as it did, that she was *with child and unmarried*; for that might still be true, and yet the woman might have sufficient substance of her own, or ample security be given by others, to preclude the least risk of her becoming an actual burthen to the parish: and the case of *The King v. Alveley*, 3 East, 563, was relied on, as having put a construction upon the statute of the 35 Geo. 3. c. 101. s. 6, that the mere fact of a single woman being with child did not *therefore*, as an inevitable conclusion of law, make her chargeable to the parish: that the act only meant to give the magistrates jurisdiction to remove a person so circumstanced, like one actually chargeable, if otherwise a proper object of removal within the spirit of the poor laws.

Scarlett and *Paley*, in support of the orders, said, that though the Court would not intend anything to give jurisdiction to magistrates below; yet where they had jurisdiction of the subject matter, as here, every thing would be intended in support of their order. Now the justices below have stated on the face of the order all the facts necessary to shew that the pauper was a person of that description whom *prima facie* at least the law deems to be chargeable, and therefore liable to be removed, if in their judgment she were a proper object of removal: then having in fact ordered her removal, they must necessarily have drawn the conclusion that she was chargeable within the meaning of the law, though they have omitted to state in express words that legal conclusion from the facts stated. But it never is necessary in judicial proceedings to state a mere conclusion of law which follows from what is stated. In *Rex v. Mathews*, 2 Salk. 475, the principle was carried further; for an order to maintain a bastard child, which did not state that the child was likely to become chargeable, was refused to be quashed on that objection; because it was self evident that every bastard child was likely to become chargeable. In *Hobey v. Kingsbury*, 1 Stra. 527, it was held sufficient to state the husband as likely to become chargeable, without stating the same of his wife and child, who were removed with him: because it followed as a legal conclusion. In *The King v. Great Yarmouth*, 8 Term Rep. 68, it was thought that the words of the act were large enough to comprehend every single woman with child, though residing under a certificate, and consequently in a situation to exclude the possibility of her becoming chargeable to the certificated parish: and that it was not necessary in the order to negative her having a certificate. And as in *Rex v. Tybenham*, 9 East, 388, the Court thought, upon a case stating the bare fact of a married woman, whose husband had been absent from her for four years beyond sea, being pregnant of a child at the time of the removal, which had since been born a bastard, was sufficient to warrant the general allegation in the order, that she had become actually chargeable; because the presumption

of her being chargeable was raised by the statute from the bare fact of being with child of a bastard, if no circumstances were stated to shew the contrary: in like manner ought the legal presumption to be made from the same fact in an order, without other controuling circumstances stated. And the Court seems to have come to this conclusion in *Rex v. Diddlebury*, 9 East, 398, where an order, stating that *A. E. single woman was, by being pregnant, deemed to have become chargeable*, was held good: the Court treating the latter as a legal conclusion from the fact stated of a single woman being pregnant.

LORD ELLENBOROUGH, C. J. If it were an irrefragable conclusion that, being a single woman, and with child, the party removed must be deemed to be chargeable within the meaning of the statute, then this order would be good: otherwise the justices ought to have drawn that conclusion, in order to shew that in their judgment she was a proper object of removal within the poor laws. But, consistently with this order, the party might have been a single woman with child worth 10,000*l.*, or she might have given the most ample security to the parish against any charge which could be thrown upon them. The statute in question first gives the general rule, that no persons shall be removed before they are actually chargeable. It then says, that single women with child shall be *deemed and taken* to be actually chargeable within the true intent of the act. But still the justices ought to draw the conclusion that she is within that general rule: otherwise it would come to this, that every single woman with child, whatever was her substance, might be removed by the parish officers. Being unmarried and with child, such a person is presumptively chargeable, from the strong probability of the fact that she must be so; but there may be circumstances, such as the substance of the party, or the giving a complete indemnity to the parish, which may exclude that presumption. Now, every circumstance of that sort might have existed in this case, and yet the order, as it is framed, be true. In *The King v. Diddlebury* the justices *deemed* her to have become chargeable; but she could not have been *deemed* to be chargeable, if those circumstances had existed in her instance. It ought to appear by the order that the justices have exercised their judgment upon the matter, and repelled the existence of such circumstances by their adjudication that she was chargeable, in order to shew that she was a proper object of removal within the meaning of the law.

GROSE, J. The Legislature never meant to say, that at all events an unmarried woman with child should be removed as chargeable; but only to state the circumstance of such a person being with child as evidence that she was chargeable, unless repelled by other facts to shew that she was not. The justices therefore ought not to have barely stated the fact of her being with child, but to have drawn the conclusion that she was chargeable, to shew that she came within the meaning of the poor laws.

LE BLANC, J. The order of removal is defective. The act of parliament only gives a power to remove persons who are actually chargeable; the justices therefore must find, that the party is chargeable before they can remove her. But the act has made the circumstance of an unmarried woman being with child evidence of her being chargeable: the justices therefore should have adjudged upon that circumstance: instead of which they have merely found the fact, but have not drawn the conclusion.

BAYLEY, J. Before the statute of the 35 Geo. 3, it was essential for the justices to have adjudged that the party removed was likely to become chargeable, in order to give them jurisdiction to remove her. But by this statute another rule is given, and it is not sufficient that the party is likely to become chargeable, but they must be actually chargeable before they can be removed. To avoid, however, the inconvenience likely to ensue from the application of the general rule to the case of a single woman with child, the act has made that circumstance *prima facie* evidence of her being chargeable. But that

only furnishes a rule of evidence, on which the justices are to decide: and many cases may exist as those put by my Lord, of the substance of the party, or of an indemnity to the parish, which may rebut that presumption. Here the order only states the facts of the woman being a single woman and being with child; and does not go on further to draw the conclusion of her being chargeable. If then there may be cases where a woman, though single and with child, may not be removable, as not being chargeable within the meaning of the law, the order is clearly not sufficient, but the justices ought to have gone on to draw the conclusion. In the cases of *Tibbenham and Diddlebury* the Court considered the 6th section of the act as giving a rule of evidence only.

Orders quashed.

Scarlett then observed, that the magistrates had been misled by following the precedent stated in a new edition of *Burn*, published since the statute; and since the author's death.

Brooke v. Booth.

11 East, 387. June 16, 1809.

After judgment by default in debt on bond to secure an annuity payable quarterly; and *scire facias* thereon, suggesting a breach in non payment of a quarter, and damages assessed to that amount on the stat. 8 & 9 W. 3. c. 11; held, that the plaintiff was entitled to his costs on the 8th section, which directs a stay of proceedings on payment of future damages, costs and charges, toties quoties; though the 3d section only gives costs in *scire facias* after plea or demurrer.

JUDGMENT by default was obtained about two years ago in debt on bond, conditioned to secure an annuity of 40*l.* a year, payable quarterly. On this a *scire facias* issued suggesting a breach on the non-payment of the last quarter; which was found for the plaintiff; and at the sittings after last *Hilary* term, the damages were assessed at 10*l.* under the stat. 8 & 9 W. 3. c. 11. s. 8. It had been the practice not to allow costs in this case, because the same statute (s. 3.) only gives costs in *scire facias* after plea or demurrer. But in *Easter* term last, *Dampier* moved for a rule to shew cause why the plaintiff should not have his costs, on the words of the 8th section: which, after providing that the judgment shall remain as a further security to answer damages for further breach of covenant in the same deed or writing, upon which the plaintiff shall have a *scire facias* suggesting other breaches, &c.; enacts "that upon payment or satisfaction in manner as aforesaid of such future damages, costs, and charges, as aforesaid, all further proceedings on the judgment are again to be stayed, and so toties quoties;" which, he contended, gave the plaintiff a right to his costs, though it was not a case mentioned in the third section. That the giving costs in certain cases in sect. 3, did not negative the plaintiff's right to costs in another case provided for by a subsequent section. He then argued, that the 8th section clearly gave the plaintiff a right to his costs in the present case, because the judgment stood for the penalty; and the defendant by the words of that section could not redeem himself from that judgment and the execution consequent thereon but by payment of the costs as well as the damages.

The rule came on among the peremptories in this term, and no one appeared for the defendant; but as the motion went to alter the established practice, *Dampier* drew the attention of the Court to it, and repeated his former observations: when the Court, upon looking at the different clauses of the statute, made the

Rule absolute.

The King v. The Inhabitants of Corsham.

11 East, 288. June 17, 1809.

An order of removal, executed and unappealed against is conclusive as to the settlement of the pauper at the time of such order, even as between third parishes no parties to the former order.

TWO magistrates, by an order, removed *Mary Bowler*, wife of *William Bowler*, and their two children, by name, from *East Moulsey* in *Surry* to *Corsham* in *Wilts*. The sessions upon appeal, confirmed the order, subject to the opinion of this Court upon the following case.

William Bowler was settled by birth in the parish of *Garsdon* in *Wilts*, and at the age of 12 years acquired a settlement in *Corsham* by hiring and service; and subsequent thereto, in 1798, he married the pauper *Mary*, by whom he afterwards had the two children mentioned in the order. *Wm. Bowler* was on the 9th of *April* 1807, by virtue of an order of justices duly made on that day, removed from *Charlton* in *Wilts* to *Garsdon*, against which last mentioned order no appeal was made by *Garsdon*. *W. Bowler* has done no act to gain a settlement in *Corsham* by hiring and service; but he has been from time to time relieved by *Garsdon* since the time he was removed thither under the said order; having gained no settlement elsewhere since the said removal to *Garsdon*.

Marryat and *Lawes*, in support of the orders, argued that the order of removal unappealed against, from *Charlton* to *Garsdon*, was not conclusive that the settlement of the pauper was in *Garsdon*, upon the same question arising between *East Moulsey* and *Corsham*; and that *East Moulsey* was not estopped by the ignorance or laches of a third parish from shewing the truth of the case against *Corsham*. Estoppels are odious, and only bind parties or privies; but *res inter alios acta* can never be set up as an estoppel against strangers. In none of the cases has such an order been deemed conclusive, except against the parish to which the removal was made, whether appealing or not against it: and the phrase which occurs in some of the cases, that the order is conclusive as to all the world, must be understood with respect to the parish against whom the order is established. Then if the former order be not conclusive, the pauper's settlement is found to be in *Corsham*. They referred to the cases of *Harrow* and *Ryslip* parishes, *Salk.* 524, 5, and *Rez v. Sarratt*, *Burr. S. C.* 74.

Nolan and *Cowley*, contra, were stopped by the Court; but they afterwards mentioned the opinion of *Buller, J.* in *Rez v. Kenilworth*, 2 Term Rep. 599, that there was no proposition in the law of settlements more clear than that an order of removal unappealed against, was conclusive against all the world; and that this was so clearly and so universally established, that it ought never to be impeached.

LORD ELLENBOROUGH, C. J. If the pauper were settled in *Garsdon* at the time of the former order made, could not *Corsham* as well as all other parishes have taken advantage of that, upon a question of settlement? Now the order of removal to *Garsdon*, which was submitted to, is the most authentic proof of his settlement being there at the time of the order made; and we must intend every thing in support of that settlement so adjudged. It is in effect a statuteable certificate, if I may so express myself, that the pauper was then settled at *Garsdon*; the statute(a) gives him a settlement there: and the fact stated by the Sessions of a prior settlement in *Corsham* is immaterial.

LE BLANC, J. If the former order were not conclusive as to the settlement

(a) The stat. 13 & 14 Car. 2. c. 12, gives authority to two justices of the peace by their warrant to remove paupers to the place where they were last legally settled.

being in *Garsdon* at the time, *Garsdon* would escape the effect of it altogether; for this order would be conclusive upon *Corsham*, so as to prevent *Corsh* removing to *Garsdon*.

GROSE and BAYLEY, Justices, assenting,

Orders quashed.

Steinman and Others v. Magnus.

11 East, 390. June 17, 1809.

Where a debtor entered into an agreement with his creditors, whereby they agreed to receive 20*l. per cent.* in satisfaction of their several demands, and released the remainder in consideration that half of the composition should be secured by the acceptances of a certain person (also a creditor,) which security was accordingly given and paid when due; held that such agreement was binding on the plaintiff, one of the creditors; though the agreement were not under seal; and though he were the last who signed it, and it did not appear that he had actively induced any of the other creditors or the surety to sign it; and that the plaintiff's suing the debtor, after having received the composition, was a fraud upon the surety and the other creditors.

THIS was an action upon a bill of exchange dated the 10th of *October* 1804, drawn by the defendant upon *G. and M. Isaacs*, payable six months after date to the plaintiffs or order for 400*l.*, which was dishonoured when due by the acceptors. There was also a like count upon another bill drawn by the defendant for 376*l. 4s. 1d.* in favour of the plaintiffs; a count for goods sold and delivered, and the common money counts. The original consideration of these bills was goods sold and delivered by the plaintiffs to the defendant in 1804: and the defendant being afterwards in failing circumstances, the following agreement (not under seal) was entered into and signed by 17 creditors, the names of the plaintiffs being at the bottom of the list. "We the undersigned, being respectively creditors of *Moses Magnus*, do hereby agree for ourselves respectively to take and accept 20*l. per cent.* in full payment and satisfaction for our several and respective debts due at the date hereof: and upon payment of the said 20*l. per cent.* we hereby release and forever discharge the said *M. Magnus* for ever as to the remaining 80*l.* And it is hereby agreed to receive the said 20*l. per cent.* in manner following; viz. 10*l. per cent.* within one month after the execution of these presents; 5*l. per cent.* secured by the acceptance of *Mr. Garland*, payable in five months: and the remaining 5*l. per cent.* on the like acceptance, payable in nine months. Dated this 11th of *November*, 1806." *Garland's* signature was amongst those of the creditors; and he paid the sums to the plaintiffs stipulated for by him on account of the defendant, and also certain collateral sums for expences of litigation, &c. which being taken at the trial in reduction of the original debt, the plaintiffs recovered a verdict for the balance amounting to 668*l.*; after an objection urged and overruled as to the whole of their demand. The ground of that objection was stated by

Garrow in moving for a new trial; that the agreement of the plaintiffs to compound with the defendant was an inducement to the other creditors to execute the composition: and without that, *Garland* would not have given the securities which he did for part payment of the debt, and which have since been paid. That these were sufficient considerations for sustaining the agreement by the plaintiffs to release the residue of their demand upon the defendant; and the suing for it in this action was in fraud of *Garland*, and also of the creditors in general, who had compounded their respective debts on the basis of the agreement: on which ground he distinguished this from *Fitch v. Sutton*, 5 East, 230, where the composition moved from the debtor himself, and there was nothing to shew that there was any stipulation between the

plaintiff and the other creditors, for remitting the rest of their demands upon any mutual consideration.

LORD ELLENBOROUGH, C. J. then said, that the validity of such an agreement, as it affected the surety and the other creditors, was not considered at the trial; but his opinion was governed by the case of *Fitch v. Sutton*, 5 East, 230, which was founded upon the authorities of *Heathcote v. Crookshanks*, 2 Term Rep. 24; *Cumber v. Wane*, 1 Stra. 426; *Pinnet's case*, 5 Rep. 117; *Adams v. Tapling*, 4 Mod. 88, and Co. Litt. 212, b. which went to shew that the agreement, not being by deed, to accept a less in satisfaction of a greater sum than was due, was not binding as against the original debtor. But the present view of this case made it fit to be re-considered; and therefore the Court granted a rule, to set aside the verdict, &c. : against which

Park and *Marryat* now shewed cause, and relied altogether upon the cases before cited, and the rule of law on which they were founded, that the taking of a less sum cannot be a satisfaction of a greater, unless it be by deed. [On which Lord *Ellenborough* observed, that the general doctrine of *Fitch v. Sutton* would not be disputed, but that this would be distinguished from it, on the ground that it was a fraud upon *Garland* and the other creditors, who were induced to sign the agreement with a view to liberate the defendant from any further demands, on payment of the proportions settled; as was said by Lord *Kenyon* in *Cockshott v. Bennett*, 2 Term Rep. 763-5: and his Lordship wished the case to be argued on that ground.] To this they answered, that in *Cockshott v. Bennett* and that class of cases, (a) the compositions were by deed; and there was evidence that other creditors were induced by the plaintiffs to accept the compositions. But here there were no facts of that description; no evidence that *Garland* was induced to become surety by any undertaking of the plaintiffs, or that any of the other creditors were induced to sign by their example; on the contrary, the names of the plaintiffs were signed after all the others.

Garrow and *Comyn* were stopped by the Court.

LORD ELLENBOROUGH, C. J. If the whole subject had been presented to my mind at the trial as fully as it is now, I should not have had any doubt upon the subject. It is true, that if a creditor simply agree to accept less from his debtor than his just demand, that will not bind him: but if upon the faith of such an agreement, a third person be lured in to become surety for any part of the debts, on the ground that the party will be thereby discharged of the remainder of his debts; and still more when, in addition to that, other creditors have been lured in by the agreement to relinquish their further demands, upon the same supposition; that makes all the difference in the case, and the agreement will be binding. In *Fitch v. Sutton*, our opinion proceeded upon the precise terms of the case as stated to us on the report of the evidence: if the evidence had gone but a very little further, it would have altered our decision. But on the case now presented to us, it would be a mixed question of law and fact to go to the jury, whether, after the plaintiffs had entered into this composition in conjunction with *Garland* and the other creditors, it were not a fraud upon those persons, within the principle of the case of *Cockshott v. Bennett*, to endeavour to obtain a further payment from the defendant, whom they all purposed to liberate upon the terms of that agreement.

The other Judges assented; and *Bayley*, J. added, that in *Fitch v. Sutton* the composition was probably paid out of *Sutton's* own money: but here the plaintiffs bought *Garland's* security for a part of the debt upon the terms of freeing the defendant from any further demand after payment of the sums agreed upon; which have been paid; and therefore it is a fraud upon *Garland* to sue the defendant afterwards.

Rule absolute.

(a) Vide *Jackson v. Duchaire*, 3 Term Rep. 551. *Jackson v. Lomas*, 4 Term Rep. 166. *Feise v. Randall*, 6 Term Rep. 146, and *Leicester v. Rose*, 4 East, 372.

Winterbourne v. Morgan and Others.

11 East, 395. June 17, 1809.

Where one who entered under a warrant of distress for rent in arrear continued in possession of the goods upon the premises for fifteen days, during the four last of which he was removing the goods, which were afterwards sold under the distress; held that at any rate he was liable in trespass *quare clausum fregit* for continuing on the premises and disturbing the plaintiff in the possession of his house, after the time allowed by law.

THE plaintiff declared in trespass, that the defendants on the 30th of December 1807 and on divers other days, &c. with force and arms broke and entered the dwelling-house of the plaintiff, and then and there disturbed him in his possession thereof, and remained there for a long time, to wit for ten days then next following, and then and there seized, took, and carried away the plaintiff's goods, and converted the same to their own use, against the peace, &c. to the plaintiff's damage of 500*l*. Some of the defendants demurred specially; and the defendant *Morgan* pleaded not guilty; and at the trial before Lord *Ellenborough*, C. J. at *Westminster*, gave in evidence, that the breaking and entry was made by virtue of a warrant of distress issued by the plaintiff's landlord against the plaintiff for 50*l*. rent in arrear, under which the goods in question were taken and sold: but it appeared that the defendants continued in possession of the goods upon the premises for eleven days before they began to remove them, and did not quit the premises till four days after that, during which four days they were employed in removing the goods; after which they were sold in payment of the rent. A question was then raised on the part of the defendants, whether as their original entry and possession under the warrant of distress was lawful, and only their continuance in possession, after the time allowed by law, (a) unlawful; and the stat. 11 Geo. 2. c. 19. s. 19, having provided, that where any distress has been made for rent, "and any irregularity or unlawful act shall be afterwards done by the party distressing, the distress itself shall not therefore be deemed to be unlawful, nor the party making it be deemed a trespasser *ab initio*; but the party aggrieved by such unlawful act or irregularity, shall and may recover full satisfaction for the special damage he shall have sustained thereby, and no more, in an action of trespass, or on the case, at the election of the plaintiff:" whether the action of trespass *vi et armis* were the proper remedy; or whether it should not have been an action on the case? And as the point was admitted to be new (b), a verdict was found for the plaintiff, for damages, and leave was given to the defendants to move to set it aside and enter a nonsuit, if the Court should be of opinion that the objection was well founded. This was accordingly moved on a former day, and the case of *Wallace v. King*, 1 H. Blac. 13, was referred to in support of the objection: where it was held that trover would not lie for goods irregularly sold under a distress since the statute 11 Geo. 2; that statute having exempted the party making such irregular distress from being deemed a trespasser *ab initio*, and given an action on the case to the party grieved: the Court there considering trover the same in effect as trespass. And *Etherton v. Popplewell*, 1 East, 139, which was also mentioned, where the action of trespass was maintained, was

(a) The st. 2 W. & M. st. 1. c. 5, directs that goods distrained for rent may be appraised and sold, if not replevied within 5 days: and the st. 11 G. 2. c. 19. s. 10, provides, that they may be secured and sold upon the premises, in like manner, and under the like directions, as under 2 W. & M.

(b) The case of *Griffin v. Scott*, 2 Ld. Ray. 1424, where the landlord, keeping a distress on the premises for an unreasonable time after the 5 days allowed by the st. 2 W. & M. st. 1. c. 5; namely, for 8 days, was held to be a trespasser, was before the stat. 11 Geo. 2.

distinguished from this, on the ground that the defendant had, at the time of making the distress, turned the tenant's family out of possession; which was a distinct and substantive act of trespass, not within the scope or protection of the act: and had also continued in possession of the house after the rent was paid.

Garrow and *Puller* shewed cause against the rule; and admitting that a mere irregularity; as to the manner of making the distress, would not make the entry and continuance of the party on the premises during the five days allowed by the law, a trespass; contended, that his continuing in possession after the time allowed by law was in itself a distinct trespass, not depending on the previous regularity or irregularity of the distress, but altogether out of the protection of the act; which was not intended to cover subsequent trespasses, in continuing a wrongful possession for an indefinite period, but only to prevent the original entry, which was in fact lawful, from being deemed a trespass by relation and operation of law on account of any subsequent irregularity of the party distraining during the period allowed for his continuing on the premises, or afterwards in making sale of the distress: reserving however to the party grieved his remedy in damages for any act in itself unlawful or irregular, to be recovered either in an action of trespass, or on the case; that is, his action of trespass for acts in themselves unlawful, and trespasses; and his action on the case for consequential injuries. The 19th section of the statute 11 G. 2, recites the hardship upon landlords, against whom damages as trespassers ab initio had been recovered to the amount of the rent due for which the distress had been made, on account of some subsequent irregularity or tortious act in the disposition of the distress taken; and it was to relieve them from this conclusion of law only that the provision was made. The 21st section enables them, when sued in trespass or in case, to plead the general issue, and give the special matters in evidence: without that, the defendants must have justified their entry and continuing in possession under the distress, by virtue of the statute; and consequently could not have covered the trespass for any longer period than the law allowed for such continuance, which is for five days only. And though if a party enter by leave for a certain time, and continue longer, such mere continuance will not make him a trespasser; yet if he afterwards refuse to go out, the action must be by trespass and not case. The case of *Wallace v. King*, 1 H. Blac. 13, merely decided, that trover would not lie by the original owner for goods which had been regularly distrained and regularly removed for the purpose of sale, though appraised afterwards by persons sworn before the constable of another parish; inasmuch as the statute protected the landlord from being deemed a trespasser ab initio by relation. In *Lynne v. Moody*, 2 Stra. 851, which was before the statute, the Court held that trespass would not lie merely for taking an excessive distress; the first taking being lawful, and there being nothing subsequent to make it a trespass, as there is where the distress was abused. The subsequent abuse therefore was considered as a substantive act of trespass, which before the statute was carried back by relation to the original taking: and the effect of the statute is only to save that relation, and not to alter the nature of the act itself; leaving it therefore a trespass as committed at the time of the abuse. So in *Etherton v. Popplewell*, 1 East, 142, though the original entry to make the distress were lawful; yet Lord *Kenyon* said, that no answer could be given to the action of trespass for the excess of the defendant's conduct in turning the plaintiff's wife out of possession. And Mr. Justice *Grose* relied also on the fact of the defendant's continuing in possession of the house after the rent was paid. They also relied on the general practice in the like cases to implead the wrong-doer in trespass, and not in case.

Park, in support of the rule, said, that as the question had never before been raised, the practice of pleading in trespass could have little or no weight in the construction of the statute. If the party be still deemed a trespasser for contin-

uing on the premises after the period allowed for removing the goods at the expiration of the five days, or for doing any other unlawful or irregular act there, arising out of his possession of the distress, it will not in effect be of any avail to him that he is not to be deemed a trespasser *ab initio*. There is nothing in the statute of Geo. 2, to confine the protection to acts done within five days. It meant to put the entry of the landlord, and his possession of goods under a distress, on the same footing as if made and taken by leave of the tenant; leaving to the latter his remedy by trespass, or case, for any specific damage which he should sustain by the wrongful or irregular act of the other. But in order to make this option consistent with the general provision of the statute it must be understood that the action of trespass was to be confined to distinct and independent acts of wrong, disconnected with the entry or continuance on the premises by the distrainers for the purpose of the distress, or the subsequent treatment of the distress, such as, in *Etherton v. Popplewell*, the expulsion of the tenant's wife from the house, or any wrongful act done after the distress was settled. But here there is nothing of that sort, in addition to the mere act of continuing on the premises beyond five days; for which, if the defendant had entered by leave of the plaintiff, trespass would not have lain at common law. And such continuance can only be made an act of trespass by considering that, which is in fact all one continuance from the original entry, as a distinct and original entry after the five days. By this form of declaring the defendant has no notice for what specific act of trespass and damage he is sued; which the statute meant to give him. It treats him as a trespasser *ab initio*, beginning with his breaking and entering, which must be referred to the original breaking and entering, to which only it applies in fact. Then the 20th section which provides "that no tenant shall recover in any action for any such unlawful act or irregularity as aforesaid, if tender of amends have been made by the party distraining before such action brought," will be rendered nugatory; for the landlord cannot tell for what trespass the tenant seeks to recover, and therefore cannot apportion the amends to be tendered. The case of *Wallace v. King*, 1 H. Blac. 13, governs this.

Lord ELLENBOROUGH, C. J. I should have had great doubt in this case, whether upon the construction of the statute the action of trespass were well founded, if one of the trespasses charged and proved had not been the taking and removing of the goods from the premises, and the disturbance of the plaintiff's possession of his house after the time when by law they ought to have been removed; and the case had only rested upon the mere personal remaining of the party on the premises without any act done by him after the time allowed by law. The statute provides, that where the entry for the distress is lawful, the distrainer shall not be deemed a trespasser *ab initio* by reason of any irregularity or unlawful act done by him afterwards; but the party grieved shall recover satisfaction for the special damage thereby sustained, and no more, in an action or *trespass* or *on the case* at the election of the plaintiffs. But I cannot consider this election as giving him the option of either of those remedies in every case of an unlawful act or irregularity, whether adapted to the nature of such act or not, by the general rules of law. I cannot, for example, consider it as enabling him to maintain trespass against the distrainer either for an excessive distress, or for a detaining in his hands of the proceeds of the goods sold under the distress *ultra* the rent and costs. I must therefore understand the option as given, according to the subject matter of the grievance, *i. e.* to maintain trespass, where by the general rules of law trespass would be the proper remedy; and case, where case would be so. And in the instance I have last put, if the party grieved chose to waive his complaint for the tort, and to bring *assumpsit* to recover back the surplus money withheld from him, I see no reason why he may not do so. The statute, however, having said, that the party whose entry was at first lawful shall not be deemed a trespasser *ab initio* for any subsequent irregularity or unlawful act, I should

have had great doubt whether the mere act of remaining in possession of the goods on the premises after the time allowed by law, if the same had not been accompanied or followed by the act of removing them, must not have been referred to the original lawful entry by the operation of the statute; and thereby have assimilated this to the case of one who enters by leave of the owner, and does not quit at the time, or after the purpose satisfied to which his leave extended; who according to the doctrine discussed in the *Six Carpenters'* case, 8 Rep. 146, is not, by merely not doing what he should, a trespasser. I would not be understood to say, that in no case will a party be a trespasser by continuing in possession of another's property after the time allowed by law: such continuance may, and in many cases must be accompanied by a repetition of the same or different acts of trespass, with those which attended the original entry: but my doubt arises upon the particular provision of this statute, which says that he shall not be deemed a trespasser *ab initio* by reason of any subsequent unlawful act or irregularity, i. e. merely on such account: and from the difficulty of saying when and in what cases the mere continuance of a lawful entry and possession would by the general rules of law become a new substantive trespass. The true test, as it appears to me, by which it may be decided whether a mere remaining on the premises, without a new breaking and entering, be properly a trespass, where the original breaking and entering is protected from being so by the provision of the statute, is by considering whether a declaration in trespass, that the defendant with *force and arms remained* on the premises for so many days, without more, would be good. I am not at present aware of any authority or principle of law which would warrant such a mode of declaring in trespass. In this case, however, as I have said already, we are not driven to the necessity of deciding whether the mere act of remaining on the premises after the allowed time be a trespass in itself, inasmuch as the act of removing the goods after such time appears to me to be a substantive trespass: and that notwithstanding the party removing may have acquired a lawful property in the goods themselves by means of a distress originally lawful. For it is not a necessary consequence of law from the circumstance of my having goods in another man's close, that I may remove them by my own act: (a) and it appears to me to make no difference that I might once have removed those goods from the place where they now are, and have done all necessary acts for the purpose, without being a trespasser, when the authority which exempted me from being so has wholly ceased. After that period perhaps even a mere act of egress, but much more probably the active interference with goods antecedently on the premises, by changing their position there and removing them therefrom, may be deemed a trespass; and if the latter act be a trespass, it is sufficient for the purpose of the present action.

GROSE, J. agreed on the same ground.

LE BLANC, J. I think that this action is maintainable; and I wish not to be concluded in any subsequent case from saying that a party might be a trespasser by continuing on the premises wrongfully, even though he did not remove the goods therefrom after the time allowed by law. All that the act, as I conceive, meant to say, was, that a party whose entry was lawful to take a distress on the premises should not be made a trespasser *ab initio* for any subsequent irregularity; as he was deemed to be before that act. The object of it was to separate that which he had a right to do from that which was irregular and unlawful: and therefore it meant to say, that the landlord should not be deemed a trespasser for entering and taking the goods in the first instance, or for continuing in the possession of them on the premises for so long time as the law allowed him to continue there: but that if he continued there after that time, he should be treated as a trespasser for that which was in law a tres-

(a) Vide Cro. Eliz. 246, and 2 Rol. Rep. 55.

pass; or be liable to an action on the case for such injuries as would in law subject him to that remedy by the party grieved, according to the nature of the act done by him. I admit, that if he did not continue on the premises after the time allowed by law, but were guilty of an irregularity during that time, he would not be liable in trespass *quare clausum fregit*, because his continuance there for the purpose of guarding the distress would be lawful: but here he remained there after that time; and that, I think, made him a trespasser, even if he had not taken away the goods afterwards.

BAYLEY, J. I am bound to say, upon what appears to me to be the true construction of the statute, that the defendant in this case was a trespasser: and that trespass is the proper remedy against a person who has made a distress continuing upon the premises after the time allowed by law; because I think his continuing there in possession of the goods after that time did not divest him of the property in those goods taken under the distress, or make him liable to an action of trespass for removing them after that time: and if not, this action would not be maintainable if he were not a trespasser by continuing on the premises after the time allowed by law for removing the goods. A continuation of every trespass is in law a new trespass, as a continuation of every imprisonment beyond the time allowed by law is a new imprisonment. I consider this declaration as imputing to the defendant that for every day's continuance on the premises after the time allowed by law, he was a trespasser, and therefore that he was a trespasser for nearly ten days of the time. The jury were not to give the plaintiff damages for the defendant's continuing upon the premises for the time, during which he was justified in remaining there by the act: but the defendant was to be considered a trespasser, and the plaintiff entitled to damages, for the time the defendant remained there afterwards. (1)

Rule discharged. (a)

Chambers v. Jones.

11 East, 406. June 19, 1809.

A plea to an action against the marshal, &c. for the escape of a prisoner in custody for a debt, after stating the return of the prisoner into custody after such escape, before action brought, &c. ought to shew a detention of him by the officer down to the commencement of the action, or a legal discharge from that detention: and therefore though the plea only stated that, after the return of the prisoner into custody, the defendant did thereupon *then and afterwards keep and detain* the said prisoner in his custody in execution, &c. under and by virtue of the said commitment, &c. and the replication traversed that after the prisoner's return the defendant did *keep and detain* him in custody in execution, &c. *in manner and form* as stated in the plea; *a detention down to the commencement of the action*, or until a legal discharge from such detention, is virtually implied in the plea, and included in the traverse; and therefore the plea is negatived by shewing in evidence that after the prisoner's return, he again escaped, and died out of custody.

THIS was an action of debt against the marshal for an escape, in which the declaration alleged a recovery had against *H. Caulfield* for 2120*l.* dam-

(1) [See acc. *Woglam v. Couperthwaite*, 2 Dal. 68. See also *McKinney v. Reader*, 6 W. 34. *Fisher v. Algar*, 2 C. & P. 374. *Bradby on Distresses*, by Adams, 154-5.—W.]

(a) *WASHBORN* against *BLACK*, Sittings at *Westminster* after *Michaelmas* 1774. *Buller J.'s MS.*—Trespass for entering a house, and taking goods, &c. This was done in taking a distress for rent. After the distress was taken a man was left in possession till the 5th day, and then the goods were replevied. During the five days the person left in the house went into different parts of it. *Mr. Dunning* insisted that he was a trespasser; for he ought either to have put the goods all into one room, and kept possession of that only, or to have removed the goods out of the house. And he cited a case of *Thornton v. Cru-ther and Others*, C. B. Mich. 9 G. 3, before Lord Chief Justice *Wilmot*, where it was so holden.—Lord *Mansfield*, C. J. said, that the strict law was so; and that the man might, if he pleased, have stripped every room, and put all the goods together, and by that means

ages in a certain action; that a writ of *non omittas ca. sa.* issued to the sheriff, upon which he took *H. C.* in execution for the damages; that *H. C.* was afterwards duly committed to the defendant's custody, there to remain in execution at the suit of the plaintiff until, &c.; and that the defendant afterwards, and whilst *H. C.* remained in his custody as aforesaid, permitted him to escape; the plaintiff not being satisfied his damages, &c. The defendant pleaded, 1st, *nil debet.* 2dly, That after the commitment of *H. C.* in execution for the damages aforesaid, to wit, on the 1st of *January* 1808, *H. C.* wrongfully, and without the privy or consent of the defendant, escaped out of his custody; and that afterwards, and before the exhibiting of the plaintiff's bill, and before the defendant had notice of such escape of *H. C.*, to wit, on the 2d of *January*, *H. C.* returned back again into the defendant's custody, as such marshal; and that the defendant, as such marshal, did thereupon *then and afterwards keep and detain the said H. C. in his custody in execution* at the suit of the plaintiff for the said damages, under and by virtue of the said commitment, to wit, at *W.*, &c.; which said escape of the said *H. C.* in this plea mentioned is *the same escape* whereof the plaintiff has above complained. And that *H. C.* after he had so returned, and after the exhibiting of the plaintiff's bill, to wit, on the 10th of *September* in the same year, died: and this the defendant is ready to verify. Replication to the 2d plea, That the defendant, as such marshal, did not, after the return of *H. C.* into his custody, as in that plea is stated, *keep and detain* him in his custody in execution at the suit of the plaintiff, *in manner and form* as the defendant hath in his plea alleged. On which there was issue.

It appeared in evidence, at the trial before Lord *Ellenborough*, at the sittings in *Middlesex*, that the prisoner, who had the benefit of the rules, did escape and return, as stated in the plea; and that after that return he was in the defendant's custody in execution at the plaintiff's suit, but that he again escaped and died out of custody; though the body was afterwards brought within the rules again. Whereupon it was objected, that, upon the issue joined between these parties, the plaintiff was not entitled to recover, inasmuch as all the facts stated in the plea and affirmed by the defendant, in the issue joined, were proved. That the first escape was effectually answered: and that if the plaintiff meant to rely upon a second escape, he should have new-assigned it. The objection, however, was overruled at the trial, and the plaintiff recovered a verdict for the amount of the debt; the point being reserved for further consideration upon a motion for a new trial. The case was accordingly moved; and the rule for setting aside the verdict and granting a new trial was supported on a former day in the last term, by *The Attorney-General*, *Topping*, and *Marryat*; and was opposed by *Scarlett* and *Owen*. The grounds of the argument and the principal authorities were afterwards fully stated by the Court in delivering their judgment. And after consideration,

LORD ELLENBOROUGH, C. J. now delivered the opinion of the Court, (after stating the pleadings, and the facts of the case as before mentioned;) his Lordship proceeded—Upon this evidence the point was taken at the trial, which has been insisted upon before the Court, that according to the issue joined between the parties, this evidence did not entitle the plaintiff to a verdict: that the first escape was effectually cured by the prisoner's return; and that to have recovered in respect of the second escape, there ought to have been a new assignment. The issue joined was, *whether the defendant kept and*

greatly damaged them; but instead of doing that, he acted for the benefit of the plaintiff, and left the goods as he found them: therefore he should leave it to the jury to consider whether the plaintiff did not consent. The only evidence of consent was that *Mrs. Washborn* had said how much she was obliged to *Mr. Mountfort*, who had acted like a gentleman. And on this his Lordship left it to the jury to consider, whether the plaintiff did not consent to an act which he said was clearly for his benefit.—Verdict for the defendant.

detained the prisoner after his return in manner and form as the plea alleged : and the allegation in the plea is, that upon the prisoner's return, the defendant did then and afterwards keep and detain him. The plea therefore is altogether indefinite as to the period of detention ; and the proof of any detention, even for a single moment, after the return, would satisfy the literal terms of it. It must be understood, however, that the defendant meant, that there had been such a detention as would make the return an answer to the action ; *i. e.* that he had so kept and detained the prisoner as to be no longer liable for the first escape. And this brings us to the question, Whether upon a plea of subsequent return, it be necessary to state any and what detention ? If it be not necessary to state any detention, or if it be sufficient to state some detention without bringing it down to the period when the action was commenced, there ought to have been a new assignment : but if it be essential to state a detention, and to shew that it either continued when the action was commenced, or that something had intervened to put a legal termination to it ; a detention to the time of the action must be considered as the detention properly in issue upon these pleadings : and as the evidence negatived such a detention, the verdict for the plaintiff is right. In *Griffiths v. Eyles*, 1 Bos. and Pul. 413, the plea of subsequent return alleged a detention to the commencement of the action : and *Eyre*, C. J. seems to have thought, that it would have been a good replication in such case to have stated, that the defendant had not kept the prisoner in custody from the time of the return : and that, upon such a replication, proof of an escape after the first return would have been admissible, and would have entitled the plaintiff to a verdict. This shews, that in his opinion it was necessary to allege a detention in the plea, and to shew that it continued to the time of the action : and this opinion will appear corroborated by several authorities. The pleas of recaption, or return (which for this purpose are the same in point of effect) always state a detention at the time of the action ; or shew that it has been terminated by legal means. In *Whiting v. Reynell*, Cro. Jac. 657, the plea was, that the defendant had retaken the prisoner, and *yet hath him*. In *The Queen v. Briggs*, Litt. Ent. 151, the plea (which was signed by Sir *Edward Northey*) was, that the defendant had retaken the prisoner, and that he *yet detains him*. In *Clench v. Mullens*, M. 16 Geo. 2. 2 Richardson's B. R. Practice, 90, there is a similar plea signed by Mr. Serjt. *Draper* ; and in *Chambers v. Gambier*, and *Gray v. Gambier*, H. 8. G. 2, similar pleas were signed by Mr. Serjeant *Hawkins*. Reference may also be made to 2 Thomps. Entr. 143. 151. Read's Declarations, 204. 5 Wentworth's Pleadings, 228. 241, and to *Bonafous v. Walker*, 2 Term Rep. 127. In *Willes v. Gambier*, Pract. Reg. 199, the defendant pleaded a return, and a detention till the prisoner was discharged by the Court of Common Pleas, by virtue of the act for relief of debtors with respect to the imprisonment of their persons. To this plea there was a demurrer ; and the ground of objection was, that the plea ought to have shewn that all the proper previous steps had been taken to make the discharge legal. The Court overruled the demurrer ; because the defendant was bound to obey the order of the Common Pleas, and could not question its validity. This case, however, shews, that it was understood both at the bar and by the Bench, that it was essential in the plea to shew a detention : and to account for its not continuing down to the time of the action. If a momentary detention would have done, and the plea would equally have been a bar whether that detention were legally determined or not, the counsel could never have taken the objection, that the discharge was not properly pleaded ; nor can it be expected that the Court would have decided upon it. But a more unequivocal case is *Meriton v. Briggs*, 1 Ld. Raym. 39 : the defendant there pleaded a recaption, without stating that he still detained the prisoner : the plaintiff traversed the recaption ; but added in the traverse, *quod adhuc detinet* ; so as to make the *then detention* parcel of the issue : the defendant demurred, and shewed for cause,

that the plaintiff had included in his traverse matter not alleged in the plea, viz. *quod adhuc detinet*; and he insisted, that if the defendant had suffered the prisoner to escape a month after the recaption, yet the plaintiff should be barred by the recaption for the old escape, and should have a new action for the new one: but this was denied by *Holt*, C. J.; and judgment for the plaintiff. Now upon what principle could this judgment proceed but this, that the recaption was no protection to the sheriff, nor any answer to the action, unless there was a subsequent detention to the time of the action or a legal discharge from that detention: that such a detention therefore was to be considered as being virtually implied in the plea, and that the plaintiff might therefore include it in his traverse. As the precedents, therefore, invariably shew a detention down to the commencement of the action, or a legal discharge from it: as the cases of *Griffiths v. Eyles*, *Willis v. Gambier*, and *Meriton v. Briggs*, import that this ought to be shewn: we are of opinion that the plea in this case ought to be considered as implying, that there had been from the time of the prisoner's return a valid and operative detention; and as such detention was negatived by the evidence, the verdict was properly found for the plaintiff, and this rule ought to be discharged.

Rule discharged.

Binns v. Morgan.

11 East, 411. June 19, 1809.

After declaration filed conditionally in a town cause until special bail should be put in and perfected, and notice thereof served, the defendant has only four days for pleading in abatement; and if he put in special bail on the 4th day, which are excepted to on the 5th, and not justified till the 9th, he is too late then to plead in abatement: and the plaintiff having demanded a plea, and none other being pleaded, is entitled to side judgment as for want of a plea.

THIS was a rule for setting aside interlocutory judgment and subsequent proceedings for irregularity. The defendant was held to bail on process returnable on the 1st return of *Easter* term, 19th of *April*. On the 20th of *April* a declaration was filed conditionally until special bail should be put in and perfected, and notice of such declaration served, in the name of *John Morgan*; to which the defendant was to plead in four days: and a rule to plead was given the next day. On the 24th special bail was put in for the defendant by the name of *Isaac Morgan*, sued by the name of *John Morgan*, and notice thereof was served at 9 o'clock that night. Exception to the bail was entered, and notice served, on the 25th. On the 27th the defendant gave notice of adding and justifying bail for the 29th: on which day the bail justified. The plaintiff demanded a plea on the 1st of *May*; and on the 2d of *May* the defendant took the declaration, which had been filed conditionally as above, out of the office, and filed a plea of misnomer, in abatement, that his Christian name was *Isaac*, and not *John*. And the question was, Whether he were out of time to plead in abatement? If he were, the interlocutory judgment, which was signed on the 16th of *May*, for want of a plea, was irregular: otherwise, not.

Park shewed cause against the rule, and insisted that there was no distinction between the time for pleading in abatement to a declaration filed conditionally or absolutely; the defendant was equally bound to plead in four days. If he lose his opportunity, by not putting in and perfecting his bail in time, it is his own fault.

Lawes, contra, said that a defendant cannot plead in abatement till he has put in and perfected his bail; except, as was held in *Dimsdall v. Neilson*, (a)

(a) 2 East, 406. There the Court held, in the case of a country cause, that if the defendant put in special bail in time, he might plead in abatement, though the bail were

in a country cause, from the necessity of the case: but this was a town cause. The time for putting in bail did not expire till the 24th; and that falling on a *Sunday*, the defendant had till the 25th. Then came the exception, which postponed the perfecting bail; but the same bail were perfected on the 29th of *April*; and within 4 days after that, namely, on the 2d of *May*, (there being no demand of plea till the 1st) the plea in abatement was filed: which he contended to be in time: otherwise a defendant in this situation will be ousted of his plea in abatement.

BAYLEY, J. The defendant might have put in bail within the four days, and given notice of justifying them, and then pleaded in abatement: and if the bail were afterwards perfected, the plea would have stood good.

Per Curiam. The plea in abatement was out of time, and therefore the judgment was regularly signed.

Rule discharged.

Pill v. Taylor.

11 East, 414. June 20, 1809.

One who at the time of a prize taken by a custom-house cutter bore the commission of mate, but was *acting commander* on board, under an order from the commissioners, communicated by letter to the collector of the port to which the cutter belonged, and by him communicated by letter to such mate, is entitled to the *commander's* share of the prize under the king's warrant of the 26th of *November* 1803, referring to his former warrant of the 4th of *July* 1803, which speaks generally of the share to be given to the *commander*, officers and crew, *as a reward for their service*: and this, though the former commander, whose *commission as such* had before been withdrawn and cancelled by order of the commissioners, on some supposed misconduct, was afterwards restored, and a new commission granted to him, bearing the same date as his former commission, which was before the prize taken. And such acting commander was held to be entitled to the full share of commander, without deducting the share of a *deputed mariner*, who, at the time of such capture made, was on board *acting as mate*, by like authority.

THIS was an action of *assumpsit* for money had and received to the plaintiff's use by the defendant, and on the common money counts. The defendant pleaded a tender, before action brought, as to 202*l.* 6*s.* 3*d.*; which he paid into court; and the general issue, as to the residue of the demand. The plaintiff, by his replication, admitted the tender, and accepted the same tendered in satisfaction of so much of his demand; and then proceeded to recover the further extent of such demand; on which issue was joined. And at the trial a special verdict was found, stating that in substance: That *J. M. Allan*, on the 26th of *March* 1803, was the commander of the *Hinde* cutter, in the service of the commissioners of the customs, by virtue of a commission from them, dated 20th of *October* 1801, (which was set out.) That on the 26th of *March* 1803, the commissioners, by their order of that date, directed to the comptroller and collector of the customs at *Falmouth*, after noticing certain charges which had been preferred against *Mr. Allan*, *commander* of the *Hinde* cutter, of inactivity and inattention to the service in which he was employed; of which charges, after reading the evidence against him and his answer thereto, he appeared to them to be guilty, "and consequently an unfit person to be any longer employed in the service of that revenue:" they stated that they had "*dismissed him therefrom*;" and directed the comptroller and collector "*to call in his commission and instructions*, and transmit the same to the board cancelled." And they also enjoined those officers to take care that the cutter should be kept at sea "*under the command of the mate*, to the end that the service

not perfected till after the four days, if they were ultimately perfected within the time allowed by the practice of the Court. And the same point was ruled, on the authority of that case, in *Holland v. Sladen*, *M.* 47 *G. 3. B. R.*, which was a town cause.

might not suffer, *until another commander should be appointed* ;” and they were “to pay *the said mate* the usual allowance for victualling *during the time he should act as commander*.” That in consequence of such order, the said comptroller and collector called in *Allan’s* commission as such commander ; and it was delivered up and cancelled on the 29th of *March* 1803, and transmitted to the commissioners in *London* ; and on the next day, *Allan* left the cutter and went on shore, and did not return again on board until a new commission was granted to him as after mentioned. That before and at the time of *Allan’s* dismission, and of the cancelling of his commission, *Pill*, the plaintiff, was a *deputed mariner* of and belonging to the *Hinde* cutter, but *acting as mate*, and serving on board in that capacity ; and on the said 29th of *March* 1803, he received from the comptroller and collector of the customs at *Falmouth* an order, stating that the commissioners having *dismissed Mr. Allan from the command of the Hinde cutter*, they (the comptroller and collector) thereby “directed and enjoined him (*Pill*) to take care that the cutter be kept at sea *under his command*, to the end that the service might not suffer until *another commander* should be appointed :” and that they had “the board’s directions to pay him the usual allowance for victualling during the time he might *act as commander*.” That on the 2d of *April* 1803, four of the commissioners of customs *executed a commission* appointing *Pill* to be *mate* of the said cutter. And on the 5th of the same month, they issued their order to the comptroller and collector at *Falmouth*, stating that, on referring to their report of the 17th *ultimo*, it did not appear “that *Captain Allan* was present at the charge” against him as required by their orders ; to report to them forthwith as to that fact ; “and to charge him *de novo* ; and in the mean time to *suspend all proceedings as to his dismissal*.” That *Captain Allan* was not present at the hearing of the charges against him, though he had previous notice of the same. And the commissioners of the customs, having investigated the matter again on the 16th of *June* 1803, transmitted their order thereon in a letter of that date to the same officers at *Falmouth*, wherein they state, that having considered the former charges and the renewed charge against *Mr. Allan*, “the *present commander of the Hinde cutter*,” and read his answers thereto, and the evidence of the persons examined, &c., they deem his answer to the first charge satisfactory ; and that he is guilty of the second charge ; but that under all the circumstances of the case ; and considering that the revenue had not been injured by the mode adopted by *Captain Allan*, though highly irregular and improper, for reimbursing himself the loss sustained in victualling his crew, for which it appeared that he had the example of his predecessors, &c. ; and that he had shewn himself a meritorious officer for 15 years : they therefore direct the *Falmouth* officers to enjoin him to be particularly circumspect in his conduct in future : “and we therefore hereby *rescind our order of the 26th of March last for his dismission*, and direct you to deliver to him his commission and instructions in order that he may return to his duty.” That the commissioners having before received the cancelled commission, made out a *new commission* for *Captain Allan* of the same date as his former commission, and transmitted the same to the *Falmouth* officers in a letter on the 23d of *June* 1803, with directions to deliver the same to *Captain Allan*. That in consequence of the before-mentioned order of the 29th of *March* 1803, the plaintiff *Pill* immediately took upon himself the command of the *Hinde* cutter, and continued in the exercise of such command from that time until the 29th of *June* following, when the new commission was delivered to *Allan* as commander of the cutter, who thereupon resumed the command of her. That between the 29th of *March* 1803, and the granting of such new commission to *Allan*, and whilst *Pill* had the command of the cutter and was on board of the same, namely, in *May* 1803, the cutter captured certain vessels from the enemy. That on the 18th of *March* 1803, the commander in chief of the king’s ships at *Plymouth* sent an order to *Allan* as commander of the cutter to receive on board her a lieutenant, 4

petty officers, and 6 seamen, with a month's provisions, and proceed therewith to the western ports in the neighbourhood, for the purpose of impressing men. That on the 26th of *March* 1803, before making the captures, Lieutenant *Senhouse* with the petty officers and seamen were sent on board the cutter, with directions to make reprisals on the *French*, and to detain *Dutch* vessels, as stated in his majesty's warrant after mentioned, and continued on board on such service till after making the captures. But *Allan* was not on board the cutter at the time of making the captures, nor at any time after he left the cutter, until he resumed the command as aforesaid; nor did any person act as commander on board at the time of making the captures except *Pill*, who from the time of his receipt of the order of the 29th of *March* 1803, until *Allan* was so restored to and resumed the command, had the command of and acted as commander of the said cutter and the officers and crew thereof, and from time to time victualled the same; and he was afterwards paid the usual pay as mate, and the usual allowance in respect of victualling, as commander. That the defendant *Taylor* as prize agent to the cutters employed in the custom-house service, on the 9th of *November* 1804, presented a memorial to the treasury, in which he described *Allan* as commander of the *Hinde* cutter; and stated the fact of the captures on the 28th of *May* 1803, under the order stated; the condemnation in the Court of Admiralty; and the application for the prize money amounting to 361*l.* to be paid to the memorialist for the use of the officers and crew of the said cutter, though she had not a letter of marque at the time. That this was followed by other memorials to the like purport from the prize agent, and by others from the admiral on the station, and on behalf of Lieutenant *Senhouse*; and on the 26th of *November* 1805, the King granted his warrant for the distribution of the prizes, in which it is stated, that whereas Lieutenant *Senhouse* of the ship *Conqueror* was, on the 26th of *May* 1803, appointed by the port admiral at *Plymouth* to the *Hinde* revenue cutter, with orders to make reprisals on the *French*, and to detain *Dutch* vessels, agreeable to the instructions he should receive from his Captain (*Louis*); that Captain *Louis* accordingly gave Lieutenant *Senhouse* further orders, &c. That the said revenue cutter *Hinde*, under the command of Lieutenant *Senhouse*, during the time she was in the service of the *Conqueror* as aforesaid, seized and detained certain *French* and *Dutch* vessels, which had been condemned as prize, and the proceeds were in the Admiralty Court: His Majesty then proceeded to direct 1-8th of the moiety of the proceeds to the Port Admiral; 3-8ths to the captain, officers, and crew of the *Conqueror*, including Lieutenant *Senhouse* and the officers and men put on board the *Hinde* revenue cutter from the *Conqueror*; "and the remaining 4-8ths to the commander, officers, and crew of the said *Hinde* revenue cutter, or to *R. Taylor*, general prize agent for all captures made by custom-house cutters; to be distributed amongst them conformably to our proclamation for the distribution of prizes, and according to the sanctions and penalties of the existing prize act, &c.; and the proportion hereby granted to the commander, officers, and crew of the revenue cutter *Hinde*, to be distributed amongst them conformably to our warrant dated 4th July 1805, directing the distribution of the proceeds of prizes taken by custom-house vessels." That by the King's warrant lastly referred to, the prize money is distributed into 32 parts, of which 14 parts are given to the commander, 7 to the mate, 3 to deputed mariner or mariners, if any, exclusive of their shares as mariners, and 8 to other mariners: or if there be no deputed mariners, one half to the commander, 1-4th to the mate, and 1-4th to the mariners. And it is therein stated to have been recommended to his majesty, that these or some portions of prizes made by custom-house vessels "shall be distributed amongst the commanders, officers, and crew of the vessel making such capture, as a reward for that service," &c. That no memorial was presented to the King or to the Treasury by *Pill*, except as aforesaid; nor was it known to his majesty before or at the time of making his warrant or

order of the 26th of *November* 1805, that *Allan* was not on board the *Hinde* cutter or in the actual command thereof at the time of making the captures, or that *Pill* at that time had the command, or acted as commander of the said cutter. The special verdict then stated, that on the 10th of *December* 1801, one *J. John* received a custom-house commission appointing him to be a *deputed* mariner on board the *Hinde*, by virtue of which he was acting as deputed mariner when *Pill* was appointed to the command of the cutter; but on such appointment of *Pill*, and during the time that *Pill* acted in such command, he ceased to act *as mate* of the cutter, and *John* during all that time acted as mate in the place of *Pill*, and not as deputed mariner, nor did any person act as deputed mariner during that time. That the captured vessels were duly condemned as prizes, and 1-4th of the proceeds was paid to the defendant as the general prize agent for custom-house captures, amounting to 9253*l.* 18*s.* 6*d.* That *Pill's* share, if entitled to share *as commander*, without deduction of a deputed mariner's share, was 4626*l.* 19*s.* 3*d.*, or if subject to such deduction 4048*l.* 12*s.* 6*d.* But if *Pill* were only entitled to share *as mate*, then 2024*l.* 6*s.* 3*d.*; which latter sum was tendered to him by the defendant before the action brought, and a tender thereof being pleaded, the plaintiff took that sum out of court, and the remainder of the sum claimed continued in the defendant's hands.

This case was argued in the last term by *Lawes* for the plaintiff, and *Richardson* for the defendant. The argument turned principally on the terms of the King's warrants stated in the special verdict; but the counsel on both sides reasoned also by analogy to the decisions which had taken place on the prize proclamations in respect to claims by officers in the royal navy; and these cases were referred to; *Johnson v. Margetson*, 1 H. Blac. 261; *Taylor v. Ld. H. Pawlett*, ib. 264, note; *Lumley v. Sutton*, 8 Term Rep. 224, and *Ld. Visc. Nelson v. Tucker*, 4 East, 238. The case was directed to stand over for consideration; and in this term

Lord ELLENBOROUGH, C. J. delivered the opinion of the Court.

The question upon this special verdict is, Whether the plaintiff, *Philip Pill*, who acted *as commander* of the *Hinde* cutter, in the service of the customs, at the time when the several captures mentioned in the special verdict were made, be, or be not, upon the facts therein stated, under his majesty's warrant of the 26th of *November* 1805, referring to his former warrant of the 4th of *July* 1805, entitled to share *as commander* of that cutter, or *as mate* only? If in the latter character, he has been already paid all that he is entitled to receive as mate, by a payment into court upon the plea of tender. If he be entitled to share as commander, and there be no deputed mariner's share payable in this case, he must then recover the further sum of 2602*l.* 13*s.*, in addition to what has been already paid him as for a mate's share. The plaintiff's right, which is derived solely from his majesty's bounty, rests entirely on the terms of the king's warrant. That warrant is professedly granted on a recommendation of the Lords of the Treasury, "that the whole or some portion of the proceeds should be distributed amongst the commanders, officers, and crew, of the vessel making a capture, *as a reward for that service*:" and the warrant afterwards proceeds to make the distribution recommended, by giving to the *commander* 14-32 parts of the sum to be distributed, where there was a *deputed mariner*, and one half where there was no deputed mariner. As the declared objects of the distribution are "the commander, officers, and crew of the vessel making the capture," and as the declared inducement to the distribution is "*a reward for that service*," it is clear, that no persons were intended to share but such as united in themselves one of the described characters and functions on board the vessel, and also a claim to reward by actual service performed in such character at the time of making the capture: which intention clearly excludes the claim of *Allan*; inasmuch as he performed no actual service whatever in making the captures in question, and of course

could have no claim to reward on that account ; and also as clearly includes the claim of *Pill* to a certain extent, as he was certainly serving on board, under some one at least of the specified denominations of service, at the time of making the captures : but in respect of what particular character, and to what amount his claim should be admitted, is the question to be determined. The warrant supposes that there may or may not be a deputed mariner or mariners on board at the time of making any particular capture, and provides for that contingency by varying the distribution between the other persons entitled to share accordingly : but it assumes in general, for the purpose of distribution, that there always will be a commander, and a mate. And the question then will be, Whether a person filling at the time of the capture made, either of those functions, under a temporary appointment thereto, made by the comptroller and collector of the customs at the port to which his cutter belongs, under an authority for that purpose from the Board, will satisfy the terms of the king's warrant ; or whether it be necessary that he should have been appointed to that situation by an actual commission from the commissioners of the customs, under their hands and seal, in the usual form, determinable of course at the pleasure of the commissioners. The plaintiff was, in point of commission, only mate at the time of the capture made : his commission as mate bearing date the 2d of *April* 1803, and the captures in question having been made in the *May* following. The commissioners of the customs having, for the reasons by them assigned in their letter of the 26th of *March* 1803, addressed to the comptroller and collector of the port of *Falmouth*, to which the *Hinde* cutter belonged, thought fit to dismiss Mr. *Allan* from the command of that cutter : proceed to enjoin the comptroller and collector "to take care "that the cutter be kept at sea, and in constant motion, *under the command "of the mate*, to the end the service might not suffer, until *another commander "should be appointed ;*" and they were "to pay the said mate the usual allowance for victualling during the time he should *act as commander,*" &c. In obedience to which letter, the comptroller and collector, on the 29th of *March* 1803, proceed to execute the commands of the Board, by communicating to the plaintiff the fact of *Allan's* dismissal from the command of the *Hinde* cutter, and his own appointment, in these words : "We hereby direct and "enjoin you to take care that the said cutter be kept at sea and in constant "motion, *under your command*, to the end that the service may not suffer, until "another commander shall be appointed. And we have the Board's directions "to pay you the usual allowance for victualling *during the time you may act as "commander ;* but you are to take especial care, the failure of which you will "have to answer at your peril, to render a just and true account of the number of mariners really and truly victualled ; and also a list containing the "names of those not victualled : distinguishing the particular times in each "respective case ; so that the crown may not be defrauded." It will be observed, that the duties cast upon him by this written order of the comptroller and collector, made under the express authority of the Board for that purpose, and which is in effect a commission from the Board, are those which were before required to be discharged by the preceding commander of the cutter, under the several articles of his instructions referred to in the special verdict, and form no part of his prescribed duty under his commission as mate. The plaintiff is appointed expressly to the end, *that the service may not suffer*, (which imports an expectation at least that the service might by this means be prevented from suffering) until another commander should be appointed : and he is appointed under express notice of the responsibility of his situation, and a denunciation of the peril to which he would be liable, if he should fail in rendering a just and true account of the number of mariners really and truly victualled ; and which was the very offence for which his predecessor in the command was dismissed. He is allowed the *usual allowance* for victualling during the time he should *act as commander*. The orders of the Board to the

comptroller and collector, and of the collector to the plaintiff, are silent on the subject of the precise pay he was to receive; but as he was afterwards only in fact paid the pay of mate, he was (it may be supposed) meant from the first to receive no higher rate of pay. Under these orders he was clearly *acting commander* for all purposes in the interim, until another commander should be appointed in the room of *Allan*, who had been dismissed. He bore, therefore, *pro tempore*, that description and quality of office, with all the duties, risks, and responsibility annexed to it, to which his majesty's warrant, according to its obvious and literal import, attaches the eventual advantages of a commander's share in the moiety of prize profits distributable under such warrant. If he were commander for all purposes of trust, responsibility, and danger; and during the period of his command had the good fortune to assist, in such his character of commander, in making those captures, a portion of which his majesty has specifically assigned to the commander, *eo nomine*, as such, "*as a reward for that service*;" how can we say that a person, thus circumstanced, was not the intended object of his majesty's bounty, under the description of *commander*? The only argument against it is, that the king meant by the term *commander* an officer bearing a regular permanent commission, under the hands and seal of the commissioners of customs, for that office: and as it is clear that the plaintiff bore no such commission, the consequence of this argument would be, that the sum claimed would not belong to the plaintiff; and as it could not belong to *Allan*, would remain the unappropriated *peculium* of his majesty. But upon what words is this argument built? In the first place, supposing the deputed mariners to be appointed by commission only, as probably is the case, it would have been natural for his majesty, when he mentioned them, if he had meant by *commanders* and *mates* persons duly appointed to those offices, in like manner as *deputed mariners* are to theirs, *i. e.* by commission only, to have so said: but he does not: he merely uses the words *commanders* and *mates*; and which words are satisfied by a situation of actual command, however uncertain the period of its duration might be. Indeed, what certainty of tenure, beyond that of good pleasure, is there for any commander in that service, whether appointed by commission or otherwise; and what material difference is there between an appointment expressed or impliedly made during pleasure, and an appointment *until another commander should be appointed*; an event equally depending on the uncertain pleasure of the persons empowered to appoint. Supposing the plaintiff had been allowed, as he might have been, to continue in the undisturbed command of the cutter, under the comptroller and collector's appointment, down to the present time, the legal construction of the king's warrant, and his claims under it, would still have been exactly the same; though the hardship of excluding him from the share he claims would have appeared more striking in that case than in the present. But the doubt which has been cast over this case has arisen principally from the retrospective reappointment of Captain *Allan* to the command; a person who, as having no concern in making the captures, can by no correct construction of the warrant possibly be allowed to take the share now in question; and from some supposed analogy to situations of superior command in the royal navy; to which the service in question bears no very near relation or resemblance. The rules for the gradual succession and appointment of officers in the naval service, the permanence of their rank, the quality of their duties, the remuneration of their services under the king's prize proclamation, are all peculiar to that department of public service, and form no adequate rule for governing the construction of the king's grant in a case like this; that is, in respect to persons accidentally and occasionally filling situations of marine employment and command in a perfectly distinct branch of public service. But we do not conceive that any rules, drawn by any fair analogy from the regular course of the naval service, nor any principles to be collected from any one of the naval prize cases

cited in argument, will at all affect the claim of the plaintiff to a commander's share under the circumstances stated. Upon the whole, as the plaintiff was an actually appointed and then serving custom-house commander, under every responsibility belonging to that character, at the time of making the captures in question; and as in making such captures he performed that specific service, for which the moiety of the prize proceeds is, according to the declared purpose of his majesty's warrant, meant to be a *reward*; and as we cannot find any ground of objection to his title, from the mere want of a commission in form under the hands and seal of the commissioners of the customs, sufficient to countervail his claim as founded on the above circumstances; we are of opinion that such claim ought to prevail, and that the judgment on this special verdict ought to be for the plaintiff. And inasmuch as we are also of opinion, that there was no *deputed mariner* in this case, entitled to share as such, independently of his superior character of mate, in which he is specifically entitled under the king's warrant: we are of opinion, that the plaintiff is entitled to recover the sum of 2602l. 13s., being the balance of the plaintiff's share of the prize-money in this case: and in which prize-money we are of opinion, that he is entitled to share, as commander of the cutter, without being subject to any deduction on account of a deputed mariner's share.

Judgment for the Plaintiff to recover accordingly.

Routh v. Thompson.

11 East, 423. June 20, 1809.

After a proclamation by the king in council to detain and bring into port all *Danish* vessels, a hired armed ship of his majesty took and carried into *Lisbon* a *Danish* vessel, and sold her cargo there towards defraying in part the expense of necessary repairs, but without the authority of a Court of Admiralty, and afterwards took in a cargo on freight for *England*, and sailed on the 3d of *November* from *Lisbon*; on which day hostilities were declared against *Denmark* by another proclamation of the king in council; after which an insurance was made on the ship and freight by order and on account of the captors. Held that a statement in a case reserved, that the insurance was on account of the captors, precluded the consideration whether a count in the declaration could be sustained averring the interest to be in the crown, and the insurance to be made on account of his majesty; and that the captors had no insurable interest, as they could claim nothing of right, but only *ex gratia* of the crown; the *Dans* having been seized and detained before any declaration of war against *Denmark*, and the captors having no claim to prize under the prize acts. But as there was no fraud in the captors in effecting the policy, nor any thing illegal in the voyage or insurance; held that the assured were entitled to recover back the premium, which had not been paid into court.

THIS was an action upon a policy of insurance tried before Lord *Ellenborough*, C. J. at *Guildhall*, in which a verdict was taken for the plaintiff for 276l. 7s.; subject to the opinion of the Court on the following case.

That on the 2d of *September* 1807, an order by the king in council was made, of that date, which ordered that no subjects should be permitted to enter and clear out for any of the ports within the dominions of the King of *Denmark* until further orders; and that a general embargo should be made of all vessels belonging to the subjects of the King of *Denmark* then within or which should thereafter come into any of the ports, &c. of his majesty's dominions, together with all persons and effects on board such vessels; and directing the commanders of his majesty's ships of war and privateers to detain and bring into port all vessels belonging to the subjects, or bearing the flag, of the King of *Denmark*; but that the utmost care should be taken for the preservation of all and every part of the cargoes on board any of the said vessels; so that no damage or embezzlement whatever be sustained. And the Lords Commissioners of his majesty's treasury were to give the necessary directions

therein as to them might appertain. This order of council was gazetted on the 5th of *September*; and on the 10th, the officers, crew, and soldiers on board his majesty's hired armed ship, called *The Duchess of Bedford*, in the pleadings mentioned, took and detained off the coast of *Lisbon* the Danish ship *Knud Terkelson* loaded with salt, the property of *Danish* subjects, and sent her into *Lisbon*, being in a very leaky state, and requiring considerable repairs, which were then performed; and the salt was sold towards defraying the expence of such repairs, but was insufficient for that purpose: but no proceedings were instituted in any court of admiralty. The ship being repaired, and there being at the time a considerable demand at *Lisbon* for tonnage to convey *British* property to *England*, the captors by their agents took on board of her a cargo of wines and other merchandize to be carried to *London* on freight, which would have amounted in the event of the ship's arrival at *London* to 1510*l.* On the 3d of *November* 1807, another order of the king in council was published, reciting that the King of *Denmark* had issued a declaration of war against his majesty and his subjects; and ordering that general reprisals should be granted against the ships, goods and subjects of the King of *Denmark*, excepting any vessels to which his majesty's licence had been granted, &c.; so that as well his majesty's fleets and ships, as also all other ships and vessels that shall be commissioned by letters of marque, or general reprisals or otherwise, by his majesty's commissioners for executing the office of Lord High Admiral of *Great-Britain*, shall and may lawfully seize all ships, vessels, and goods, belonging to the King of *Denmark* or his subjects, &c., and bring the same to judgment in any of the courts of admiralty within his majesty's dominions, &c. On the 3d of *November* 1807, the ship with her cargo of wines, &c. on board sailed with convoy from *Lisbon* on the voyage insured, and in *December* following was lost by the perils of the sea. The plaintiff on the 12th of *November*, by order and on account of the captors, effected the policy declared on at and from *Lisbon* to *London*, at a premium of 12 guineas per cent., to return 5*l.* per cent. for convoy: and the insurance was declared to be 3500*l.* on the ship *Knud Terkelson*, valued at 3500*l.*, and on freight; but the freight was not valued in the policy; and the defendant subscribed the same for 300*l.*, and received the premium thereon. None of the officers or crew of *The Duchess of Bedford* are owners of that ship; neither is his majesty the owner thereof, otherwise than as having hired the same as an armed ship, to be employed as such for a time in his majesty's service. The defendant has not paid the premium into court. If the Court were of opinion that the plaintiff was entitled to recover, the verdict was to be entered for him, on such counts, and for such sum as they should direct: if otherwise, a nonsuit was to be entered; and this case was to be turned into a special verdict, if the court should so think fit.

The case was argued on a former day by *Richardson* for the plaintiff, and by *Carr* for the defendant: and the questions made were, whether the detainees or captors had an insurable interest in the ship and freight on their own account, founded upon a lawful possession, with the certain expectation, as it was called, of a grant from the crown on the condemnation of the prize. Or if they had no such insurable interest *suo jure*, whether they could sustain the action upon a count in the declaration alleging the interest to be in his majesty, and the insurance to have been made on his account.

Carr denied that the crown had adopted the act of insurance in this case; on which ground principally he distinguished this case from *Lucena v. Crawford*. The subject has been so exhausted in the full report of the case of *Lucena v. Crawford*(a) in the House of Lords, that it is needless to repeat the arguments and authorities, all of which are there collected.

Lord ELLENBOROUGH, C. J. said, that the case involved a question of con-

siderable magnitude; and that the Court would consider of it. And at the end of the term his Lordship delivered their opinion.

This was an action on a policy of insurance upon ship and freight from *Lisbon to London*. The ship was a *Dane*, had been seized as such after his majesty's proclamation of 2d September 1807, by his majesty's armed ship the *Duchess of Bedford*, had received some repairs at *Lisbon*, and had taken in a cargo there for *London*. In one count the interest is averred to be in his majesty, and the insurance is stated to have been on his account; and in another, the interest is averred to be in the commander, officers, and crew of the *Duchess of Bedford*; and the insurance is stated to have been on their account. The case expressly states that the policy was effected on account of the captors; and that statement precludes us from considering it as effected on account of the crown. Had there been no such specific statement, it might have been open to us, to consider, whether the policy were not referable to the interest of the crown, but after a distinct statement that it was effected (not on behalf of the crown, but) on account of the captors, it must be referred wholly to them, and the plaintiff must recover or fail according as they have or have not a right to aver an interest in themselves. This brings us to the question, Whether they had an insurable interest? Their right in this respect has been put upon two grounds: first, That they had a well-grounded expectation, warranted by the practice of the crown in similar cases, that the ship and freight, had there been no loss, would have been granted to them: and, secondly, that they had the lawful possession, and were liable either to the crown or the foreign owner, for the safe custody of the vessel: and that on either of these grounds they were warranted in insuring on their own account. As to the first, it is material to see in what situation the captors stood: it is clear they had no vested right; they could demand nothing of the crown. Had the crown made the grant in their favour, it would have been altogether *ex gratia*, a mere boon and gift. That gift might have been of the whole, or it might have been of part, and of a very inconsiderable part only. The bounty of the crown would probably have been proportioned to the merit of the detention and capture, and the value of the prize: Had any considerable danger attended the performance of these services, the grant would probably have extended to the whole; had there been no danger or difficulty in them, the grant would probably have been smaller: and had it appeared that the seizure had been made upon speculation only, without any knowledge of the proclamation, there probably would have been no grant at all. At any rate, however, if there were a grant, it would be mere bounty; and has a man a right to indemnity, because he has lost the chance of receiving a gift? Had the ship arrived in safety, the captors would have had the chance of a grant from the crown; but can they, in respect of that chance, insure the ship's arrival? To what extent could they insure? Not to the whole value, because the grant might only have been of part; nor to any given part, because it must have been uncertain what part, if any, would have been granted. The utmost extent is the value of the chance, and how is that to be estimated? Is application to be made to the Crown, to know what it would have granted if the ship had arrived? And what is to be the case if the answer be, as it probably would be, that the crown never has considered, nor has occasion to consider, that point. Independently, however, of the difficulty of fixing the value, and supposing such a chance insurable, must it not be insured specifically as such chance? Must not the interest be so described in the policy? Can a man who has no right, legal or equitable, either in ship or freight, effect an insurance on either, merely because he has a chance that some collateral benefit may arise to him if the ship and cargo should arrive in safety? The declaration must aver an interest in the subject insured, and that interest must be proved: and how can it be said, that these captors have any interest either in this ship or freight, when the ship is altogether the king's; the freight is

altogether the king's; and the captors have no interest in either, nor other concern in respect to the same, beyond a mere chance that the king may be induced to give them something out of the produce of such ship and freight? In *Leccras v. Hughes*, which was cited in the argument, part of the captors at least, viz. the seamen, were considered as having a vested right in the ship and cargo, as prize, to a certain extent: and the Court decided that the capture was within the prize act, and the captors had therefore a right vested by that act. It is true, that another question (which Lord *Mansfield* considered as by no means the strongest) was raised, whether possession and the expectation of future benefit, founded on the contingency of a future grant from the crown, but warranted by universal practice, amounted to an insurable interest? and the Court gave a decided opinion that it did. But what fell from Lord *Eldon* in *Lucena v. Crawford*, 2 New Rep. 323, is materially at variance with the decision of the Court of *K. B.* on that point. However, if the authority of that case were unquestionable upon both the points decided, yet what was held by the Court of *K. B.*, in respect to a contingency of the nearly certain kind which was then under consideration, would afford no rule to govern a case circumstanced like the present. As to the second ground, that the captors had the lawful possession, and were responsible either to the crown or to the *Danish* owners for the safe custody of the vessel; is this a true representation of their situation? They certainly had the lawful possession; but were they responsible for the ship's safety, unless as far as that safety might be endangered by any wrongful acts of their own? The seizure was warranted by the king's proclamation: that made their possession lawful. The subsequent declaration of hostilities put an end to any claim by the *Danish* owners, and of course to all responsibility of the captors in respect to them. It then became their duty to act for the best, with a view to the safety of the ship, and the mere interest of the crown therein. They were bound to leave *Lisbon*; it was for the interest of the crown that they should make the ship instrumental in withdrawing from *Lisbon* as much property as she could properly carry; they acted, therefore, for the best, and were consequently justified in respect to the crown in what they did. The crown cannot call upon them for damages; and they have no right to ask for a sum, as an indemnity, when they had not been, and (under the circumstances stated) could not have been damaged. The consequence is that the plaintiff has no right to recover upon the policy. The question then arises, whether he has any right to recover back his premium? and as there was no fraud in the captors in effecting this policy; as there was no illegality in the voyage or insurance; and as the resistance of the underwriters to the claim upon the policy proceeds upon the ground that there was no risk; the plaintiff is entitled to his premium, (1) and the verdict should be entered accordingly. (2)

(1) See the editor's note to *Taylor v. Hare*, 2 New Rep. 263. i. sect. 16, where the cases of return premium are collected. *Oom & al. v. Bruce*, 12 East, 225, and editorial notes.

(2) ["The sole and exclusive right to all prizes rests in the government, and no individual can acquire any interest therein unless under their grant and commission; and "all captures, therefore, made, without such grant and commission, enure to the use of "the government, by virtue of its general prerogative." Per *Story, J.* in *The Joseph*, 1 Gall. 558. See also, *The Elzebe*. 5 Rob. 155.—W.]

Trehwella and Another v. Rowe.

11. East, 435. June 13, 1809.

The sole registered owner of a ship gave orders for materials to be furnished and work to be done for the repairs of it; but before all the articles were delivered on board, he conveyed the vessel, with all its furniture, to another by a bill of sale, which was duly registered; Held, that the vendee was not liable for any of the goods furnished before the legal title was conveyed to him and registered in the manner prescribed by the registry acts; whatever equitable agreement might have existed before between him and the vendor for the conveyance of the whole or a share of the ship, which was unknown to the tradesmen: nor was the vendee even liable for any of the goods delivered on board after the sale to him, by virtue of the previous orders of the vendor, to whom the credit was personally given: but the vendee was held liable for articles which were ordered by the captain for the use of the vessel after the legal title was transferred to him.

THIS was an action of *assumpsit*, brought to recover a sum of about 200*l*. claimed to be due from the defendant as owner of a certain vessel to the plaintiffs, for furnishing the said vessel with sails, &c.; and the declaration consisted of the common counts for work and labour, goods sold and delivered, and the usual money counts; to which *non assumpsit* was pleaded. There were other actions brought against the same defendant by other tradesmen for different articles furnished for the use of the vessel; which, by an order of the Court, were to abide the event of this; the amount of each demand being ascertained, if the plaintiffs were entitled to recover, and the whole amounting to about 700*l*. At the trial before *Chambre, J.* at *Launceston* in *March* 1809, it appeared that the materials had been originally provided and the business done under the orders and directions of one *Christopher Parnall*, then the sole registered owner of the vessel, who had afterwards become a bankrupt, and of whom the defendant contended that he had purchased the vessel with all her apparel and equipment, as furnished, or to be furnished, by the plaintiffs and the other tradesmen, after the contracts made by *Parnall* with them for that purpose: and that the goods had not been furnished, nor the work performed, upon his own credit. On the other hand it was contended by the plaintiffs, that the defendant was before and at the time of the orders given by *Parnall* a secret partner with him for certain shares in the vessel: and that however the forms of a bill of sale and conveyance of the ship to him, and of a registration under the acts of parliament, might have been observed, they were only to colour the transaction. It appeared by the documentary proof of the ship's registers, and by the evidence in chief of *Parnall*, that the vessel, which had been purchased by him of the plaintiff *Trehwella*, and registered in *Parnall's* name, as sole owner, on the 18th of *November* 1807, was not conveyed by him to the defendant till the 15th of *December* following, as was proved by the register of that date: and that the orders for furnishing her were given by *Parnall* to the plaintiffs and the other tradesmen in *October* 1807, before the purchase of her was made by the defendant, or any agreement entered into for that purpose with *Parnall*; though in fact the articles furnished by the plaintiffs were not put on board till shortly after the 15th of *December*. It also appeared, that these goods were agreed to be furnished by the plaintiffs to *Parnall* at six months credit, and that the plaintiffs actually delivered the bill for the amount to *Parnall* in *January* 1808; and *Parnall* negatived any partnership with the defendant in the vessel when the orders were given. Notwithstanding this evidence, however, upon the supposed bearing of certain expressions in letters which were admitted by *Parnall* upon cross examination, and upon his admission that within a day or two after the sale of the vessel with her furniture, &c. to the defendant for 1200*l*., he had taken a bill of sale from the defendant to himself for 2-16ths, and had also

sold a quarter part to others for the defendant, and had retained the money to pay himself in part of the 1200*l.*, and also upon certain expressions in a letter of the defendant's to *Parnall*, dated the 23d of *November* 1807, in which he says, that as no commission would be granted in *Parnall's* name, he (the defendant) had got the ship register indorsed as his property: and that if another person (named) would take half of the ship, it was well, but that he (the defendant) would not like to hold more than a quarter; and concluding with desiring *Parnall* to sign the register and return it to him; the plaintiff's counsel went to the jury upon the fact of there having existed a secret agreement for a share of or a partnership in the vessel, between *Parnall* and the defendant, prior to and at the time of the orders given for furnishing her; and insisted on the liability of the defendant in that respect: and upon that ground the plaintiffs obtained a verdict for their whole demand. This verdict was moved to be set aside in the last term, upon the ground of its being a verdict against evidence, and against law. In the latter respect, because by the ship registry acts^(a) there could be no legal title in the ship conveyed to the defendant, in respect of which he could be made liable for articles furnished or work done upon it, before the 15th of *December*, when the bill of sale made to him was registered. That no equitable title to a ship, (even if there had been any agreement for that purpose, which was denied) could be recognized since those statutes; and that the defendant, having no legal title in the ship, could only become liable for articles furnished upon his personal credit; which was negatived by all the evidence in the case. The Court granted a rule *nisi*, upon the ground of the ship's registers having been given in evidence by the defendant at the trial, which Lord *Ellenborough*, C. J. said raised a question of considerable importance, and that the defendant was entitled to the legal effect of that evidence.

Lens, Serjt., *Pell*, Serjt., and *Dampier* now shewed cause against the rule, which was to have been supported by *Jekyll*, *East*, and *Gaselee*; but

The Court made the rule absolute, without hearing the defendant's counsel, Lord *Ellenborough*, C. J. saying, that the verdict was against all the evidence. There was no evidence to shew that any personal credit was given to the defendant: and the ship's registers were decisive to shew that he had no legal title in the ship before the 15th of *December*; and all the goods were supplied upon the orders of *Parnall* given before that time.

The cause was tried the second time in *August* last before *Graham*, B. at *Bodmin*; when he was clearly of opinion that the defendant could not be fixed with the payment of any goods furnished by the plaintiffs upon the orders of *Parnall* before the defendant had any legal title in the ship conveyed to him. But the plaintiffs afterwards proving, for the first time, that certain goods to the amount of about 40*l.* had been delivered upon the order of the captain after the 15th of *December*, when the defendant became owner, and upon the defendant's credit, the learned Judge permitted the plaintiffs to recover a verdict for that sum only; and no new trial was moved for in this term on his direction to the jury to reject the rest of the demand.

Childerston v. Barrett.

11 East, 439. June 21, 1809.

A plaintiff who was attending from day to day at the Sittings, in expectation of his cause being tried, was privileged from arrest whilst waiting for that purpose at a coffee-house in the vicinity of the court before the actual day of trial.

THE plaintiff, who resided in the country, had come up to town to attend

(a) Vide stat. 7 & 8 W. 3. c. 22. s. 21. 26 G. 3. c. 60, and 34 G. 3. c. 68.

the trial of his cause against the defendant at the sittings at *Guildhall*, and had been in attendance for several days: and whilst waiting at *Guildhall* coffee-house for that purpose, was arrested at the suit of the defendant. *Lawes* moved, on a former day, for his discharge from the custody of the sheriff, on the ground of his being privileged from arrest *eundo, morando, et rediendo*, upon such an occasion, and cited 4 Com. Dig. Privilege, A. 1, and *Lightfoot v. Cameron*, 2 Blac. Rep. 1113. *Reader* now shewed cause; and admitting that within the principle of decided cases (a) a party was protected in attending the trial of his own cause; endeavoured to distinguish this case from others, upon an affidavit stating, that the cause in question was not to be tried on that day, not having been included in a paper of some particular causes, which the Lord Chief Justice had given notice that he should try on that day; although it stood as a *remanet* from the last sittings; and therefore that the plaintiff's attendance in the Court or in its vicinity was purely voluntary.

The Court, however, said that this was not sufficient to take the case out of the general rule, and made the rule absolute. (1)

Doe, on the joint and several Demises of William Brown and Thomas Bland, v. F. Brown, William Bland, and Thomas Bland.

11 East, 441. June 21, 1809.

Upon a devise to the testator's wife of all his wines, &c. for house-keeping, in addition to the settlement he had made her upon his copyhold estate; and to his niece M. the rents and profits of his new enclosed freehold cow-pasture close in North-Collingham, during the life of his wife; and then to two nephews all his personal estate, to be divided amongst certain nephews and nieces and their sons and daughters: and after the decease of his wife, he devised to the same two nephews all his furniture, plate, &c. and "all his copyhold estates in North and South Collingham," and all other his personal estate to sell and divide amongst his nephews and nieces, &c. including T. B. who he declared should be an equal sharer in this division of his real and personal estate; held that extrinsic evidence could not be given that the settlement on his wife included a certain freehold close, mistakenly there enumerated as one of several copyhold closes settled, and which was in fact intermingled with copyholds, (as were also some other freehold closes, the bounds of which were no longer distinguishable from the copyhold, and all of which freeholds were included in the settlement;) for the purpose of shewing that by the devise of "all his copyhold estates in N. and S. Collingham," after his wife's decease, in trust to be divided, &c. the freehold close in question passed; as meant to include all his real estate in settlement upon his wife, and which settlement was referred to in the first devise to the wife.

And as the settlement which was thus referred to in the former part of the will was not evidence for that purpose, so neither were other instruments and papers, not referred to, admissible for the same purpose; such as, 1. a bond of the same date with the set-

(a) Vide *Meekins v. Smith*, 1 H. Blac. 636, and *Johannet v. Lloyd*, Barnes, 27.

(1) See the following authorities upon the subject of privilege from arrest. 1. Of Parties. *Walker v. Webb*, 3 Anst. 341. *Moore v. Booth*, 3 Ves. jun. 350. Ex parte *King*, 7 Ves. jun. 314. *Sidgier v. Birch*, 9 Ves. jun. 69. *Cole v. Hawkins*, Andrews 275. *Wilson v. Sheriffs of London*, Brownl. 15. *Clerk v. Molincaux*, Sir T. Raym. 100. Anon. 2 Salk. 544. *Bligh's executors v. Fisher & al.* Circuit Court, U. S. New-Jersey, Oct. 1809. *Hurst's case*, 4 Dal. 387. *Miles v. McCullough*, 1 Binn. 77. Ex parte *M'Neil*, 6 Mass. Rep. 245. 2. Of witnesses. Ex parte *King*, 7 Ves. jun. 312. *Smythe v. Banks*, 4 Dal. 329. *Hurst's case*, 4 Dal. 387. Ex parte *M'Neil*, 6 Mass. Rep. 264. 3. Of Attorneys and Solicitors. *Gascogne's case*, 14 Ves. jun. 183. 4. Of Bankrupts attending examination, or creditors to prove their debts. *Arding v. Flower & al.* 8 Term Rep. 534. Ex parte *Parker*, 3 Ves. jun. 554. Ex parte *Donlevy*, 7 Ves. jun. 317. Ex parte *King*, 7 Ves. jun. 312, 314. *Ogle's case*, 11 Ves. jun. 556. 5. Of members of the legislature. 4 Inst. 24. *Pitt's case*, Com. Rep. 444. S. C. Fortesc. 342. S. C. Cas. temp. Hardw. 28. S. C. 2 Stra. 985. *Bolton v. Martin*, 1 Dal. 296. 302. *Coze v. Clenachan*, 3 Dal. 478. *Geyer's Lessee v. Irwin*, 4 Dal. 107. *Gibbs v. Mitchell*, 2 Bay, 406. *King v. Coit*, 4 Day, 129. 6. Of foreign ministers. *Dupon v. Pichen*, 4 Dal. 321.

tlement, and in aid of it, speaking only of *copyhold* to be settled; 2. the rough draught of the settlement altered by the testator; 3. a book endorsed "*Collingham* estate survey," kept with the muniments of his property, and including the freehold in question, without distinguishing it from the *copyhold* closes; and 5. a rental kept in the same place, which was indorsed by the testator, that "all the rents of the *copyhold* lands in *North* and *South Collingham*, &c. were settled on his wife for life."

For there is no ambiguity on the face of the will; the testator having *copyhold* estates in *North* and *South Collingham* to answer the description in it; nor is there any reference from the devise in question to the settlement, but by connecting it with the antecedent devise to the wife; and there is no such necessary connection. Nor does it follow, that the testator meant to devise the *same premises* under the name of *copyhold* to the trustees as were settled on his wife; or that he was under the same mistake that the close in question was *copyhold*, when he made his will, as when he made the settlement or indorsed his rental: and therefore there is nothing appearing on the will to warrant a construction of the word *copyhold* so contrary to its ordinary acceptation as to include the *freehold* in question.

IN ejectment for a close of freehold land, called *The Least Ox Pasture Close*, at *North Collingham* in the county of *Nottingham*, a verdict was found for the defendants, subject to the opinion of this Court on the following case.

Henry Milnes being seised in fee of the close in question, together with another freehold close, called the *Sudmarsh*, or *Cow Pasture Close*, in *North Collingham*, and of other freehold and *copyhold* premises in *N. and S. Collingham*, and having surrendered his *copyhold* to the use of his will, by his will dated the 10th of *February* 1800, devised as follows: "I give unto my dear wife the house, with all the premises in which I now dwell, for her life. I give her also all my wines, liquors, and provision for housekeeping, in addition to the settlement I have made her upon my *copyhold* estate. I give to my niece *Mary* the wife of *W. Lansdale*, the rents and profits of my new inclosed freehold *Cow Pasture Close*, in *North Collingham*, for her sole and separate use, during the life of my dear wife. And I give to my nephews *Thomas Bland* and *William Brown*, their executors, &c. in trust, all my moneys, securities for money, and personal estate, to be divided and paid amongst my nephew and nieces (mentioning them by name) and their sons and daughters, share and share alike. And after the decease of my dear wife, I give to my nephews *Thos. Bland* and *Wm. Brown*, their executors, &c. in trust, my dwelling-house, in *Newark*, with all my household furniture, plate, pictures, brewing vessels, and all my *copyhold* estates in *North* and *South Collingham*, and my freehold *Cow Pasture Close* in *North Collingham*, and all other my personal estate of what nature or kind soever, to sell the whole by public auction, and to divide the money, when all expences are paid, amongst my nephews and nieces and their sons and daughters, (mentioning them by name) share and share alike, with the addition of my nephew *Thomas Bland*, who it is my will should be an equal sharer in this division of my real and personal estate with the rest of them." And the testator appointed the said *Thos. Bland* and *Wm. Brown* joint executors. The testator died on the 17th of *October* 1800. The lessors of the plaintiff are his co-heirs at law. It was admitted by the defendants, that the plaintiff was entitled to recover possession of the close in question, unless it passed by the will to the devisees therein named; and in order to shew that it was the intention of the testator that it should pass, the following evidence was offered for the defendants, and received by the learned Judge, subject to the opinion of this Court upon its admissibility.

1st, An indenture tripartite, dated the 1st of *February* 1792, between *H. Milnes* (the testator), *Mary Spragging* his intended wife, and *T. Spragging*, a trustee, whereby, after reciting the intended marriage, and that for making a jointure for the said *Mary*, *Henry Milnes* had agreed that the *copyhold* messuage, homestead closes, lands, grounds, allotments, and hereditaments, thereafter described and covenanted to be surrendered, should be settled to the uses thereafter expressed: *H. Milnes*, covenanted with the trustees, that

after the marriage he would surrender all that *copyhold* messuage with the homestead and appurtenances in *North Collingham*, and all those several *copyhold* closes and parcels of land and grounds, allotments and hereditaments, thereafter described (enumerating the several closes, and amongst the rest *the close in question*) to the uses in the indenture mentioned, and containing also a covenant from *Milnes* of his lawful seisin of the said *copyhold* hereditaments and premises, and of his authority to surrender the same to the uses aforesaid. This indenture was executed by the parties, and the marriage afterwards took effect. The whole of the real property in *North* and *South Collingham*, to which the testator was entitled at the time of making his will and of his death, was comprised in the above settlement, with the exception of the *Sudmarsh* or *Cow-Pasture* freehold close, and he had no other real property except his freehold property at *Newark*, which was also devised by his will. The estate comprised in the settlement, therein described as of *copyhold* tenure, contains, besides the *freehold close in question*, several other parcels of land of *freehold* tenure: but neither the situation nor extent of these parcels can be precisely ascertained. 2d, A bond from the testator of the same date with the settlement, for 2000*l.*, conditioned to be void if he should permit *Mary Spragging* in case she survived him to take all his liquors and provisions for housekeeping, and enjoy for her life his dwelling house in *Newark*, and all his household furniture, &c., *over and above* the provision intended to be made for her by a settlement of his *copyhold* estate in *Collingham*. 3d, The rough draft of the settlement, proved to have been perused and corrected by the testator's own hand, and an alteration made by him in the description of the very close in question, which had been named in the draft the *Little Ox Pasture Close*, and which he altered to *the least*. And the testator in giving his instructions to Mr. *Allen* his attorney for the above deeds, described the whole of the property contained in the settlement as *copyhold*. 4th, A book indorsed "*Collingham Estate Survey*," found in a box among the testator's title deeds and writings, containing the following particulars of his estate in his own hand-writing. "*Henry Milnes' estate at North and South Collingham taken since the inclosure.*" The list began with the house, buildings, and homestead, followed by the names of the several closes of the old inclosure, with the number of acres in each; in which the close in question, called, "*The Least Ox Pasture*," is enumerated amongst the rest, without distinction: but in the list of the new inclosures immediately following the other, one of the closes is mentioned as "*Sudmarsh freehold close*." And the same distinction occurred again in a 5th paper, also found among the testator's title deeds and writings and indorsed by him, containing the rental of the several closes. And at the bottom of this rental, the whole of which was in the hand-writing of the testator, is this: "All the rents of the *copyhold* lands of *H. Milnes* in *North* and *South Collingham*, now in the tenure of *W. Lansdale*, *T. Pacy*, and *W. Rodall*, are settled on *Mary* my present wife for her life." The heirs at law took equal portions with the other devisees under the will of the testator. The verdict was to be entered for the plaintiff or the defendants, according to the opinion of the Court upon the case.

Balguy, jun., for the defendants, contended that the evidence was properly admitted to explain the sense in which the testator had used the word *Copyhold* in his will; 1st, because the property was misdescribed in the will; and, 2dly, because the will refers to the settlement, as including all which was settled on his wife, and by which settlement the misdescription may be corrected. 1st, by the devise of all his *copyhold* estates in *North* and *South Collingham*, &c. *after the decease of his wife*, in trust to his two nephews to sell and divide, it is plain that he meant the *whole* of that estate by him before mistakenly called *copyhold*, which was settled upon his wife; because he had first given to her all his wines, &c. "*in addition to the settlement I have made her upon my 'copyhold estate.'*" The settlement explains the ground of the mistake; for

it describes as *copyhold* the close in question, though in fact *freehold*: and it also conveyed several other closes of freehold tenure, though the extent of them cannot now be ascertained, being so intermingled with the copyhold as no longer to be capable of being distinguished from it. It appears, therefore, that when the testator spoke of his *copyhold* estates which were settled on his wife, he did not merely mean that part of the settled estates which was of copyhold tenure, but the whole of the settled estate, the greater part of which indeed was copyhold, but which also included some closes of freehold tenure intermingled and confused with the copyhold, and therefore designated by the same term, which is used merely as descriptive of the property, and not of the tenure. And to shew that property misdescribed may pass under such misdescription, if clearly ascertained, he referred to *Roe d. Conolly v. Vernon*, 5 East, 51, and *Doe d. Cook v. Danvers*, 7 East, 299. It is also apparent from the subsequent clause, which speaks of the division he had made of his *real* and *personal* estate, that the testator meant to include the whole of his real estate in the description before used. He concluded by referring to other cases where evidence dehors the will had been admitted to explain it. *Pulteney v. Ld. Darlington* in 1773, cited from the Register, fo. 710, in *Hinchcliffe v. Hinchcliffe*, 3 Ves. jun. 521. *Druce v. Denison*, 6 Ves. jun. 385. Lord *Cheney's* case, 5 Rep. 68. *Beaumont v. Fell*, 2 P. Wms. 141. *Rivers' case*, 1 Atk. 410. *Thomas d. Evans v. Thomas*, 6 Term Rep. 671, and *Whitbread v. May*, 2 Bos. & Pul. 593.

Copley, contra, contended, that in this case where the testator had left property corresponding with the description in the will, extrinsic evidence was not admissible to shew that he meant to include other property not falling within that description: though he admitted that such evidence may be received to explain the testator's meaning in cases where he has no property answering the description in the will: as in *Day v. Trig*, 1 P. Wms. 286. This distinction, he said, was recognized in most of the cases cited: and also in *Denn d. Wilkins v. Kemeys*, 9 East, 366, and *Knotsford v. Gardiner*, 2 Atk. 450. Then as there was copyhold to answer the description in this will, it cannot be said to be a *misdescription* of the testator's property. The cases in Chancery where the extrinsic evidence has been admitted do not apply; because they involve questions of trust, or election, or other considerations of equitable cognizance only. In *Hinchcliffe v. Hinchcliffe*, 3 Ves. jun. 522—530, the Master of the Rolls expressly disclaimed receiving the extrinsic evidence to explain the will; and only received it to explain the circumstances in which the testator was at the time of the devise. And Lord *Eldon*, in *Druce v. Denison*, 6 Ves. jun. 400-3, evidently disapproved of *Pulteney v. Lord Darlington*, and other cases, where extrinsic evidence was received in any degree to explain words in a will, which were unambiguous. Here, in order to let in the evidence, the word *copyhold* must in effect be expunged from the will. The settlement is indeed referred to in the first clause of the will, but not for the purpose of explaining the extent of the property bequeathed: the testator does not affect to devise all *the estate* comprised in the settlement: which would have let in the evidence of the settlement to shew what did pass by it: and there is no reference whatever to the settlement in the subsequent clause of the will by which the defendants claim. Neither does the confusion of the freehold with the copyhold closes bear upon the question as to the freehold in dispute, which is clearly defined, and requires no reference to the settlement to ascertain it.

Balguy, in reply, said that in considering the meaning of a particular clause in the will, the Court was not restrained to look at that clause only, but might collect the intention of the testator, as to the property which he meant to devise by that particular clause, from the whole of the will. That the evidence went to shew that the particular freehold close was included in that portion of the testator's property which was called by the general name of *the copyhold*

estate, because the greater part of it was of that description, and the small portions of freehold were intermingled and consolidated with it : and that all the evidence was admissible in this view of it, but particularly the settlement, which was referred to by the will itself.

Lord ELLENBOROUGH, C. J. said, that as the case appeared to involve a general question of extreme importance, the Court would look further into it before they delivered their opinion. And now his Lordship delivered judgment.

This was a special case, reserved at the trial of an ejectment for a close of freehold land, called *The least Ox pasture Close*, in *North Collingham*, in the county of *Nottingham*. The question arose on the will of one *Henry Milnes*, whether such close passed by the devise in that will, of all the testator's copyhold estates in *North* and *South Collingham*, to his nephews, *Thomas Bland* and *William Brown* : if it did, the lessors of the plaintiff had no title : if it did not pass by such devise, it descended to the lessors of the plaintiff, who are his heirs at law. [Then, after stating the words of the will as before set out, his Lordship proceeded.] The facts were, that the testator had, at the time of making his will, and also at the time of his death, besides the freehold close in question, another freehold close, called the *Sudmarsh* or *Cow-pasture Close*, situate in *North Collingham*, and was also seised of other freehold and copyhold premises in *North* and *South Collingham*, and had surrendered the copyhold to the use of his will. On the face of the will we find no ambiguity. The testator gives to his nephews *Thos. Bland* and *William Browne*, their executors, administrators, heirs, or assigns, in trust, after the death of his wife, his dwelling-house at *Newark*, with all his household furniture, plate, &c. and all his copyhold estates in *North* and *South Collingham*, and all his freehold Cow-pasture close in *North Collingham* : and he had copyhold estates in *North* and *South Collingham*, and a freehold Cow-pasture close ; which answer and satisfy the terms of that devise ; which terms are definite and certain : and on this clause alone, it could not be contended for a moment, that evidence could be admitted to shew, that in this description of all his copyhold estates, the testator meant to include freehold property. But the argument on the part of the defendants is, that a prior clause of the will may be brought down to and connected with the devise of the copyhold to the trustees ; and so open a door to let in the evidence of intent from matter dehors the will. That prior clause is at the beginning of the will, where the testator gives to his wife all his wines, liquors, and provisions for housekeeping, in addition to the settlement I have made her upon my copyhold estate : and the argument is, we will shew that by the settlement made on his wife, the testator covenanted to surrender to the uses of that settlement certain copyhold premises, enumerating them, among which is the freehold close in question : and as he has by his will given her his wines and provisions of housekeeping, in addition to the settlement made her on his copyhold estate, his subsequent devise, after the death of his wife, of all his copyhold estates in *North* and *South Collingham*, must have been intended by him, and must be understood by the Court, as comprising all that he had settled on his wife under the denomination of copyhold, or rather that he meant to settle on her, under that denomination. But, independently of the other objections, we think the argument fails in connecting the two clauses, or in raising any ambiguity if they were connected. The only circumstance is, that in both clauses the testator uses the term copyhold estate ; and in the latter clause he devises all his copyhold estates, with other property, after the death of his wife. But it does not necessarily follow, that he meant to devise to the trustees the same premises which he had settled on his wife ; or that when he made his will in the year 1800, he was under the same mistake, with respect to the tenure of this part of his estate, as he might have been under in 1792, when he made his settlement, or at the date of his rental in 1794. It would be going further than any case which we are aware of has yet gone,

in admitting evidence of intent, from extraneous circumstances, to extend plain and unequivocal words in a will. The terms used in both clauses are unambiguous. The testator had *settled copyhold* estates on his wife: so far the expression in the first clause is correct: and even if the settlement referred to were looked at, that would present no ambiguity as to the quality of the estates so settled. He had also copyhold estates to devise: here again he is correct. And therefore we do not feel ourselves at liberty to look beyond the will for circumstances from whence an intent may be collected to include property of a different description, and where nothing appears to require such a violation of the ordinary terms used in the description of property: and it would be, as we apprehend, most dangerous to allow ourselves that latitude. The *postea* therefore must be delivered to the plaintiff.

Barnes v. Hunt.

11 East, 451. June 20, 1809.

To a declaration for several trespasses on the plaintiff's land, on divers days, &c. the plea alleged, that at the said several days, &c. the defendant committed the said several trespasses by licence of the plaintiff: and the latter replied, that the defendant of his own wrong, and *without the cause* alleged, committed the said several trespasses, &c.; held that evidence of a licence which covered some, but not all of the trespasses proved, within the period laid in the declaration, did not sustain the justification upon the issue taken by the replication.

THE declaration consisted of two counts in trespass, the first of which alleged, that the defendant, on the 1st of *September* 1808, and on *divers other days* and times between that day and the day of exhibiting the plaintiff's bill, broke and entered the plaintiff's close at *Combe*, &c. and with dogs hunted and beat for game there, and committed other trespasses there particularising them: and the second count was similar, in respect of another close of the plaintiff at *Combe*, except that it omitted some of the trespasses particularized in the first. The defendant pleaded 1st, the general issue; 2dly, as to the breaking and entering the close in the first count mentioned, and committing all the trespasses therein alleged, (except breaking locks of gates, &c.) *at the said several days and times*, &c.; and as to the trespasses in the last count mentioned at the several times, &c.; the defendant averred the identity of the closes, and of the several days and times mentioned in the two counts: and then pleaded, that *at the said several days and times* when, &c. he committed the said several trespasses in the introductory part of his plea mentioned *by the leave and licence* of the plaintiff. The plaintiff replied, that the defendant of his own wrong, and *without the cause* by him in that behalf alleged, committed the said several trespasses, &c.: on which issue was joined. At the trial before *Chambre, J.* at *Salisbury*, it appeared that the defendant, who had been warned by a prior notice from the plaintiff not to trespass upon his grounds, was seen trespassing thereon, on the 1st, 2d, 13th and 19th of *September*. That on the 2d, as the defendant was returning from shooting upon the plaintiff's land, he met the plaintiff, and after mutual salutation offered him some game, which the latter accepted and thanked him for. And the defendant having then asked whether a Mr. *H.* was to have all the game, (meaning on the plaintiff's land,) the plaintiff replied, "I do not care who has the game; you may kill as much as you like, or all if you please, so as you do not ride over my corn." On this evidence two questions arose; one upon the form of pleading; whether as the plaintiff had declared for trespasses committed on a particular day and on divers other days and times afterwards; and the defendant's plea alleged generally, that he had done all the acts complained of (except some trespasses, of which no evidence was given) by the

licence of the plaintiff; and the whole of that plea was put in issue; there was any necessity for the plaintiff to have made a new assignment, to enable him to recover for the trespasses committed prior to the licence. The other question was, whether the licence could by relation apply to the prior trespasses, *viz.* on the 1st and 2d of *September*: but this was afterwards abandoned upon shewing cause. The plaintiff took a verdict for the first trespass, with nominal damages: and liberty was given to the defendant to move the Court to set aside that verdict, and enter a verdict for the defendant.

This was accordingly moved by *Burrough*, in the last term, who contended that the *cause* only, namely, the licence which went to the whole trespass, was put in issue by the replication; and there being no new assignment, and proof having been given of trespasses which were covered by the licence, the defendant was entitled to a verdict. And he said, that it had been always understood, and the practice on the Western Circuit for many years had been in conformity with the general understanding, that if the plaintiff meant to dispute the application of the licence pleaded to the particular trespass declared for, it was necessary for him to new assign it.

Lord ELLENBOROUGH, C. J. then said, that he did not feel the weight of the objection; but as such a practice had prevailed, the ground of it was fit to be considered upon a rule *nisi*. To him it appeared, at present, that the declaration alleging several trespasses, on divers days and times, the plea of licence to the whole should be understood as applying to each, *reddendo singula singulis*; and that it was necessary to prove a licence co-extensive with the trespasses proved at the several days and times included in the declaration; and here the licence proved did not cover all the trespasses.

Lens, Serjt., *Dampier*, and *Casberd* now shewed cause against the rule, and observed that though there were two counts, yet they were reduced in effect to one by the special plea, which averred the identity of the respective trespasses in each. Then taking it as if there were but one count, still the plaintiff having declared for several trespasses on divers days within the period stated, was at liberty to give in evidence as many trespasses as there were days included. And the defendant does not by his plea confine the generality of the count, by selecting one or more acts of trespass, and setting up a licence to cover those particular acts; which would have driven the plaintiff to new assign, if he meant to rely on other acts of trespass; but he says, as to the trespasses at the said *several days and times*, &c. he had the licence of the plaintiff: insisting, therefore, on a licence co-extensive with the number of trespasses which might be proved under the count. So a new assignment would not have carried the matter further, but must have been a mere repetition of the declaration. It would even have amounted to pleading double; because it would have been pleading again what had been answered by the plea. In *Cheasely v. Barnes*, 10 East, 73, a single trespass being laid in the count, and that being justified, and issue taken on such justification, the Court held that a new assignment was double.

Burrough (*Pell*, Serjeant, was with him) in support of the rule, contended, that though upon the plea of not guilty the plaintiff might prove as many trespasses as he pleased within the period laid in his declaration: yet upon the plea of licence, the proof of which lay upon the defendant, the trespasses were agreed upon, and nothing was in issue except the *cause of the justification*, namely, the licence: and if the defendant proved any trespass covered by his licence, the issue must be decided for him. [Lord *Ellenborough*, C. J. The question is, what is the *cause* under the replication of *de injuria sua propria, absque tali causa*; is it one, or several trespasses; and one, or several licences?] In *Sayer v. The Earl of Rockford*, 2 Blac. Rep. 1170, *Blackstone*, J. said, that the words, *de injuria sua propria*, were merely introductory; that the traverse was contained in the words, *absque tali causa*; and whatever went to disprove that cause was admissible evidence, and nothing else: and *Crogate's*

case, 8 Rep. 66, 7, explains what the clause is: which is the ground of the justification. Here the licence is the only cause, and it has always been so considered.

LORD ELLENBOROUGH, C. J. *The cause* is one combined thing arising out of several facts; and I will venture to translate that word in this case into what it really means, and that is, *without the matter of excuse alleged*. Now, what is the matter of excuse alleged? The defendant, in answer to a declaration complaining of several trespasses committed by him on the 1st of *September*, and on divers other days and times between that day and the day of exhibiting the bill, says, that at the *said several days and times* when, &c. he had the licence of the plaintiff; not a licence to commit one or more trespasses, but a licence, as large as the declaration, to commit as many trespasses as the plaintiff has assigned and is able to prove. What then does the replication import when it alleges that the defendant of his own wrong, and without the cause alleged, committed the several trespasses? It denies the defendant's justification to the extent pleaded by him: it denies that he had licence to commit the several injuries of which the plaintiff complained and is able to prove within the terms of his declaration. Whatever practice may have prevailed, this sense of the pleadings appears to me to be clear.

GROSE, J. was of the same opinion.

LE BLANC, J. The defendant having by his plea applied a licence to *all* the trespasses complained of, the plaintiff, intending to deny a licence co-extensive with those trespasses, could only reply as he has done.

BAYLEY, J. The declaration is general complaining of trespasses on divers days within a certain period. The defendant undertakes to meet that general and indefinite charge, and says, in effect, that whatever may be the number of trespasses that the plaintiff complains of within that period, he is prepared to shew as many licences. The replication states that the defendant at the said several days, committed the said several trespasses of his own wrong, and without the cause alleged. What does that put in issue but that the defendant had a licence to cover all those trespasses. Then, in common sense and understanding we must take it that *the cause* put in issue by the replication is, that the defendant had not a licence co-extensive with the trespasses complained of, and a new assignment could have done no more than repeat the same thing.

Rule discharged.

CASES

IN

MICHAELMAS TERM,

IN THE FIFTIETH YEAR OF THE REIGN OF GEORGE III.

The King v. Morgan.(a)

11 East, 457. Nov. 15, 1809.

Affidavit, entitled "In the King's Bench," upon which the Attorney-General had filed an information *ex officio* against the defendant, permitted to be read in aggravation after judgment by default.

PEMBROKESHIRE.—This was an information filed by *The Attorney-General* against the defendant for assaulting and obstructing an officer of the excise in the due execution of his office; to which the defendant had suffered judgment to be signed by default. And on this day, when he came up to receive sentence, the affidavit upon which the Attorney-General had filed the information was offered on the part of the crown to be read in aggravation; but was objected to by Mr. *Erskine* for the defendant, as not having been sworn in the cause. But

The Court, after deliberation, permitted it to be read; the affidavit being entitled, "In the King's Bench," sworn before a Commissioner of the Court, and being the foundation of a proceeding in the court: and the Court understanding that it had been the practice for such affidavits to be read on judgments by default.

Philip Thomas Wykham v. Sophia Elizabeth Wykham, an Infant, by her Guardian, and Others.

11 East, 458. May 5, 1809.

One, after devising certain lands to trustees and their heirs, to pay debts in aid of the personal estate, devised the surplus, and all his other lands, &c. to his 1st, 2d, 3d, and other sons successively for life, with successive remainders to trustees and their heirs to preserve subsequent estates during the lives of the several tenants for life, with several remainders successively to the first and other sons of the bodies of the testator's several sons in tail male, with like remainders to his daughter S. for life, to trustees, &c. and to her first and other sons successively in tail male: with a proviso, that each of the testator's sons, as he came into possession, might from time to time

(a) The note of this case, which was decided in this court in Mich. 45 Geo. 3. 1804, was communicated to me lately by Mr. *Dealtry*; and involves a point of general practice.

grant or appoint all or any part of the lands whereof he should be so seised and possessed to *trustees*, on trust by the rents and profits to pay a jointure to any wife, &c. for the term of each such wife's natural life only. There were also powers by deed to charge the lands with portions for daughters and younger children, and to lease for 21 years.

The eldest son, having married, by deed, reciting the will and power, conveyed certain of the lands to *trustees and their heirs*, on trust by the rents and profits to raise and pay a jointure to his wife during her natural life only: and charged the lands with portions for younger children, if any; which deed also contained a covenant for quiet enjoyment during the wife's life: Held that by such deed the trustees took a fee.

PHILIP Lord Wenman, being seised in fee of divers real estates, and entitled in fee to the equity of redemption of certain other real estates then mortgaged in fee to *Agatha Child*, by his will dated the 4th of May, 1758, and duly executed and attested, devised part of such his legal and part of his equitable estates to *Harvey and Bassett and their heirs*, in trust that they should out of the rents, issues, and profits, or by sale, from time to time, and also by virtue of the power thereafter given to them to cut and sell coppice woods, raise money sufficient to pay off the testator's debts and legacies, or so much thereof as his personal estate not specifically devised would not be sufficient to pay. And as for all such parts of the said lands, tenements and hereditaments so given to the trustees which should remain after the said trusts were performed, he devised the same, and also all other his freehold manors, lands, &c. whereof he was seised or possessed, or wherein he was entitled to any estate in possession, reversion, remainder, or expectancy, in the counties of *Oxford, Kent, Bucks*, or elsewhere in *England*, to his eldest son *Philip Wenman*, for life, without impeachment of waste; remainder to trustees and their heirs to preserve subsequent estates; remainder to the first and other sons successively of the body of *Philip Wenman* in tail male; and for default of such issue, with like remainders to his youngest son *Thomas Francis Wenman* for life, &c.; to trustees and their heirs to support subsequent remainders; and to his first and other sons successively in tail male; remainder to the testator's third and other sons in tail male successively, &c.; and in default of all such issue male of the testator's body, if the testator should have any other daughters besides his daughter *Sophia Wenman*, to and amongst his said daughter *Sophia* and other such daughter or daughters in tail, as tenants in common: but if no other daughter than *Sophia*, then to her for life without impeachment of waste: remainder to trustees and their heirs to preserve contingent remainders; remainder to her first and other sons successively in tail male; with divers remainders over; with the ultimate remainder to the right heirs of the testator. The will also contained this proviso: "Provided, that it shall and may be lawful to and for each of my said sons *P. Wenman* and *T. F. Wenman*, and every other son of my body, when and as they shall respectively become entitled to the aforesaid manors, lands, or any part or parts thereof, in possession, by virtue of the devises and limitations aforesaid, from time to time to grant, convey, limit, or appoint, all or any part or parts of the said manors, lands, &c. whereof they shall respectively be so seised and possessed, to trustees, upon trust by the rents and profits thereof to raise and pay any yearly rent-charge not exceeding 1000*l.* by equal quarterly payments, clear of all out-goings and reprises whatsoever, as and for a jointure to and for any wife or wives that he or they shall hereafter happen to marry, for and during the term of each such wife's natural life only. And further, that it shall and may be lawful for each of my said sons, at any time or times after they shall respectively come into the possession of the said manors, lands, &c. by virtue of the aforesaid limitations, by any deed or deeds executed in the presence of two or more credible witnesses, or by his or their will or wills respectively, duly signed, &c. and attested, &c. to charge all or any part or parts of the said manors, lands, &c. whereof

"he or they shall be so severally seised and possessed, with any sum or sums
 "not exceeding the sums hereinafter mentioned, for portions of their daughters and younger children; viz. for one such daughter or younger child
 "5000*l.*, for two such, &c. 8000*l.*, and for three or more such, &c. 10,000*l.*,
 "with such maintenance in the mean time not exceeding 4 per cent. interest
 "of their respective portions as my said sons shall respectively by such
 "deeds or wills appoint." And also this proviso; "that it shall and
 "may be lawful for my said sons, or such other person or persons who
 "shall by virtue of the limitations aforesaid respectively, when and as
 "they shall come into possession of the said manors, lands, &c. so devised
 "to them for life as aforesaid, by indenture to demise and lease all or any
 "part or parts of the said manors, lands, &c. to any persons for any term or
 "number of years not exceeding 21 years in possession; so as in every
 "such lease there be respectively reserved, &c. as great a yearly rent as can
 "be reasonably obtained." *Philip Lord Wenman*, the testator, died in *August* 1760, leaving only two sons, namely, *Philip*, afterwards *Lord Wenman*, and *Thomas Francis Wenman*, and one daughter, *Sophia Wenman*, who afterwards married *William Humphrey Wykham*, the father of the plaintiff. The testator's eldest son, *Philip Lord Wenman*, attained his age of 21 years in *April* 1763, and was thereupon let into possession of all the testator's real estates, and held them till his death. And in 1766, he married *Lady Eleanor Bertie*: previous to which by indenture tripartite, properly attested, dated the 28th of *June* 1766, reciting the said will of his late father, whereby he was entitled to make a jointure out of the said estates upon a wife, and to make provision for daughters and younger children; and reciting his intended marriage with *Lady Eleanor*, and for making such jointure on her in case she should survive him after the marriage as he was empowered to make by virtue of and according to the true intent and meaning of the said recited will: he, *Philip Ld. W. Wenman*, pursuant to and by force and virtue of the said power and authority to him given for making and limiting such jointure, and of every other power and authority enabling him thereunto, did grant and appoint unto the *Earl of Abingdon* and *J. Morton* (trustees and parties to the deed) all and every the freehold manors, lands, &c. devised to him by his father, in the counties of *Oxford* and *Bucks*, or elsewhere in *England*, *habendum* to the trustees and their heirs, upon trust by the rents and profits thereof to raise and pay to *Lady Eleanor Bertie* and her assigns, during her natural life only, the yearly rent-charge of 500*l.* by equal quarterly payments clear of all outgoings and reprises whatsoever, as and for a jointure for the said *Lady E. B.* in case the marriage took effect, and she should survive the said *Philip Ld. W.*, and to be in bar and satisfaction of Dower, &c. And by that indenture *Philip Ld. W.*, for making provision for the daughters and younger children of the marriage, as he was authorized and empowered to do by force and virtue of the recited will of his father, in pursuance of such power and of every other power enabling him thereunto, charged all the said manors, lands, &c. in the counties of *Oxford* and *Bucks*, subject to the jointure of *Lady Eleanor*, with the payment of the several sums therein mentioned. The deed also contained covenants by *Ld. Wenman* to the trustees, that he had good right and full power to make such grant, settlement, limitation, appointment, and charge, as were by him thereby made respectively; as aforesaid. And further, that the trustees, in case the marriage took effect, and *Lady Eleanor* survived him, should from time to time after his decease, during the natural life only of the said *Lady Eleanor*, peaceably and quietly enter, possess, and enjoy the said manors, lands, &c. before granted, &c. to them, and take as much of the profits thereof as should be sufficient to pay the said yearly rent-charge of 500*l.*, without lawful let, eviction, or interruption, &c. of *Lord Wenman*, his heirs or assigns, or of any other person, &c. Then by another indenture of the 26th of *December* 1782, *Philip Ld. Wenman*, the son, made a further jointure of 300*l.* a year on *Eleanor*

Lady *Wenman* his wife; reciting as before his power under his father's will, and granting and appointing to Lord *Abingdon* (one of the former trustees) and Sir *J. W. Gardner* and *their heirs*, such parts of the freehold manor, lands, &c. in the county of *Oxford* as were devised to him by his father, to hold to the trustees and *their heirs*, upon trust by the rents and profits to raise and pay to the said *Eleanor*, *during her natural life only*, such further rent-charge of 300*l.* &c. in case she survived him; with the like covenants as before for his right to make such grant, and for quiet enjoyment *during her life only*. And by another similar indenture of the 1st of *Dec.* 1796, Lord *Wenman* granted and appointed to Sir *Wm. Henry Ashhurst* and the said Sir *J. W. Gardner*, and their heirs, such parts of the said demised estates as lay in the county of *Oxford*, and in *Pounden*, in the parish of *Twyford*, in the county of *Bucks*, upon trust to raise and pay to *Eleanor Lady Wenman*, during her natural life only, a further jointure and rent-charge of 200*l.* in addition to the 500*l.* and 300*l.* before settled on her: with like covenants as before. In 1796, *Thomas Francis Wenman*, the second son of the testator *Philip Lord Wenman*, died unmarried and without issue, in the lifetime of his elder brother *Philip Lord Wenman*, who died on the 26th of *March* 1800, without issue, leaving *Eleanor Lady Wenman* him surviving. *Sophia*, the only daughter of the first-named Lord *Wenman*, having married and survived *Wm. Humphrey Wykham*, died in *March* 1792, leaving issue *Wm. Rd. Wykham*, her eldest son, *Philip Thomas Wykham*, the plaintiff, and *Harriet Mary Wykham*, who married the defendant *Willoughby Bertie*. By indentures of lease and release of the 1st and 2d of *January* 1799, the said *Wm. Rd. Wykham* conveyed to *Wm. Walford* and his heirs his life estate expectant on the death of *Philip* then Lord *Wenman*, in the said manors, lands, &c. in trust for certain uses, (the object and effect of which was only to bar any wife of his from dower.) *Wm. Rd. Wykham*, on the death of the last Lord *Wenman*, was let into possession of all the testator's real estates not sold by the trustees under the will, and enjoyed the same till his death: and by indenture of lease and release of the 20th and 21st of *June* 1800, all the said estates in *Oxfordshire*, *Bucks*, and *Kent*, were conveyed by *Walford* and *Wm. Rd. Wykham* to *W. Meyrick* in fee, to make him tenant to the *præcipe*; and recoveries were suffered of the same in *Trinity* term in 1800, in which *Wm. Rd. Wykham* was the vouchee; at which time *Eleanor Lady Wenman* was still living. On the 1st of *July*, 1800, after the recoveries suffered, *Wm. Rd. Wykham* died, leaving the defendant *Sophia Elizabeth* his heiress at law, and she is also the heiress at law of the testator *Philip Lord Wenman*. The mortgages are still unsatisfied and outstanding; and all Lord *Wenman* the testator's debts are not yet paid.

The complainant filed his bill in Chancery against the defendants, insisting that the estate in tail male, limited by the said will of *Philip Lord Wenman* to the first and other sons of the body of his daughter *Sophia* was not bound by the said recovery; and praying that the plaintiff might be declared entitled to an estate tail in all the estates thereby devised, and that he might be let into possession, and for an account of the rents and profits from the death of *Wm. Rd. Wykham*; and that the Earl of *Abingdon* and Sir *Wm. H. Ashhurst*, the surviving trustees in the jointure deeds of *Eleanor Lady Wenman*, without prejudice to her who was then living, but is since dead, or any other charges or incumbrances affecting the said estates, might be directed to convey to the plaintiff, to enable him to suffer a good recovery. And on the hearing before the Lord Chancellor, he directed this case to be made for the opinion of this Court and that the question should be,

Whether the trustees named in the deed of appointment of the 28th of *June* 1766, and in the other deeds of the 26th of *December* 1762, and the 1st of *December* 1796, or any of them, took any and what estate and interest in the manors, lands, and hereditaments in question, of which *Philip Lord Wenman*, the testator, was seised in fee simple at the time of making his will, and

which were thereby given to *Philip* his son, afterwards Lord *Wenman*, for life, or any of them?

The case was argued in last *Easter* term.

Helroyd, for the plaintiff, contended that the trustees in the jointure deeds of appointment did not take estates in fee, but only took estates *to them and their heirs for the life of the jointress Lady Eleanor Bertie*. First, he considered the construction of the power as given by the will of Lord *Wenman*, and next the mode in which that power was executed. 1st, This being a power given by a will is to receive that construction which will best effectuate the apparent intention of the testator. The estates given by the will to the testator's two sons, for life, to the trustees to preserve contingent remainders, and to the first and other sons of the bodies of the elder and younger sons successively in-tail male, are all legal estates, and remainders to the two sons vested remainders. Then the remainder to the daughters of the testator, if more than *Sophia*, as tenants in common in tail general; and if only *Sophia*, then to her for life, remainder to trustees, &c., remainder to her first and other sons successively in tail male; were also all legal estates: and it is clear that the testator's younger sons were to have the same power of jointuring as was given to his eldest son: and this power was given to be exercised *from time to time* by the several male tenants for life in succession, in favour of any number of wives they might severally have. It was a power given in addition to the estates of the several tenants for life, and co-existent with them, but was not meant to subvert and destroy those estates, and entirely to change their nature from legal to equitable. The power is to each of his sons when in possession by virtue of the limitations of his will to grant *to trustees* upon trust, &c.; but no words of limitation are added to the estate to be granted to the trustees; and therefore those words would not authorize a tenant for life to grant a fee or any greater estate to the trustees than was necessary to execute the power: though it may be admitted, that if words of limitation were necessary to be added for the effectual execution of the power, the Court would imply them. The purpose of the trust, however, being to raise a jointure for the *life of the wife only*, the estate in the trustees must be limited to such life. But as the trustees, if the estate were limited to *them only*, might die before the wife, in which case there would be an end of her estate, it may be necessary to imply some words, and therefore the Court may imply that it was a power to limit *to trustees and their heirs during the life of the jointress*. And even if the power had been express to limit the estate to *trustees and their heirs*, yet as the object was only to execute the trust for the life of the jointress, the Court would have implied that the estate of the trustees was to be limited to her life: and so it was decreed by Ld. C. *King* in the case of *Jones v. Ld. Saye and Sele*, 8 Vin. Abr. 262, and 1 Eq. Cas. Abr. 383. pl. 4, which was affirmed in the House of Lords. And the like construction was put by this Court in *Doe d. Compere v. Hicks*(a) upon devises to trustees *and their heirs* to preserve contingent remainders interposed between the several estates for lives, and the remainders in tail; which trust estates being created for that particular purpose only, the Court thought should only enure for such respective lives; and that the several tenants for life in remainder took legal and not merely equitable estates. *A fortiori*, therefore, in this case, where the words, "*and their heirs*," are not added to the limitation to the trustees, the Court will not imply a power to devise the fee to the trustees; which would have the effect of converting all the subsequent estates to the first and other sons into equitable estates, when the testator meant them to take legal estates, and would preclude their remedy to enter and take possession except in equity. When a power is executed, it makes part of the instrument by which it is raised; and to hold that the trustees took the fee under this appointment would

(a) 7 Term Rep. 483, and vide *Harton v. Harton*, ib. 652.

in effect be making the testator say, I give a legal estate to the first and other sons of the body of my eldest son *Philip* in tail male, &c. and yet I give a legal estate to trustees in fee, which will defeat all the legal estates which I have given. In *Doe d. White v. Simpson*, 5 East, 162—171, the general rule was laid down, that where the purposes of a trust (under a devise to trustees) can be answered by a less estate than a fee simple, a greater interest than is sufficient to answer such purpose shall not pass to them, but the uses in remainder limited on such lesser estate so given to them shall be executed by the statute. Here, therefore, if the Court will imply a power to appoint to trustees *and their heirs*, still they will limit the implication of such an estate to the duration of the life of the jointress, for whose use alone it was created. In *Curtis v. Price*, 12 Ves. jun. 89, though a remainder in fee was limited by a deed of settlement to trustees, yet as the object of the trust terminated with the estate of a tenant for life, the Master of the Rolls confined the operation of the trust estate to the period of that life; and he relied upon the manifest intention of the parties so to confine it by limiting a subsequent remainder for a term of years to the same trustees upon the death of the tenant for life. So here the testator must be taken to have repeated the power after each limitation to a tenant for life, as he has in effect done by the relative terms used; and that shews that he only meant the trustees to take estates during the lives of the respective jointresses. If such be the true construction of the will, 2dly, the appointment must be taken to have been made in conformity to it, so far as it is capable of that construction. *Philip*, the son of the testator, in the indenture of *June* 1766, recites the will giving the power, and states that he doth grant and appoint the devised lands, pursuant to and by virtue of that power, to the trustees *and their heirs*, on trust to raise and pay to the jointresses a certain yearly sum *during her natural life only*. The mere words would seem to pass a present estate and rent charge; but that certainly could not be meant: and to make him pass a fee would be contrary to his own recital of the estate, and power devised to him, from whence it appears that he had only power to grant to the trustees, (or to the trustees *and their heirs*, if the latter words can be implied,) *pur autre vie*: and to his covenants in the same deed for good title and quiet enjoyment, which are confined to Lady *Wenman's* life estate: the whole deed must be construed together; and it would be repugnant to the latter covenant to give the trustees a fee. But if a greater estate than for Lady *Wenman's* life has been granted to the trustees and their heirs, and the deed of appointment cannot receive the narrower construction contended for; then, 3dly, the estate granted to the trustees will be void for the excess, and good only *pur autre vie*. And he cited *Tomlinson v. Dighton*, 1 P. Wms. 149; *Peters v. Masham*, Fitzg. 156, and *King v. Melling*, 1 Ventr. 228; in the former of which it was held, that a power might be executed by lease and release, though properly adapted only to pass an interest; and in the latter, that a covenant to stand seised was a good execution of a power; that both sorts of execution were good *pro tanto*, and void for the excess. But supposing the express appointment were entirely void on account of the excess, it may be rejected altogether; and then the covenant for quiet enjoyment, which is confined to the life of the wife, may be considered as an execution of the power. Such a covenant in a common-law conveyance, if livery of seisin be given with it, will operate as a lease, 4 Bac. Abr. Leases, K. p. 161-2; but here livery of seisin was not necessary.

Dampier, contra, after stating the real question between the parties to be, whether the recovery which had been suffered were good, either as a legal or as an equitable recovery; argued upon the question immediately before the Court, 1st, That the will creating the power only authorized the grant of a chattel interest to the trustees to secure the jointure. The testator having legal and equitable estates to devise meant to continue each kind of interest the same in the hands of the successive devisees. And if he meant the several

tenants for life to have legal estates, he could never have meant to give such a power as, when executed by the first tenant for life, would convey the freehold and right of possession from the succeeding tenant for life, leaving him only a legal remainder during the subsistence of the trust-estate of the jointress : so that, though the tenant for life had a son of age, they could not join in suffering a recovery to bar the entail, without the consent of the trustees of the first jointress : nor would the second tenant for life have a legal right to enter into possession ; and if he married and made a jointure, the trustees of the second jointress could have no legal remedy to enforce the payment of the second jointure during the subsisting estate of the first jointress, but must resort to equity. But if the jointuring power of the tenants for life be confined to the creation of chattel interests only in the trustees, the freehold will remain in the tenants for life, and the estate will devolve upon them with all the powers and enjoyments belonging to their legal estates, and they will not be cramped beyond the necessity of the thing. And this view of the case accounts for that which might otherwise seem an omission in not extending the power to convey "to trustees *and their heirs* ;" but the latter words appear to have been purposely omitted. Admitting then, that the power, being general in the terms of it, may be moulded by the Court to answer the necessity of the charges ; yet if the grant of a term of years will satisfy the charge, the Court will not imply more. The usual way, indeed, of executing these jointuring powers is by giving a term which will overreach the life of the jointress, and secure the arrears at her death. A general charge for payment of debts is only considered as a chattel interest.^(a) The leasing power also shews, that the trustees were not intended to take a freehold interest. Secondly, supposing the will only to authorize an appointment to the trustees of a chattel interest, a deed conveying an estate to them *and their heirs* cannot be an execution of such a power, so as to make it a good legal appointment *pro tanto* as of a chattel interest. This point was much pressed in *Roe d. Brune v. Prideaux*, 10 East, 156, where a power to lease for years not exceeding 21, or for life or lives, was held ill executed by a lease for 99 years determinable on lives. It was argued to be good at least *pro tanto* for 21 years, though void for the excess : but the Court held it void *in toto* at law, as conveying an interest of a different nature from that warranted by the power. *A fortiori*, therefore, a power to grant a chattel interest cannot be executed by granting a fee : and it is very distinguishable from a mere excess in the execution of a power ; as in *Tomlinson v. Dighton*, 1 Pr. Wms. 140, where a power to the wife to dispose of an estate amongst the children being well executed by granting an estate tail to a daughter, with remainder in fee to the son, was held not to be avoided by the excess of appointing an intermediate estate for life without impeachment of waste to the wife herself. This is not the case of a general power : and to hold such an execution of it to be good would be contrary to the manifest intention of the testator ; as the grant of the legal fee to the trustees would remove the successive tenants for life from the present legal estate and possession while any trust estate for a prior jointress subsisted. Neither could it have been intended to give an estate to the trustees merely for the life of the jointress ; for then immediately on her death the estate would be at an end, and she would lose all her arrears then due ; which was likely enough to happen on an estate heavily burthened. And it is not pretended that it was meant to give an estate for the lives of the trustees themselves : but if the estate were considered as intended to be limited to the trustees generally, that must be considered as a freehold. The only estate which will best answer all the purposes of the power is a term of years in the trustees, for the life of the jointress ; which will protect her jointure during

(a) He cited Cordal's case, Cro. Eliz. 316, and 8 Rep. 96. Co. Lit. 42. a. *Carter v. Bernardiston*, 1 P. Wms. 509, and *Hilchins v. Hilchins*, 2 Vern. 404.

her life, and cover all the arrears due at her death, without encroaching upon the legal estate of the tenants for lives; but if that be put out of the question, the trustees must take the legal fee, from the insufficiency of any life estate, either of the trustees themselves or of the jointress, to answer completely the purposes of the trust: and if the nature of the trust requires a fee in the trustees, the appointment of a fee will be good. That will have the effect of converting all the subsequent remainders into equitable estates during the continuance of the trust estate: each subsequent tenant for life and in tail taking subject to the prior legal charge of the trustees; as in *Ren d. Hall v. Bulkeley*, Dougl. 292. In *Doe v. Hicks*, 7 Term Rep. 433, it was the evident intention of the testator to give the trustees an estate of freehold during the life of the particular tenant; and they were to permit the tenant for life to take the rents and profits: there was no contemplation of arrears after the death of *cestui que vie*: but here the trust would not be satisfied by giving the trustees only an estate *per autre vie*. In *Doe v. Simpson*, 5 East, 162, the Court indeed held, that as an estate for the lives of the annuitants, and term of years in remainder sufficient for raising the gross sum charged out of the rents and profits, would answer the purposes of the trust, they would not pass a greater estate to the trustees by implication. But there the estate was devised to the trustees and the survivor and his *executors*; which shewed an intention not to devise the fee to them. And there too the inconveniency of fettering the tenant for life and remainder-man in tail from suffering a recovery, and of there being no remedy for the arrears of the annuities after the deaths of the annuitants, were not adverted to in the argument. If these consequences had been pointed out, it is probable the Court would have considered that giving a long term to the trustees would have answered all the purposes. [Lord *Ellenborough*, C. J. observed, that that case had undergone much consideration, not only by this Court, but upon conference with others who were in the general habit of considering such questions. But the only object there was to get the legal estate out of the trustees after all the purposes of the trust were satisfied. But have you any cases for the implication of a chattel interest for an indefinite term; for that was the difficulty which pressed us in *Doe v. Simpson*.] Such is the case of a devise to trustees for payment of debts: as in *Cordell's* case, 8 Rep. 96; and even in *Doe v. Simpson*. But if this be not confined to a chattel interest, the *habendum* in the deed conveys a fee-simple to the trustees; which cannot be cut down to a life estate, even by a warranty, Co. Lit. 47. 384. a. & b.: much less, therefore, by the covenant for quiet enjoyment, to the operation of which, as contended for, there is also these objections, that it supposes all the prior parts of the deeds to be cut out; that no provision is thereby made for the arrears of the annuity; and that the nature of the subsequent estate for life is altered pending the life of the jointress. And he referred to *Venables v. Morris*, 7 Term Rep. 438, where a limitation to the use of trustees and their heirs to preserve contingent remainders generally, was held to be a use executed in them in fee, in order to protect the subsequent equitable uses and contingent remainders; and observed that a similar use might be made here of a fee in the trustees, in order to protect the subsequent tenants for life in the equitable enjoyment of their estates, and enable an equitable recovery to be suffered.

Holroyd, in reply, denied that any construction of the power, which would enable the first tenant for life and the tenant in tail to suffer a recovery and defeat all the subsequent limitations, could be considered as furthering the intention of the testator. In *Mansell v. Mansell*, Wilmot's Rep. 55, 6, Sir *Eardley Wilmot* considered that the execution of such a power had only the effect of postponing the subsequent remainders after the life estate of the widow. And in *Doe v. Hicks*, 7 Term Rep. 437, Lord *Kenyon* said, that upon the same principle that it was necessary in *Venables v. Morris* that the trustees should have the legal estate to answer the intention of the parties, he

thought it was not necessary in the case then in judgment that they should take the legal estate for a longer term than during the lives of the tenants for lives, since that construction would best answer the intention of the testator. The leasing power does not shew that the trustees were not to take the legal estate during the life of the jointress; for they would be obliged to execute it not merely for her benefit, but for the benefit of the tenants for life and of the inheritance; or it might still be executed by the tenant for life, as in *Ren v. Bulkeley*, Dougl. 291, though the legal estate were in the trustees. And this latter will also apply as an answer to the power to raise portions for younger children: a power to charge does not require the legal estate. There is no ground for saying that this is a chattel interest in the trustees: no such interest can be commensurate in legal contemplation with an estate for life. Debts and other incumbrances may be paid off long before any given life is spent, and then the trust immediately ceases. Whenever an estate is given generally to a person, the law says, that it is an estate for life. This is equivalent then to an express estate of freehold given to the trustees; and the object being to pay the rents and profits during her life to the jointress, the law will construe that to be an estate for her life. It does not necessarily follow that there must be arrears at her death; but supposing a possible loss of a quarter or half a year, it would be too much to provide against it by giving to the trustees a fee by implication, which will defeat the general purposes of the will. The trustees may guard against any eventual loss either by taking the rents and profits themselves, or by letting with a covenant from the lessees to secure all arrears to the jointress. And under the stat. 11 Geo. 2. c. 19. s. 15, persons entitled for life are enabled to recover the rents and profits up to the time of their deaths in proportion. Then as all powers when executed are referred to the instrument creating the power, the several estates would be limited exactly as they stand in the will, only with the interposition (after the estate for life of the eldest son, with the remainder to trustees to preserve contingent remainders) of a remainder to trustees for the life of the wife to secure her jointure, with an implied trust to pay the surplus to the person beneficially entitled; then a vested remainder in the first son, after the jointuring estate was satisfied, &c. [*Le Blanc, J.* The succeeding tenants for life in possession would only take equitable estates during the continuance of the first jointuring trust estate: and that breaks in upon a great part of your argument, as to changing the nature of the estates which the testator meant to give them.] By interposing only an estate to the trustees and their heirs during the life of the jointress, all the other estates would remain the same as they were intended to be, except so far as is absolutely necessary to the execution of the trust: it does not divert any subsequent estates; it only interposes another legal estate; and the only effect of it is to prevent the estate tail from being defeated during the estate of the trustees, without their joining. [*Le Blanc, J.* It still prevents the subsequent tenants for life from having a legal estate in possession during the continuance of the trust estate. What would be the effect, if, instead of heirs, an estate to the trustees and their executors were substituted?] The word *executors* must be rejected as surplusage if the estate were given to the trustees and their executors during the life of the jointress; for it would still be an estate of freehold, and not a chattel, and would go to their heirs as special occupants. And no term being granted here, it can only be taken to be an estate for the life of the jointress; and the putting in a term by the Court would be doing that which the testator has not done. [*Bayley, J.* Supposing the first jointress to be living when the second son came into possession, he would only have an equitable estate *pur autre vie* in the surplus of the rents and profits, with a legal estate in remainder; which would be a different estate from that which his son, afterwards *Philip Lord Wenman*, the first son, took.]

LORD ELLENBOROUGH, C. J. said, that the Court would consider the case, and certify their opinion: and afterwards the following certificate was sent.

THIS case has been argued before us by counsel: We have considered it, and are of opinion, that the trustees named in the deed of appointment of the 28th of June 1766, took an estate in fee in the manors, lands, and hereditaments, in question, (being those which were not limited to *George Hervey* and *Francis Bassett*, Esquires, for payment of debts and legacies,) of which the Right Hon. *Philip Lord Wenman*, the testator, was seised in fee simple at the time of making his will, and which were thereby given to the Hon. *Philip Wenman*, for life.

ELLENBOROUGH.

N. GROSE.

S. LE BLANC.

J. BAYLEY.

June 31st 1809.

Doe, on the Demise of J. Graham, Clerk, v. Scott, Clerk.

11 East, 478. Nov. 7, 1809.

Proof of a curacy *augmented* is made by shewing an order for the augmentation of it, entered in a book and signed by the governors according to stat. 1 G. 1. st. 2. c. 10. s. 20; without going on to prove that the money was afterwards laid out in land, and allotted by deed under the corporation seal of the governors of *Queen Ann's* bounty to be annexed to the curacy, and that such deed was enrolled within six months after its execution according to stat. 1 G. 1. st. 2. c. 10. s. 21 and 9 G. 2. c. 36.

Where an old mortgage term of 1000 years, created in 1727, was recognised in a marriage settlement of the owner of the inheritance in 1751, by which a sum was appropriated to its discharge; and no further notice was had of it till 1802, when a deed, to which the then owner of the inheritance and the representatives of the termors were parties, reciting that a term was still subsisting, conveyed it to others to secure a mortgage; held that it could not be presumed to have been surrendered against the owner of the inheritance, who was interested in upholding it.

WILLIAMS, Serjt. moved to set aside the verdict, which had been given for the plaintiff at the trial of this cause at *Hereford*, before *Thomson*, B., and to enter a nonsuit. He stated, that this was an ejectment for the rectory of *Brampton Bryan* under 8*l.* a year in the king's books, to which the defendant Mr. *Scott* had been presented by the Earl of *Oxford* in 1801, and which it was contended on the part of the plaintiff was voidable by the patron in consequence of Mr. *Scott's* having, in 1805, been collated by the bishop of the diocese to the *augmented curacy* of *Titley*; whereupon the lessor of the plaintiff Mr. *Graham* had been appointed to the rectory in question in June 1808, on the joint and several presentation of Lord *Oxford*, *Thomas Wood*, *J. R. Wood*, and *H. Smith*, the assignees of an old term of 1000 years aftermentioned. By the stat. 1 Geo. 1. st. 2. c. 10. s. 4, all augmented curacies are made perpetual cures and benefices; and by s. 6, if they remain void for want of nomination for six months, they shall lapse to the bishop, &c. according to the course of law used in cases of presentative livings and benefices: but that statute says nothing of the acceptance of such an augmented curacy avoiding a former benefice. This however is supplied by the stat. 36 Geo. 3. c. 83. s. 3, which provides, that such augmented curacies, &c. shall be considered in law as benefices presentative, so as that the licence thereto shall operate in the same manner as institution to such benefices, and shall render voidable other livings in like manner as institutions to the said benefices. It became therefore necessary for the plaintiff to prove two things; first, that the curacy of *Titley* had been augmented by *Queen Anne's* bounty; in which case the rectory held by Mr. *Scott*, at the time of his collation to such curacy, was immediately

voidable by the patron, (a) and he might present thereto; secondly, that the lessor of the plaintiff was legally presented to the rectory. Ist, In order to prove that the curacy had been augmented, the plaintiff put in two orders of the governours of Queen Anne's bounty, (who are a corporation created by letters patent of the crown under the stat. 2 & 3 Ann. c. 11,)(b) dated the 3d of Dec. 1717, and the 2d of Dec. 1734, directing the augmentation, but not signed by any of the governours. This evidence was objected to by the defendant's counsel, on the stat. 1 Geo. 1. st. 2. c. 10. s. 20, which enacts, that all the augmentations, certificates, agreements, and exchanges made in pursuance of the act shall be entered in a book to be kept by the governours for that purpose; and that the said entries being approved at a court of the said governours, and attested by the governours then present, shall be taken to be as records, and copies thereof, or of the said entries proved by one witness, shall be evidence in law touching the matters contained therein or relating thereto. The plaintiff then put in another order, dated 24th January 1767, attested by the Archbishop of York and several other governours, wherein it was stated, that the governours had agreed to augment the forty-two livings following, amongst which the curacy of *Titley* is mentioned, and directed a certain sum to be appropriated for that purpose. To this it was objected, that by the charter of rules for the government of the corporation of Queen Anne's bounty in force at that period, all money given to augment small livings must be laid out in land; and that this falls within the statute of mortmain 9 Geo. 2. c. 36, as was held by Lord Camden C. in *Widmore v. Woodroffe*, Ambler 639, in the case of a legacy given for that purpose; and that statute enacts, that no lands, nor any sum of money, &c. to be laid out in the purchase of lands, shall be given or conveyed, &c. in trust for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment, or settlement shall be made by deed indented, sealed and delivered, in the presence of two or more witnesses, twelve calendar months at least before the death of the donor or grantor, and be inrolled in Chancery within six months after the execution of it, &c.; and all such grants, appointments, &c. made otherwise are declared absolutely void. And the stat. 1 Geo. 1. st. 2. c. 10. s. 21, had before enacted, to the end that churches and chapels might be capable of receiving augmentations, that if the governours of Queen Anne's bounty should by any deed or instrument in writing under their common seal allot to any church or chapel any lands, &c. arising from the Queen's bounty, or private benefaction, or from all or any of the ways aforesaid, and shall declare that the same shall be forever annexed, &c., such augmentation so made shall be good and effectual to all intents and purposes; provided such deed or instrument be inrolled in Chancery within six months after the date. Therefore, without shewing a compliance with the statutes in this respect, it was contended that the appropriation was invalid, and that the cure was not augmented, and consequently the collation to it worked no avoidance.

[Lord *Ellenborough*, C. J. Is not the curacy augmented when the money is appropriated by the governours to that purpose, even before it is laid out in land, which may not be for some time afterwards? The words of the 36 G. 3. c. 83, are general that all churches, &c. which shall be augmented by the governours of Q. Anne's bounty, shall be benefices, so that the licence thereto shall render voidable other livings, &c.]

(a) Benefices, says Dr. Burn, (1 vol. Ecc. L. 100 tit. Avoidance,) are voided by cession, or the acceptance of a benefice incompatible; in which case the benefice, if of the yearly value of £l. or above, is void by statute, and no notice is needful: if under £l. a year it is void by the common law, and the patron may either present immediately, or may sue in the Court Christian for sentence of deprivation, and wait for notice to be given thereupon, or the ordinary himself may *ex mero officio* proceed to deprivation, and then give notice.

(b) Vide 3 Burn's Ecc. Law, tit. First Fruits and Tenths, s. 4.

The next objection urged was to the proof of the lessor of the plaintiff's title to the rectory, to which he was presented by virtue of the joint and several presentation of the Earl of *Oxford*, and Messrs. *Wood* and *Smith* before mentioned, all or one of whom it was contended should have the legal estate, in order to make it a valid presentation. As to this, it appeared that in 1727, the then Earl of *Oxford* executed a mortgage term of 1000 years, including the advowson of *Brampton Bryan*, to secure about 20,000*l.* to the mortgagees, which term had vested by several assignments in *T. Wood, J. R. Wood, and H. Smith*. The next mention of the term was in an indenture of 1751, being the marriage settlement of the late Lord *Oxford* with Miss *Archer*, wherein it was stated that 27,000*l.*, part of her fortune, was to be applied to the discharge of the mortgage: and since then no mention was made of it, nor was there any other evidence of its existence till in a mortgage deed of the 3d of *December*, 1802, (which was after Lord *Oxford* had presented Mr. *Scott* to the rectory of *Brampton Bryan*.) this term, together with another old outstanding term of 1709, comprising the manor of *Brampton Bryan*, was assigned to secure the mortgage money. *Williams*, Serjt. thereupon contended at the trial and now, that the term of 1727 ought to have been presumed to be surrendered; and then the legal estate would be out of the trustees of that term, and would have reverted to the Earl of *Oxford*, who after his presentation of Mr. *Scott*, had conveyed the legal interest in all his estates to other trustees for the payment of debts, in whom the legal estate of this rectory was vested at the time of Mr. *Graham's* presentation to it: and against any presentation by Lord *Oxford* himself, he stated that Mr. *Scott* had another and a decisive objection, the nature of which it was now unnecessary to state. The grounds for such presumption of a surrender of the term of 1727 he stated to be the recital in the indenture of 1751 of an adequate sum to be applied to the discharge of the mortgage: and no evidence of the term's having been acted upon or recognized from that period till 1802, when it was assigned as an outstanding term; and further, the possession of the deed itself by the Earl of *Oxford*, the owner of the inheritance, which could not have happened unless the mortgage money had been paid off. If under those circumstances an ejectment had been brought upon the demise of *Ld. Oxford* against any intruder upon his property, this term could never have been set up in bar of his possessory title, but any judge would have directed the jury to presume a surrender of the term as long before satisfied.

LORD ELLENBOROUGH, C. J. asked, whether the learned Judge had been desired to leave that presumption to the jury? (and being answered, that he was of opinion at the time that there was no ground whatever for making such a presumption under these circumstances against the owner of the inheritance; but had afterwards expressed a doubt of that opinion? his Lordship continued) —There was no purpose of justice to be answered by presuming a surrender in this case; nor was it for the interest of the owner of the inheritance to have such a presumption made. It might have been his intention to keep alive the term, and to have it assigned to a trustee to attend the inheritance. At present, we have no doubt upon either point; but if upon application to the learned Judge, which we will make, he should intimate any doubt of his own continuing on the latter point, in deference to that intimation we will hear the matter further discussed upon a rule to shew cause.

On the next day *BAYLEY*, J. said, that he had seen Mr. Baron *Thomson*, who had mentioned to him, that though he had after the trial intimated to Mr. Serjt. *Williams* a wish to have the case moved in Court; yet having since had it under his consideration, he no longer had any doubt upon either of the points. That with respect to the latter of them, though no notice had been taken of the term from 1751 till 1802, yet the owner of the inheritance having then joined with the representatives of the termors in executing a deed, in which it was recited that the term had not been surrendered; he thought

that was sufficient to warrant him in the opinion which he had delivered at the trial.(1)

Lord ELLENBOROUGH, C. J. then said, that as the Judge who tried the cause was satisfied, and this Court had no doubt upon either point, there was no necessity for any further discussion of the matter, and therefore they

Refused the Rule.

Robinson v. Pocock.

11 East, 484. Nov. 8, 1809.

The general turnpike act, 13 Geo. 3. c. 84. s. 13, having given a penalty, to be recovered by information before justices of peace or by action, for using a greater number of horses than is thereby allowed for the draft of waggons, &c. on the roads; and the 19th section having provided, that if it appear on oath to the satisfaction of any justice of the peace, or court of justice, that the carriage could not be drawn with the ordinary number of horses, by reason of deep snow or ice, then such justice of peace, or court may *stop all proceedings* before them respectively; held that such application for a stay of proceedings must be made to the court above in which the action was brought, and that the defence is not available at *nisi prius*.

THIS was an action of debt for the penalty given by the general turnpike act, 13 Geo. 3. c. 84. s. 13, against a farmer for drawing his waggon along the turnpike road with more horses than are allowed by that clause, according to the relative breadth of the wheels. The fact was not disputed; and the only defence set up was under the 19th section of the act, by which "if it shall appear upon the oaths of credible witnesses to the satisfaction of any justice or justices of the peace, (*i. e.* upon information before them for the penalty,) or of any court of justice (*i. e.* upon action brought,) authorized to enforce the execution of this act, that any waggon, &c. could not, by reason of deep snow or ice, be drawn with the respective weights, and by the number of horses hereby respectively allowed; then it shall and may be lawful for such justice, &c. or court respectively, and they are hereby respectively required, to *stop all proceedings before them* respectively, for the recovery of any penalty," &c. No instance being recollected of any proceeding upon this clause, and a doubt having occurred in what manner a defendant sued in an action for the penalty could avail himself of the defence thereby given, an application was made to this Court, in the last term, to stay the proceedings, on affidavits stating that the necessity of using the surplus number of horses arose in consequence of the snow and frost having rendered the draft too great for the ordinary number allowed; but on cause being shewn, founded on other affidavits contradicting the alleged necessity, the Court discharged the rule on account of such contradictory affidavits; without, as it was now said, deciding that the course then taken was the only one in which the defendant could avail himself of the defence set up. When, therefore, the cause went to trial, at the Lent *Berkshire* assizes, the same evidence was offered to be given on the part of the defendant as to the state of the road from the effects of the snow and frost; but *Thompson*, B. was of opinion, that the clause, directing the application to be to the Court for a *stay of proceedings*, did not apply to the Court of *Nisi Prius*, but to the court out of which the record came, and therefore he rejected the evidence, and the plaintiff recovered a verdict.

(1) [In equity a merger of the term in the inheritance is not allowed, except in cases where it is perfectly indifferent to the persons in whom the interests unite, whether the term should merge or otherwise. If there be a beneficial interest in the term in any other person, it will not merge. *Dougherty v. Jack*, 5 W. 456. "An intent to prevent a merger will be presumed whenever it was the interest of the party that the term or incumbrance should not sink in the inheritance." *Per Cur. Richards v. Ayres*, 1 W. & S. 487. See also, *Moore v. Harrisburg Bank*, 8 W. 138. *Helmbold v. Man*, 4 Wh. 410. *Pennington v. Coats*, 6 do. 282.—W.]

Dauncey now moved for a new trial, and stated the preceding facts, in order to take the opinion of the Court upon the construction of the act. And being asked by the Court, whether he had tendered the evidence to the consideration of the Judge alone, as upon an application for a stay of proceedings, or as evidence for him to leave to the jury; he said, that the distinction was not specifically pointed at in the mode of application; but the evidence was tendered generally, for the Judge to act upon it according to his judgment of the meaning of the clause, during the progress of the trial: but the learned Judge thought, that as the legislature had pointed out a particular mode of making the defence before another Court, he could not take cognizance of it at *nisi prius*. It was now therefore urged, that as the matter now stood, the defendant had been shut out of making the defence which was given him by the legislature: for when the application was made here last term, this Court, not considering themselves competent to decide on which side the truth lay upon contradictory affidavits, refused to interfere: and yet when the question came before the ordinary tribunal for the decision of disputed facts, the Judge thought that the Court in which he sat could not take cognizance of a defence which the legislature had directed to be submitted to another tribunal in a different shape.

LORD ELLENBOROUGH, C. J. The defendant did not satisfy the Court upon the application in the last term that he had the excuse which the statute allows of; and then he stood in the condition of a party not bringing himself within the protection of the law, and his application of course failed. But the function of the Judge at *nisi prius* is merely to try the issue joined: he cannot stay proceedings in the cause; and by the terms of the 19th section the only application to be made is for a stay of proceedings.

GROSE, J. The Court, who are required by the clause to stop all proceedings, if the fact shall appear to their satisfaction upon the oaths of credible witnesses, must mean the Court which originates the proceedings, in like manner as it speaks of the justice or justices of the peace when the proceeding originates by information before them.

LE BLANC, J. From the terms made use of in this clause it could never be meant that the fact of the excuse allowed should be set up as a defence at the trial, but upon summary application in the first instance to the Court above.

BAYLEY, J. I am not satisfied that if the fact appeared doubtful to the Court upon contradictory affidavits, the defendant might not, if he had applied for it, have obtained an issue to try the fact; but no such application was made; and the stay of proceedings must be by the Court above.

Rule refused.

Goodtitle, Lessee of Parker, v. Baldwin.

11 East, 488. Nov. 8, 1809.

A possession of crown land commencing at least 55 years ago by encroachments on the crown in the time of the lessor of the plaintiff's father, maintained by the father till his death 19 years ago, and afterwards continued for two years by his widow, when the defendant obtained the possession, would be sufficient evidence for the jury to presume a grant from the crown to the lessor's father, if the crown were capable of making such a grant; in order to support a demise in ejectment from the eldest son and heir of such first possessor, against the defendant who had no apparent title, and whose possession was not defended by the crown, nor found to be by licence from it.

But it appearing upon a second trial, that by the stat. 20 Car. 2. c. 3, all future grants of land by the crown in the forest of Dean, within which the land in question lay, were avoided and consequently no presumption could be made of a valid grant; the lessor of the plaintiff, who can only recover in ejectment by the strength of his own title, was held not entitled to recover even against a stranger, whose possession, adverse to him, was not defended by the crown. And this, notwithstanding a part of the premi-

ses was first held by the lessor's father 60 years ago, and by the stat. 9 Geo. 3. c. 16, the suit of the crown is barred after a continuing adverse possession for 60 years under the original trespasser: for from the death of the father 19 years ago the possession was adverse to his heir, the lessor of the plaintiff, or at least the defendant's possession for the last 17 years was adverse; and the act of Geo. 3, does not give a title to the first wrongful possessor and those claiming under him, but only bars the remedy of the crown against them after 60 years continuing adverse possession by them; and as it does not repeal the stat. 20 Car. 2. c. 3, no presumption of a grant to legalize the possession of the lessor's father for the first 41 years, on which alone the lessor's claim could be founded, can be made against that statute. And the jury, it seems, may presume that the possession of the lessor's father for the first 41 years, and that of the defendant (adverse to the heir) for the last 17 years, were both legally holden by the licence of the crown.

THIS ejectment was brought to recover possession of a cottage and a small piece of land adjoining. And it appeared at the first trial before *Graham*, B. on the last spring circuit at *Gloucester*, that part of the premises, 55 years ago at least, and the rest about 40 years ago, were taken by encroachment, in three several contiguous plots, out of the forest of *Dean* belonging to the crown, partly by the lessor of the plaintiff's father, and partly by other persons who had afterwards given them up to him, and he had thrown the whole into one close. The father continued to have quiet enjoyment of the premises till his death, which happened about 19 years ago; after which his widow continued in possession for two or three years: and then the defendant got into possession, but by what means did not at first appear. The widow is since dead, and the lessor of the plaintiff is their eldest son. The learned Judge being of opinion upon this evidence, that the lessor of the plaintiff, whose claim was only as heir to the former possessor, could have no title to the freehold, inasmuch as that appeared to be in the crown, against which the adverse possession of the father could not operate to give him even a possessory right, nonsuited the plaintiff.

Dauncey moved in *Easter* term to set aside the nonsuit, insisting on the long possession of the lessor of the plaintiff and of his father, for much above 20 years, which was sufficient title against a mere wrong-doer, though not against the crown. But the crown, he said, took no part in the defence. Having obtained a rule *nisi*;

Wyburgh shewed cause against it in *Trinity* term, and urged that the commencement of the lessor's title, being proved to be by wrong and trespass upon the crown, against which the length of the possession which had occurred could not give even a possessory title, (for the king can only be ousted of his possession by matter of record, Co. Lit. 277. a. 4 Com. Dig. Prerogative, D. 71;) the lessor, who could only recover upon the strength of his own title, was upon his own shewing out of court. That it was always competent to a defendant in ejectment to avail himself of title in a third person, whether or not that person defended the cause; and here the title to the possession was shewn to be in the crown. And he referred to *Yates v. Dryden and others*, Cro. Car. 592, where it was resolved in a suit between third parties, that if a clear title and right appeared for the king, either confessed by the parties in pleading, or otherwise fully apparent, the Court were bound *ex officio* to take notice of it: and though the king's title appeared there upon the record, yet as in ejectment it can only appear in evidence, the Court must be equally bound to notice it.

The Court having then suggested that, if it were necessary as between these parties, the crown not contesting the lessor of the plaintiff's right, the jury upon this length of possession might have been advised to presume a grant subsequent to the encroachment: *Wyburgh* adverted first to the stat. 1 Ann. st. 1. c. 7. s. 5, restraining the crown from granting its lands out for any term or estate exceeding 31 years or 3 lives, &c. But it being observed, that a grant to the extent of 3 lives might cover the lessor's title: he lastly referred to the stat. 20 Car. 2. c. 3, for the regulation of *Dean* forest, which, he

said, restrained the crown from making any such grant of the forest land. But as this statute is not set forth in the common printed edition, and the terms of it were not fully brought before the Court upon that occasion; and as it was further observed by *Dauncey* for the plaintiff, that the nonsuit did not proceed upon the ground of the incapacity of the crown to grant by that statute;

Lord *Ellenborough*, C. J. said, that as the plaintiff was nonsuited upon the supposed impossibility of presuming any title which could be derived from the crown, notwithstanding so long a possession, commencing 55 years ago, and continuing to the death of the lessor's father within the last 20 years; and all this without any disturbance by the crown: and as the Court were of opinion that the jury might have presumed a grant from the crown under these circumstances to the lessor's father, unless there were any provision in the statute of Car. 2, to preclude such a grant as would cover the lessor's title, of which they were not at present distinctly informed, and certainly that point had never been made at the trial; they thought it right to send the case to a new trial, that it might undergo further consideration; and then the defendant might shew the statute to which he had referred, in order to preclude the presumption of any grant, if it would bear him out in the objection. But with respect to the general impossibility of presuming a grant against the crown, the courts were in the daily habit of presuming grants from the crown, as of markets and the like, upon an uninterrupted enjoyment of 20 years: and it was only a few days ago(a) that they had considered that the jury were warranted under the circumstances of the case in presuming a grant of enfranchisement of a copyhold from the crown. Thereupon the Court made the rule absolute for a new trial.

At the second trial before *Bayley*, J. at the last assizes at *Gloucester*, evidence was given that one of the pieces of land held by the lessor of the plaintiff's father had been inclosed from *Dean* forest 60 years ago; and the father had been in possession of the whole for above 40 years: at whose death, the lessor his eldest son being out of the way, the widow continued in possession for about two years, and then gave up the premises to the defendant about 17 years ago for a consideration of 2 or 3 guineas, without any conveyance. It appeared also, that about 20 years ago there had been a survey of the forest, when all new inclosures and encroachments were levelled by the officers of the crown; but as they had received orders to confine their prostrations to inclosures made within 20 years, the parties were left in possession of the inclosures in question. The defendant's counsel objected at the trial to the lessor's title upon the stat. 20 Car. 2. c. 3, avoiding all future grants of the forest of *Dean* by the crown, of which any presumption could otherwise have been made in favour of the lessor's title: and insisted that the defendant, though not claiming under the crown, was entitled to take advantage of the defect. On the other hand, the counsel for the plaintiff relied principally on the stat. 9 Geo. 3. c. 16, as taking away all right of suit in the crown after an adverse possession of 60 years, which would at any rate cover part of the premises sought to be recovered; and as to the rest they relied on the possession of the lessor's father for above 20 years, as giving him and his son by descent a possessory right against all the world but the crown. But *Bayley*, J. considering that no presumption of a grant from the crown could be made against the stat. 20 Car. 2, in favour of any title in the lessor of the plaintiff's father during his lifetime; and that when his possession ceased at his death, which was nearly 19 years ago, he had acquired no right of possession against the crown under the stat. 9 Geo. 3; and that since that time the possession, first, of the lessor's mother for a short period, and afterwards of the defendant himself for the greater part of the time, had been adverse to the claim of the

(a) *See, Lessee of Johnson, v. Ireland*, ante, 230.

lessor as heir to his father ; and therefore that the lessor's claim, so far as it was founded upon length of possession, stood in the same predicament as it did at the death of his father : left it to the jury to presume that the possession of the lessor's father up to the time of his death, and of his mother for two years afterwards, and that of the defendant for the last 17 years, were with the licence of the crown, as being the only way of accounting legally for these respective and adverse possessions : and the jury, adopting that presumption, found a verdict for the defendant.

Wigley now moved to set aside that verdict and for a new trial ; and after stating the general facts of the case, relied on the stats. 21 Jac. 1. c. 14, and 9 Geo. 3. c. 16, as giving title to the lessor of the plaintiff in this case for part of the premises even against the crown, and for the remainder also as against a wrong-doer. The first of these enacts, that whenever the king, his heirs, &c. and all others claiming under the same title shall be out of possession, or of the profits of any lands for 20 years before any information of intrusion brought to recover the same, the defendant may plead the general issue, and not be pressed to plead specially : and that in such cases the defendant shall retain the possession he had at the time of such information exhibited until the title be tried, found, and adjudged for the king. The stat. 9 Geo. 3. c. 16, extending the principle of that statute, enacts, that the king shall not sue, impeach, question, or implead any person for any manors, lands, &c. or make any title, claim, &c. to the same, by reason of any right or title which shall not first accrue and grow within 60 years next before such action or suit, &c. for recovering the same : unless his majesty or some of his progenitors, &c. or some other person, &c. under whom his majesty, &c. claims, have or shall have been answered, by force and virtue of any such right or title to the same, the rents, issues or profits thereof, or of any honor, manor, or other hereditament, whereof the premises in question shall be parcel within the said 60 years ; or that the same have or shall have been duly in charge to his majesty or some of his progenitors, &c. or have or shall have stood insuper of record within the said 60 years. And that all persons, &c. and all claiming by, from, or under them, according to their several estates and interests, which they have or claim to have in the same, shall, at all times hereafter, quietly and freely have, hold, and enjoy against his majesty, his heirs and successors, claiming by any title which hath not first accrued and grown within the said 60 years, all manors, lands, &c. which they or their ancestors, &c. or those under whom they claim, shall have held or enjoyed for 60 years next before the commencing of every such suit or proceeding, &c. (with the same exceptions as before.) - And then it enables all such possessors for 60 years, &c. and those claiming under them, (except as before excepted) quietly to hold and enjoy all such manors, lands, &c. against all persons their heirs and assigns claiming by force or colour of any letters patent or grants, &c. ; and saving all other rights but those of the crown. This latter statute, he contended, so far repealed the stat. 20 Car. 2. c. 3, as to give *title* to the possessor of that part of *Dean* forest which had been held against the crown for 60 years : and the lessor of the plaintiff having established a possessory right to the parcel in question as deriving title from his father, against all the world but the crown, it was not competent for a wrong-doer to set up the title of the crown under the act of the 20 Car. 2. c. 3, when by the latter act of the 9 Geo. 3. c. 16, the crown was barred from suing after having been ousted of possession for 60 years, and quiet possession was insured to the possessors against the crown and all those claiming under it. And great inconvenience he observed would ensue, if though the crown were barred, the persons whose possession was intended to be quieted against the crown could not maintain an ejectment against any wrong-doer who happened to get into possession. The statute itself gives a title after 60 years adverse possession against the crown.

Lord ELLENBOROUGH, C. J. How can the lessor of the plaintiff make out

any title in this case? No grant from the crown can be presumed, against the express provision of the stat. 20 Car. 2, to have been made to the lessor's father in his lifetime: and unless it had been competent to the crown to make such a grant, how can the lessor of the plaintiff, who claims under his father, and who has been out of possession since his father's death, have any title? No grant can be presumed in his favour. The statute of the 9 Geo. 3, does not give a title; it does not affect to repeal the statute 20 Car. 2; it only takes away the right of suit of the crown, or those claiming from the crown, against such as have held an adverse possession against it for 60 years: but here the defendant, who has been in possession for the last 17 years, was a stranger both to the lessor and to his father; and the lessor of the plaintiff must recover against the defendant by the strength of his own title, and not by the weakness of the defendant's title: and the stat. 20 Car. 2, bars any presumption of title in favour of the lessor in this case.

Per Curiam,

Rule refused.

Doe, on the Demise of Osborn and Another v. Spencer.

11 East, 495. Nov. 9, 1809.

Where a fine was levied of *Michaelmas* term, relating to the 6th, though in fact levied on the 8th of *November*, it is sufficient evidence of the seisin in fact of the cognizor at the time of the fine levied, that a writ of possession after a recovery in ejectment was executed on his behalf on the evening of the 6th, by the officer's entry on the land and claiming it for the cognizor, but without any actual change of the tenant in possession, who afterwards paid rent to the cognizor. And so it seems the receipt by a lawful possessor of rent due after a fine levied, for a period antecedent to such fine, is *prima facie* evidence, if no covin appear, of his possession during the period for which the rent is received.

THE lessor of the plaintiff claimed as heir at law of the person last seized. The defendant, at the trial before *Heath, J.* at *Derby*, set up a fine levied of the premises of *Michaelmas* term 38 G. 3, which was in fact levied on the 8th of *November*, but related to the 6th, being the first day of the term. The plaintiff's counsel then required proof that the party levying the fine was seised of an estate of freehold at the time; on which a receipt for rent of the premises, given to him by the tenant in possession, was put in, which was dated on the 8th of *November*; but in fact the rent was not received till the 17th of the same month, as for the antecedent half year. This was contended not to be sufficient, but that it was necessary either to shew that the cognizor was actually in possession at the time of the fine levied by him, or that he was in the receipt of the rent before. On this the defendant shewed that a writ of possession, after recovery in ejectment by the cognizor, was executed by the sheriff's officer who walked over the premises and claimed them on behalf of the cognizor on the evening of the 6th of *November*; but there was no previous entry by the cognizor shewn, nor any change of the tenant in consequence of the execution of the writ. The learned Judge, being of opinion that this was sufficient evidence of an actual seisin of the freehold to establish the fine, nonsuited the plaintiff.

Vaughan, Serjt., now moved to set aside the nonsuit, on the ground that the seisin in fact of the cognizor at the time of the fine levied was not sufficiently established, either by the entry of the sheriff's officer under the writ of possession sued out by the cognizor, and which was not executed till the evening of the 6th of *November*, which was after the time when by relation of law to the first moment of the day, the fine must be taken to have been levied; nor by the actual receipt of rent after that day, and also after the 8th, when the fine was in fact levied. And he cited *Lord Townsend v. Ash and his Wife*, 3 Atk. 326-9, where the defendants levied a fine of two shares of the *New River*

water; and it was objected that they had no seisin at the time to warrant the fine. The fine was levied in *Hilary* term 1733; but no claim was set up, or any entry proved, only that a demand was made of the profits in the company's office in the name of the defendants on the 19th of *February*; and the first payment was made of the *Christmas* dividend before due on the 23d of *February*, after the fine levied; and no other seisin appeared. Lord *Hardwicke*, C. J. said, that if a man enter on another's tenant, he does not gain such a possession as is sufficient to levy a fine thereon, unless he continue in possession: for a wrongdoer to gain a possession by disseisin must not step on the land, and withdraw and leave the rightful owner in possession; which would be sufficient to gain a seisin on a feoffment, but not to levy a fine. Then as to the perception of the rents and profits being a sufficient seisin; it was answered, that there was in fact no receipt till after the fine levied: if they received the rents before the fine, it would have been a disseisin. The evidence of a receipt of rent would be sufficient possession to levy a fine. And in answer to the argument, that the company were stewards to receive and pay the proprietors; and that those profits were received by the company at the time of the fine levied; and that the payment by them after the fine, of profits due before, should have relation back, so as to be considered as a payment before the levying of the fine; he observed, that the company received for the rightful owners, who were the plaintiffs, and therefore it could be no receipt for the defendants at the time of the fine levied. He therefore held that the fine had no operation.

Lord ELLENBOROUGH, C. J. The entry of the sheriff's officer under the writ of possession, on the 6th of *November*, on behalf of the party who levied the fine, was a lawful entry and possession, and will relate to the first period of that day on which such possession was taken so as to give the party a sufficient seisin in fact to warrant the levying of the fine by relation of law on that day: and the receipt of rent afterwards by the same party shewed a continuance of that possession. I should also have thought that a receipt of rent after a fine levied, for a period of time antecedent to the fine, was *prima facie* evidence of the party's possession of the premises by his tenant during the period for which the rent was received, unless fraud or contrivance appeared.

Per Curiam,

Rule refused.

Doe, on the Demise of Heapy, v. Howard.

11 East, 496. Nov. 9, 1809.

Where house and land are let together to be entered upon at different times, and it do not appear from the terms of the demise from what time the whole is to be taken as let together, it is a question of fact for the jury, which is the principal and which the accessory subject of demise, in order for the judge to decide whether the notice to quit the whole were given in time.

THE lessor of the plaintiff had demised to the defendant a certain messuage with the appurtenances, then in the possession of the defendant, together with several closes of land described as *thereunto belonging*, containing 13 acres, for the term of 11 years, to hold the lands from the 2d of *February*, and the house and other premises from the 1st of *May* then next; and the rent, which was 24*l.* per annum, was made payable half yearly at *Michaelmas* and *Lady-day*, the first half year's rent being payable at the *Michaelmas* ensuing the commencement of the term. The tenant held over the term for 4 years, and on the 31st of *October* 1808, he received from the lessor a notice to quit on the 1st of *May*, or whenever else his tenancy should expire. And not having quitted, this ejectment was brought, which came on to be tried before *Wood*,

B. at *Lancaster*; when it was objected, on behalf of the defendant, that the notice to quit was insufficient, as not having been given six calendar months before the 2d of *February* (*Candlemas*) when the land, which he contended was the principal object of the demise, was to be given up. On the other hand, the case of *Doe v. Spence*, 6 East, 120, was cited in support of the notice; where the terms of holding were, that the tenant of a farm was "to enter on the tillage land at *Candlemas* last past, and on the house and all other the premises at *Lady-day* following, and that when he left the farm, he should quit the same according to the times of entry as aforesaid:" and the rent was reserved half yearly, at *Michaelmas* and *Lady-day*. There a notice to quit delivered half a year before *Lady-day*, but less than half a year before *Candlemas*, was held good; considering the taking as in substance from *Lady-day*, with a privilege for the incoming tenant to enter on the arable land at *Candlemas*, for the sake of ploughing. But after this came the case of *Doe d. Ld. Bradford v. Watkins*, 7 East, 551, which referred the time of giving notice to quit to the principal object of the demise: and there the demise being made in *January* of a dwelling-house and other buildings for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching grounds, &c. for 35 years, to commence as to the meadow from the 25th of *December* last: as to the pasture from the 25th of *March* next; and as to the housing, mills, and all the rest of the premises, from the 1st of *May*; reserving the first half year's rent on the day of *Pentecost*, the other at *Martinmas*: it was held, that the substantial time of entry, to which the notice to quit ought to refer, was the 1st of *May*, when the house and manufacturing buildings were entered upon; and not the 25th of *December*, when the meadow, which was merely the auxiliary to the other and principal subject of demise, was entered upon. And the learned Judge, being of opinion that the land was the principal object of demise in this case, and that therefore the taking of the whole was to be reckoned from the 2d of *February*, nonsuited the plaintiff.

Walton now moved to set aside the nonsuit; and after stating the above-mentioned facts, and the late cases bearing upon the point, questioned the opinion of the learned Judge, as to the land being the principal subject of the demise rather than the house, which (in answer to a question from the Court as to its locality) he described as situated near the borough of *Newton* in *Lancashire*. He observed, that the relative value or importance of the house and of the land seemed to be rather a question of fact than of law, and must at least be nearly balanced in this instance, even if the value of the house did not preponderate, as it probably did, in the estimate of 24*l.* a year rent for that and only 13 acres of land. The uncertainty of such estimates made it extremely difficult to frame a precise notice to quit in these instances.

LORD ELLENBOROUGH, C. J. It must in all these cases depend upon the relative value and importance of the house and of the land let together, which is the principal, and which is the accessary. In this case the learned Judge, upon consideration of the whole subject matter of the demise, thought that the land was the principal and the house the auxiliary; and it lies upon you who impeach his opinion to shew that the house was the principal. If you disputed the fact assumed by him, that the land was the principal, you should have desired the Judge to leave it to the jury to say which was in fact the principal: instead of which you acquiesced at the trial in the fact assumed by the learned Judge as the ground of the nonsuit; and we cannot say that he was wrong.

GROSE, J. agreed.

LE BLANC, J. When once the inquiry was let in, as to which was the principal and which the accessary in these cases, a question of fact was necessarily let in, which, if not agreed upon, the jury must decide.

BAYLEY, J. If the plaintiff did not acquiesce in the opinion intimated by

the learned Judge, he should have desired to go to the jury upon the fact whether the house were not the principal subject of the demise.

Rule refused.

Parkin v. Dick.

11 East, 502. Nov. 9, 1809.

Where a party insured to a certain amount, in one policy, goods to be thereafter specified; and in the specification afterwards made by him were included some goods the exportation of which was prohibited under pain of forfeiting the goods themselves and treble their value, and which, also induced a forfeiture of the ship; the policy was held to be avoided *in toto*.

THIS was an action on a policy of insurance from *London* to the *Brazils* on goods as should be thereafter specified to the value of 10,000*l.*: that specification was afterwards made, whereby it appeared that the goods consisted of hardware and naval stores belonging to the same person; and the object of shipping the naval stores, the value of which was less than 600*l.* of the whole sum, was principally, as it was stated, to supply our own ships on the coast of *Brazils*, if wanted by them; or if not to supply our allies the *Portuguese*, pending the war with *France*. The vessel containing the goods soon after her sailing on the voyage was captured by the *French*, recaptured and taken into *Barbadoes*, where she was condemned. At the trial before Lord *Ellenborough*, C. J. at *Guildhall*, no fraud was imputed to the assured; but an objection was taken upon the stat. 33 Geo. 3. c. 2, which enables his majesty by proclamation or order in council, when he shall see cause, to prohibit the exportation of naval stores; and in case of any exportation contrary thereto, the stores and ship in which they are laden are declared to be forfeited, and the offenders liable to pay treble the value of such stores. And a proclamation was shewn, founded upon this act, prohibiting the exportation of naval stores, which was issued in *November* 1807; and the insurance in question was made in *January* 1808. Whereupon it was insisted, that the policy was void *in toto*, by reason of its having been made in part to cover the naval stores, the exportation of which was illegal, and subjected the ship itself as well as the stores to forfeiture. His Lordship, being of this opinion, nonsuited the plaintiff.

Taddy now moved to set aside the nonsuit, and contended that the policy, though inoperative to cover the naval stores, was yet valid for the other goods insured. The act of the 33 G. 3, he observed, does not avoid the contract of insurance, but merely creates a forfeiture of the stores illegally exported, and punishes the exporter by making him pay treble the value: and the contract of insurance was not so entire, but that it might be severed according to the subject-matter; the different goods, though belonging to the same person, being distinct in their nature. And he likened this policy to a deed containing different covenants, some of which were illegal and void; and yet the deed would stand as to the other covenants which were legal.

Lord *ELLENBOROUGH*, C. J. The statute having made the exportation of and trade in naval stores, contrary to the king's proclamation, illegal, impliedly avoids all contracts made for protecting the stores so exported. It is an illegal act to sail with such stores on board, and subjects the ship itself to forfeiture. The policy is one entire contract on goods to be thereafter specified, to which the underwriters subscribed; and the subsequent specification by the assured cannot alter the nature of the contract with respect to the underwriters, so as to sever that which was originally one entire contract. It has been decided a hundred times, that if a party insure goods altogether in one policy, and some of them are of a nature to make the voyage illegal, the whole con-

tract is illegal and void. But as this is only a nonsuit, the plaintiff, if he think there is any doubt, may bring another action, and put the question upon the record; but I do not like to grant a rule to shew cause, whatever the value at stake may be, as it might seem to imply that we entertained a doubt, when there is no doubt at all upon the point.

The other Judges concurred; and BAYLEY, J., in the course of the discussion, observed, that the ship, being liable to seizure in consequence of having the naval stores on board, was thereby subjected to an extra risk, which ought therefore to have been communicated to the underwriters: and the omission of such communication would alone have avoided the policy. But *Taddy* answered, that no objection was taken at the trial on account of the want of notice to the underwriters; and if it had, notice could have been shewn to be given.

Rule refused.

Doe, on the Demise of Johnson, v. The Earl of Pembroke and Another.

11 East, 504. Nov. 9. 1809.

A certain paper being found along with other papers relating to the private concerns of the person last seised, after his death, in a drawer in his house; which paper purported to be the will of a person answering the description of his grandfather, made in 1738, but which was found cancelled, and no evidence was given of its having ever been acted upon, or probate of it taken out; is yet evidence of its recognition by the party last seised, as the declaration of his ancestor concerning the state of his family, so as to let in the contents of it for the purpose of shewing that that ancestor acknowledged a brother of the name of *Thomas* to be older than another brother of the name of *William*: assuming the jury to be satisfied of the fact that the paper so found was kept there by the person last seised with a knowledge of its contents, and that no imposition was practiced.

AT the trial of this ejectment before *Graham, B.* at *Salisbury*, the lessor of the plaintiff traced his pedigree through a *William Johnson*, down to *John Johnson*, who purchased the land in question 40 years ago, and died seised, and left a son *John*, who also died seised. And the lessor of the plaintiff was entitled to recover the premises as heir at law to the person last seised; unless *William*, through whom he claimed, had an elder brother *Thomas* from whom the defendants made title. There was much contradictory evidence as to this fact; and the balance was probably turned in favour of the defendants by the production of a paper purporting to be the will of one *Richard Johnson*, and to be signed by his mark, properly attested, and dated in 1738, which will had the seal torn off, and was found in this cancelled state by the attorney employed for the defendants, shortly after the death of the person last seised, in a drawer in his house, where it was kept with several cancelled bonds of his and a current lease of his farm. It appeared by other evidence, that *John Johnson's* (the purchaser's) father was named *Richard*; and if he were the maker of the will which was found in the drawer of his grandson, the person last seised, then it did appear by that will of *Richard* the grandfather that he had an elder brother called *Thomas*, who was also the elder brother of *William*, through whom the plaintiff claimed; and then the title of the defendants, derived from that elder brother *Thomas*, was established. The production of this evidence so discovered and circumstanced was objected to by the plaintiff's counsel: but the objection was overruled, and the evidence received: after which the authenticity and genuineness of the supposed will was much controverted before the jury, and was submitted as a question for their consideration; but assuming it to be genuine, great stress was laid upon it by the learned Judge in summing up the evidence; and the jury found a verdict for the defendants.

Dampier now moved to set aside the verdict, in order to take the opinion of the Court upon the admissibility of this evidence; and observed, that it did not appear that the person last seised had any knowledge of the existence or contents of the paper in question: and some evidence ought to have been given that he had recognized it as the will of his grandfather. The mere circumstance of its having been found in the same drawer with other papers of the person last seised, on which alone his recognition of it was contended for by the defendants, was not sufficient: it might have been put there after his death for the purpose of being found there by the attorney. Or assuming the knowledge of it by the person last seised, he might have kept possession of it because it was a forgery: it was found *cancelled*, and there was no evidence of its having ever been acted upon, or any probate of it having been granted. It could not even be told that, if genuine, it was the will of *the Richard Johnson* who was grandfather to the person last seised, as the hand-writing of the supposed testator was not proved. He urged the danger of admitting evidence of this description.

LORD ELLENBOROUGH, C. J. The difficulty is to shew the incompetency of the evidence; its relative consequence may be cut down to nothing by circumstances; but here we must take it, that it was kept by the person last seised (for the jury must have been satisfied of that), with other family papers, as something relating to his family: and then it might be considered as recognizing that there was a person in the family of the name of *Thomas Johnson*, an elder brother of the *William* from whom the lessor claimed. I think the evidence was admissible; and then the objection would go merely to the superstructure raised upon it in the learned Judge's observations to the jury; which would not be sufficient to impeach the verdict.

BAYLEY, J. asked, if there were any other *Richard Johnson* to whom the will could be ascribed; and was answered in the negative.

Per Curiam,

Rule refused.

Woodford, and Mary his Wife, v. Ashley.

11 East, 508. Nov. 9, 1809.

In an action for a malicious prosecution, the copy of the original roll or record of acquittal given in evidence stated the finding of the bill of indictment against the now plaintiff in *B. R.*, the process to bring in the party, her appearance, and plea of not guilty in *Michaelmas* term, and the joining of issue in the same court; and then stated the *venire facias juratores* returnable in *Hilary* term, and the *distringas juratores*, by which the sheriff is commanded to have the jury before our said lord the king, at *Westminster* on *Wednesday* next after 15 days from *Easter*, on before the lord Chief Justice, if he should come before that time, i. e. on *Tuesday* next after the end of the term (*Hilary*), at *Westminster*, &c. in the great hall of pleas there; and after giving a day in Bank to the prosecutor and defendant, it proceeded—on which day, viz. on *Wednesday* next after 15 days, &c. before our said lord the king, at *W.*, came the parties; and the Chief Justice, before whom the said jurors came to try, &c. sent here his record (which is the *nisi prius* record) in these words: (which are the words of the *postea* indorsed on that record), viz. afterwards, on the day and at the place last within mentioned, before the Chief Justice, &c. and so proceeds to set out the trial, and the verdict of not guilty; which is the conclusion of the *postea*, on the *nisi prius* record sent into the Court in Bank by the Chief Justice: and then the original roll proceeded—Whereupon, all the premises being seen by the court of our said lord the king now here, it is considered and adjudged by the said Court now here, that *M. W.* (the now plaintiff) do depart here without day, &c.

The form and component parts of the original roll, or record of acquittal, being thus understood, it follows that the words of the *postea*, "afterwards, on the day and at the place "last within mentioned," stated in the indorsement on the *nisi prius* record, as sent by the Lord Chief Justice, into the Court in Bank, referred to the day and place last mentioned in the *distringas juratores* set forth in that record, namely, to "Tuesday next after the end of the "term (*Hilary*), at *Westminster*, &c. in the great hall of pleas there," which was the day and place at *nisi prius* given; and not to the "*Wednes-*

day next after 15 days, &c. before our said lord the king at W.," which was the return day in Bank in the subsequent term, and consequently after the trial was had; though the statement of this return day intervenes on the roll between the statement of the day and place given to the jury in the *distringas* and the statement of the *postea* indorsed on the *nisi prius* record as sent in by the Lord Chief Justice.

And as by the roll it appeared, that the trial was at *nisi prius*, and the judgment of acquittal in Bank; it was therefore held not to prove an allegation in the declaration, that "the defendant (the now plaintiff) on Wednesday next after 15 days, &c. in the court of our said lord the king, before the king himself, at W. before the Lord Chief Justice assigned to hold pleas before the king himself, &c. W. J. being associated with him, &c. was in due manner and according to the due course of law by a jury of the said county of M. acquitted, &c.;" which allegation supposed the trial to have been in Bank on the return-day there given.

THIS was an action for a malicious prosecution of the plaintiff *Mary*, for a supposed assault upon the defendant: in which the declaration stated, that the defendant heretofore, to wit, on the 30th of June 1801, in the court of our Lord the King before the King himself, at Westminster, in the county of Middlesex, maliciously, and without any reasonable cause, indicted the said *Mary*, &c. Then, after setting forth the indictment, it proceeded to state, that the defendant maliciously, and without reasonable or probable cause, prosecuted the said indictment against the said *Mary*, until the said *Mary* afterwards, to wit, on Wednesday next after 15 days from the feast day of Easter in the 48th year of the reign, &c. in the court of our said Lord the King before the King himself at Westminster aforesaid, in the county aforesaid, before the Right Hon. Edward Lord Ellenborough, Chief Justice of our said lord the king, assigned to hold pleas before the king himself, Wm. Jones, Gent. being associated with the said Edw. Lord E. according to the form of the statute, &c. was in due manner and according to the due course of law by a jury of the said county of Middlesex acquitted of the premises in the said indictment charged upon her; and the said *Mary* was discharged therefrom by the said Court, to wit, at, &c.

At the trial of this cause before Lord Ellenborough, C. J. the copy of the roll or record of the indictment and acquittal given in evidence stated the original finding of the bill of indictment by a jury against the said *Mary* "in the court of our said Lord the King, before the King himself, at Westminster," &c.; the indictment; the *venire* or process to bring the party in to answer, and her appearance "now on Monday next after the morrow of All Souls in this same term (a) before our said lord the king at Westminster;" her pleading not guilty, &c. and the joining of issue by James Templer, the coroner and attorney of the king. The record then proceeded thus; "Therefore let a jury thereupon come before our said lord the king at Westminster, on Monday next after the octave of St. Hilary, &c. to try, &c.; on which day, to wit, on Monday next after the octave of St. Hilary aforesaid, before our said lord the king at Westminster, come as well as the said James Templer, &c. as the said *Mary Woodford*," &c. And then it stated the default of jurors, and the *non omittas distringas* to the sheriff, commanding him to have the jury "before our said Lord the King, at Westminster, on Wednesday next after 15 days from the feast day of Easter, or before Edw. Lord Ellenborough, Lord Chief Justice of our said lord the king assigned to hold pleas before the king himself, if he shall come before that time, that is to say, on Tuesday next after the end of the term at Westminster in the county of Middlesex in the great hall of pleas there, according to the form of the statute, &c. to try, &c. Therefore let the sheriff, &c. have the bodies of the jurors aforesaid accordingly, to try in form aforesaid. The same day is given as well to the said James Templer, who, &c. as to the said *Mary Woodford*. On which day,

(a) The roll was entitled "Pleas before our lord the king at Westminster in Mich. 49 Geo. 3," &c. The rolls are always entitled of the term in which the pleas are entered.

"to wit, on Wednesday next after 15 days from the feast day of *Easter* aforesaid, before our said Lord the King at Westminster, come as well the said J. T. &c. as the said M. W. &c. And the aforesaid Chief Justice, before whom the said jurors came to try in form aforesaid, sent here his record had before him, in these words, that is to say,—afterward, on the day and at the place last within mentioned, (a) before the within-named *Edw. Lord E. Chief Justice* of our said lord the king, assigned to hold pleas before the king himself, *Wm. Jones Gent.* being associated, &c., come as well the within-named J. T. who, &c. as the within named M. W. &c. And the jurors, &c. come and are sworn upon the said jury." And then the indorsement on the *nisi prius* record (still reciting,) after stating further the proclamation made in court, and none appearing to prosecute, proceeded, "Whereupon the Court here proceedeth to the taking of the inquest aforesaid by the jurors aforesaid now here appearing for that purpose aforesaid, who being chosen, tried, and sworn, &c. say upon their oath, that the said *Mary Woodford* is not guilty," &c. Then the original roll proceeds thus—"Whereupon all and singular the premises being seen and fully understood by the Court of our said Lord the King now here, it is considered and adjudged by the said Court now here, that the said *Mary Woodford* do depart hence without day in this behalf." Upon this it was objected, that the record of acquittal given in evidence, shewing the trial and verdict of acquittal to have been before the Lord Chief Justice at *nisi prius*, did not sustain the allegation in the declaration, that the plaintiff *Mary* was acquitted by a jury of the county "in the court of our said lord the king, before the king himself," which was the description of the Court of King's Bench sitting in Bank, by which Court only the judgment of discharge could be pronounced; and upon that objection the plaintiff was nonsuited.

Puller now moved to set aside the nonsuit; and urged, first, that the allegation in the declaration, that the said *Mary* "on Wednesday next, &c. in the Court of our said Lord the King before the king himself at Westminster," &c. "before Lord *Ellenborough*, C. J. assigned to hold pleas before the King himself," was by a jury of the county acquitted, &c. was merely descriptive of the place in which, and not of the Court before which, the trial was had. It is not alleged with a *prout patet*, &c.; which according to *Purcell v. Macnamara*, 9 East, 160, would have been deemed descriptive of the record, and must have been strictly proved: but the substance of the averment is, that the trial was had in a certain place so designated, before Lord *Ellenborough*, C. J. who is himself described as "assigned to hold pleas before the king himself:" and the trial being proved to have been before him, a misdescription in the style of the court in which he sat cannot be more material than that in *Rex v. Lookup*, (b) where an indictment for perjury stating a bill in Chancery to have been directed to "*Robert Lord Henley*," &c., instead of "*Sir Robert Henley*, Knt." &c. was held to be no objection; it being sufficient that the complainant had preferred his bill before the person holding the great seal, whether he were styled by the one name, or by the other. 2dly, He urged that at all events this was not a ground of nonsuit, but of demurrer to the declaration; as the misdescription of the place of trial, supposing it to be such, was contained in the record itself given in evidence; which after stating the jury process, commanding the sheriff to have the jury "before our said Lord the King, at Westminster, on Wednesday next, &c., or before Lord *Ellenborough*, &c. if he should come before that time, i. e. on Tuesday next," &c., and after stating the same day given to the prosecutor and to the then defendant, proceeds—"on which day, to wit, on Wednesday next, &c. before our

(a) The day and place last within mentioned in the *nisi prius* record, to which these words of the *postea* refer, are the day and place of *nisi prius* given in the *distringas juratores*.

(b) T. 7 Geo. 3. B. R. cited in *King v. Pippet*, 1 Term Rep. 240.

said Lord the King at Westminster come, &c. And then it states that the Chief Justice, before whom the jurors came to try, &c. sent his record had before him in these words—"Afterwards, *on the day and at the place last within mentioned*," before Lord E., and then proceeds to state the trial and acquittal. Now, the *place last mentioned* in the record of acquittal being, "*before our said Lord the King at Westminster*," which is the style of the Court in Bank, it appears by this mode of drawing up the record as if the trial had been had there: and therefore there was properly no variance between the declaration and the record proved on which the nonsuit can be sustained. But then it may be objected, that the latter allegation in the declaration, after stating the acquittal, that "the said *Mary* was discharged from the indictment by the said Court," &c. would not be proved by the record, and that no such judgment could have been given by the court of *nisi prius*. To which he answered, 3dly, That either "*the said Court*" refers to the court of K. B. mentioned in the beginning of the declaration, (for *prædictus* does not necessarily refer to the next antecedent as *idem* does;)(a) and then it is correct: or, if applied to the court of *nisi prius*, it is immaterial and may be rejected, as the allegation of acquittal by the jury was sufficient to sustain the action; by the opinion of Buller, J. in *Morgan v. Hughes*, 2 Term Rep. 231. In *Hunter v. French*, Willes' Rep. 517, the only allegation was, that "at the sessions of oyer and terminer held at the castle of York, &c. before, &c. the plaintiff by a jury of the said county of York was duly and in a lawful manner acquitted of the premises in the said indictment specified," &c.: and by the record of acquittal it appeared, that the jury found the plaintiff *not guilty*; and upon that verdict the judgment of the Court was entered that he should go *therefore acquitted*; and this was held sufficient.(b) The redundancy therefore in this case may be rejected where the substance of the acquittal is stated.

LORD ELLENBOROUGH, C. J. It is a substantial allegation in the declaration, that the trial, which is one thing, and the acquittal which is another thing, both took place "in the court of our Lord the King before the King himself;" whereas by the record it appeared that the trial was before me in the court of *nisi prius*, and the acquittal was by the judgment of the Court in Bank: and indeed it is impossible that there could have been a judgment of acquittal at *nisi prius*.

The other Judges concurred; and in the course of the argument Bayley, J. observed, that the words "*afterwards, on the day and at the place last within mentioned*," before the within-named Edward, Ld. E. &c." was the statement of the *postea* indorsed on the *Nisi Prius* record, and had reference to the time and place of trial last mentioned in that record in the *distringas*; that is, "on Tuesday next after the end of the term at Westminster in the co. of M. in the Great Hall of Pleas there." The intermediate day stated is the return day given in Bank; which is after the trial had, and when the judgment of acquittal is given. And this was said by Mr. Dealtry to be the invariable manner of making up the records in the Crown Office.

Rule refused.

(a) He cited *Regina v. Rhodes*, 2 Ld. Ray. 808. *Weekly v. Wildman*, 1 Ld. Ray. 407, and *Fitzburgh v. Dennington*, 2 Ld. Ray. 1094; and *Sutton v. Fern*, 3 Wils. 339.

(b) It was held sufficient by construing the words *reddendo singula singulis*, and the plaintiff was *duly acquitted by the jury*, i. e. found not guilty of the facts alleged against him; and in a *lawful manner acquitted* of the premises, &c. i. e. by the judgment of acquittal pronounced by the Court.

Wright v. Shiffrer.

11 East, 515. Nov. 10, 1809.

A ship being insured at and from *Surinam*, and all or any of the *West India* islands to *London*, a warranty to sail on or before the 1st of *August* is satisfied by the ship sailing from *Surinam*, her last port of loading, before the 1st of *August*, and going into *Tortola* on the 4th to seek convoy, though she did not sail from *Tortola* which is one of the *West India* islands, direct for *London* till afterwards.

THIS was an action upon a policy of insurance on freight of the *Bellona* "at and from *Surinam*, and all or any of the *West India* islands (except *Jamaica*) to *London*, warranted to sail on or before the 1st of *August* 1807." In fact, the vessel did sail before the 1st of *August* from *Surinam*, where she had taken in her homeward cargo, and arrived at *Tortola*, one of the *West India* islands, on the 4th, to find the convoy; but the proper convoy having before that time sailed with the trade, she afterwards took sailing instructions from another ship as convoy, and was lost in her voyage home. The underwriters contended, that by the terms of the policy the vessel ought to have sailed from the last of the *West India* islands at which she meant to touch on or before the 1st of *August*; and that her sailing from *Surinam*, for *Tortola* so as not to arrive there in the ordinary course till the 4th, and consequently not being able to sail from *Tortola* till after the 1st, was a breach of the warranty, and precluded the plaintiff from recovering. The jury, however, under the direction of Lord *Ellenborough*, C. J. at the trial, being of opinion that there was a *bona fide* compliance with the terms of the warranty, according to the meaning of the parties, found a verdict for the plaintiff; which

The *Attorney-General* now moved to set aside, upon the ground of misconstruction of the warranty; considering the object of it to have been to secure the final departure of the ship from the last of the *West India* islands at which she meant to touch, on or before the 1st of *August*; otherwise, by going from one to another after that period, her stay might have been protracted to an indefinite period.

LORD ELLENBOROUGH, C. J. Is it not the same in substance as if the ship were warranted to sail from her last loading port on or before the 1st of *August*? I considered that the warranty was satisfied by her sailing from *Surinam* which was her last loading port, before the 1st of *August*; and that the introduction of "*all or any of the West India islands*" was merely for the benefit of the assured in case the ship should have been taking in cargo at any of those islands where her homeward-bound voyage was to commence.

BAXLEY, J. asked whether *Tortola* lay in the course of her voyage home from *Surinam*; and being answered that it was usual to seek the convoy there; he observed, that the vessel might then be said to have sailed on her voyage homewards before the 1st of *August*.

Per Curiam,

Rule refused.

Philipson and Another v. Mangles.

11 East, 516. Nov. 10, 1809.

An allegation in a declaration, with a *prout patet*, &c. that the plaintiffs by the judgment of the Court recovered against the bail, is not proved by the production of the recognizance of bail and the *scire facias* roll, which latter concluded in the common form. Therefore it is considered that the plaintiffs have their execution thereupon against the bail: for that is an award of execution, or at most a judgment of execution, and not a judgment to recover.

IN an action for a false return to a *testatum fieri facias* against the bail,

the declaration stated, that the plaintiffs in the 48 G. 3, in B. R. by the consideration and *judgment* of the same Court, *recovered* against *E. N.* and *J. C.*, bail of *P. N.*; 54*l.* 10*s.*, which was *adjudged* to the plaintiffs in and by the said Court for their damages by them sustained as well for not performing certain promises made by the said *P. N.* unto the plaintiffs, as for their costs and charges, &c. whereof the said *E. N.* and *J. C.* were convicted; *prout patet per recordum*. The proof of this averment was an office copy of the recognizance of the bail, and an office copy of the *scire facias* roll, which concluded in the common form.—“Therefore it is considered that the said plaintiffs have their execution thereupon against the bail.” And no other judgment is given. Upon this variance the plaintiffs were nonsuited at the trial before Lord *Ellenborough*, C. J. at the last sittings; and *Garrow* now took the opinion of the Court upon the conformity of the proof with the allegation, by moving to set aside the nonsuit, on the ground that an award of execution is in effect a judgment or adjudication of the Court. But the Court were all of opinion that the objection was well founded. And

LORD ELLENBOROUGH, C. J. said: It is an *award of execution*, and not a *judgment* properly so called: the allegation, therefore, that it was a *judgment*, was not proved. But making the most of the argument, and admitting that it may be called a *judgment*, as being an award of something by the Court, still it is not a judgment *to recover*, as alleged, but a judgment of *execution*.

LE BLANC, J. The allegation is, that by the *judgment* of the Court the plaintiffs *recovered*, &c.; that is, that the plaintiffs had *judgment to recover*: but the record only proved, that they had *judgment of execution*: or more properly speaking, it is an award by the Court of execution.

Per Curiam,

Rule refused.

Doe, on the Demise of the Baroness Lady Dacre, v. Roper.

11 East, 518. Nov. 10, 1809.

A devise to the testator's wife, of “all his property both personal and real for ever,” passes the fee in the real estate: and the devisors's intent to use them in a more restricted sense is not shewn by a subsequent clause of the will, whereby *after her decease* he gave an *additional annuity* to a person to whom he had before given a smaller annuity preceding the devise to the wife.

IN this ejectment for an undivided fifth part of certain lands in the county of *Denbigh*, a verdict was taken for the plaintiff, subject to the opinion of the Court on the following case.

Lord *Dacre* being seised in fee of the premises in question, by his will dated the 25th of *August* 1790, devised thus: “I *Trevor Charles* *Ld. Dacre*, being desirous to settle my worldly affairs, &c. do make this my last will, &c. *Item*, I give and bequeath to *G. Pickering*, my coachman, an annuity of 40*l.* *per annum* to be paid him quarterly, and to commence the quarter before my decease, provided he lives with me at my decease; if not, this annuity to be void. *Item*, I give and bequeath to *Eliz. Simons*, if living in my service at the time of my decease, an annuity of 20*l.* *per annum*, to commence the quarter day before my decease. If she has left my service, the annuity to be void. *Item*, I give and bequeath to my cousin *Blayney Roper* an annuity of 400*l.* *per annum*, to be paid him quarterly, and to commence the quarter day before my decease. *Item*, I give and bequeath to my dear wife *Mary Jane Dacre* all my property both personal and real that I am possessed of now, or may be possessed of at my decease either in land, houses, or any other description of property, for ever. *After her decease*, I give and bequeath to my cousin *Blayney Roper* an *additional annuity* of 1000*l.* *per annum*. I do constitute and appoint

my dear wife *Mary Jane Dacre* my whole and sole executrix." Lord *Dacre* died on the 3d of July 1794, leaving *Mary Jane Lady Dacre*, his wife, and also *Gertrude Baroness Dacre*, the lessor of the plaintiff, his only sister and heir at law, him surviving. Upon *Ld. Dacre's* death, *Mary Jane Dacre*, his widow, entered upon the premises, and continued in possession thereof until her death, on the 11th of September 1808, without issue; at which time the defendant, claiming as devisee under her will whereby she devised the same to him, took possession thereof. The question for the opinion of the Court was, whether *Mary Jane Lady Dacre*, the widow of the testator, took under his will an estate for life, or in fee, in the premises in question. If she took for life only, the verdict was to stand: if in fee, the verdict was to be entered for the defendant. And either party were to be at liberty to turn this case into a special verdict, if they wished to bring a writ of error.

Hargrave, for the plaintiff, admitted that by the devise to *Mary Lady Dacre* of "all the testator's property both personal and real, &c. for ever," without more, she would have taken a fee: but he contended, that the subsequent devise, *after her decease*, of an additional annuity of 1000*l.* per annum to *Blayney Roper*, shewed the intention of the testator that his widow should only take an estate for life; such devise over, *after her decease*, of a part of the property before given to her, shewing that her estate in it was to determine on that event; and those words being equivalent in the experience of all conveyancers to the words "from and after the determination of that estate." And though this be only a *partial* devise over, yet it equally evinces that the testator by having first given her "all his property, both personal and real, for ever," without adding words of limitation to the devise of the realty, did not mean that she should take an absolute estate in the realty, but only in the personalty. And there was no necessity for the testator to devise over the fee to the heir, in order to found this construction of the will: for the law gives the estate which is not devised away to the heir, charged with the partial devise over. Neither is it any argument for the defendant to say, that this is a mixed devise of real and personal estate, and that the devise of the personalty being absolute, it ought for conformity sake to be taken as conclusive of the testator's intention to pass the realty also absolutely; for the disposition of the two species of property is governed by different rules; and it is only in indulgence to the presumed ignorance of testators, that a latitude of disposition in the case of real property has been allowed to them in wills, by which they have been permitted to pass the fee by general words of devise, expressing by necessary implication such an intention, without adding words of limitation or inheritance. But that indulgence, which has grown up by degrees in the law, is still limited to cases where from the plain meaning of the words no doubt can be entertained of a testator's intention to pass the fee; and if such intention be at all doubtful, either from the words of the particular devise, or from other provisions in the will which indicate a different intent, the rule of the common law will prevail, which requires words of limitation and inheritance to pass the fee from the heir. The word *property*, it must be admitted, is a potent word in a will to pass the testator's interest in the land as well as the land itself; and so it was considered by Lord *Mansfield* in *Hogan v. Jackson*: (a) but still it has never yet been determined of itself to carry a fee, like the word *estate*, (b) or as the words "all I am worth," which were held in a late case, *Huxtep v. Brooman*, 1 Bro. Ch. Cas. 437, to carry real estate, notwithstanding a contrary decision in *Bowman v. Milbank*, 1 Eq. Cas. Abr. 208, upon the words "all to my mother." Here, however, it is not left to implication or construction to

(a) Cowp. 304, and vide *Doe v. Lainchbury*, ante, 290.

(b) Upon the force of the word *estate* to carry a fee in a devise, he referred to *Wilkinson v. Merryland*, Cro. Car. 447. *Kerman v. Johnson*, Sty. 281. 293. *Reeves v. Winnington*, 3 Mod. 45. *Lane v. Hawkins*, 2 Show. 395. *Barry v. Edgeworth*, 2 P. Wms. 524, and *Barnes v. Patch*, 8 Ves. jun. 604.

include the realty in the word *property*, as the words *personal* and *real* are added; and here are also the words "*for ever*" added, from whence, though they would not be sufficient to pass the fee in a deed, Lit. s. 1, it may be admitted that an implication would arise upon a will, Co. Lit. s. 585, 586. Fitz. Abr. Devise, pl. 20, and 15 H. 7 fo. 11, 12, of the testator's intent to pass the fee, unless there be other words to repel that inference. In the 15 H. 7. fo. 11 & 12, the question arose upon a testamentary declaration of uses by one who had before enfeoffed trustees for that purpose; and *Fineux*, Chief Justice, said, incidentally, that if one make a will that *J. S.* shall have his land *for ever during his life*, he shall only take for life, because the latter abridged the interest given by the preceding words. And *Perkins*, (a) s. 557, says, that if lands be devised to *J. S.* to have and to hold to him *for ever*, it seems that by these words the devisee shall only have an estate for life: for the words *for ever* cannot extend further than to the devisee himself, because no other persons are named. But the point seems not to have been then settled, for he adds a *quære*. And at that time, it appears by the same book to have been considered, that a devise of land to *J. S.* to have and to hold to him *and his assigns* would pass the fee: so to *J. S.* and his assigns for ever: assigns there might have been taken to mean assigns in law. But *Ld. Coke* in his Comment on Littleton, Co. Lit. 9, b. which was published after *Perkins*, says, that a devise to a man and his assigns, without saying *for ever*, gives but an estate for life. Here, however, the constructive intent to pass a fee by the words *for ever* is rebutted by the subsequent charge upon the same lands of an additional annuity to *Blayney Roper*, to take place *after the decease* of the devisee *Mary Lady Dacre*. [Lord *Ellenborough*, C. J. If you can establish that a further charge on the estate, in case the annuitant survived the devisee of the land, is the same thing as a devise over of the land itself, you will advance the argument in favour of the lessor.] It equally shews that the testator did not mean to pass the fee by the former words of devise. But it is sufficient, according to *Wild's* case, 6 Rep. 16 b. 17, if it only render his intent doubtful, to turn the scale in favour of the heir at law, who according to *the judgment of the law* will take the fee, if it be not passed to another by words of limitation or inheritance: a rule which applies to the devisees of the several annuities in this will, which being given to them generally without saying for life, the charges only enure for their respective lives. The case which comes nearest to this, is *Chycke's* case; (b) which was a devise of "*the fee simple* of my house in *S.* to *Alice Ludlam*, and *after her decease*, to *William* her son." which *William* was her heir: and according to the reports in *Benloe* and *Anderson*, it was held that *Alice* took but an estate for life, with remainder in fee to her son. *Dyer's* report however states, that *Alice* was held to take only a present life estate, with remainder to her son also for life, remainder to herself in fee. If the two first-named reporters be right, the case bears strongly in favour of the heir at law; and it will not bear against her, if the latter be right, by reason that the *fee simple* was there expressly devised.

Wigley, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. From the first moment of my reading this case, until the conclusion of the argument, which has exhibited all the learning which could be brought into the field, I have not entertained the least doubt as to the construction of the will before us, nor is there any reasonable ground on which the meaning of it can be doubted. The testator certainly meant to give the fee in his real estate to his wife *Lady Dacre*, subject to particular charges of certain annuities, amongst the rest, to an annuity of 400*l.* *per ann.* to his cousin *Blayney Roper*, to be extended to 1000*l.* *per annum* more,

(a) The learned Counsel observed, that *Ld. Coke* spoke well of *Perkins's* Treatise, in the preface to his 10th Report, p. xix.

(b) This case is properly entitled *Baker v. Raymond*, *Benloe*, 390. S. C. *Dyer*, 357, a. and 1. And. 61.

if he survived Lady *Dacre*. He meant only to saddle the estate with the charges first mentioned during the lifetime of his wife, but if she happened to die before his relation *Blayne Roper*, he meant to charge it with an additional annuity of 1000*l.* more for the life of *B. R.* But subject to these charges, whether greater or less according to the event, he gives to his wife "all his property both personal and real, &c. either in land, houses, or any other description of property *for ever*." How can words be stronger to shew an intention to pass the fee? He might, indeed, have spared himself the labour of particularizing the several species of his property, to shew that he meant to include landed property; for a devise of all his property *for ever* would have carried the fee. That a devise of land to a man *for ever* would carry a fee has been settled without question from the 22 Ed. 3, (a) to the present day, with the single exception of the doubt expressed by *Perkins* in the passage cited. The same law is recognised in Littleton s. 586, and in Lord *Coke's* comment on that section, and upon s. 1, in Co. Lit. 9, b. where he says, that "if a man devise land to another *in perpetum*, a fee-simple doth pass by the intent of the devisor." But as this is only a constructive intention to pass the fee, if the meaning of those words be abridged or restrained by other words in the will, shewing an intention to use them in a qualified sense, the construction of them would be qualified accordingly. The question then is, Whether there be any such qualifying words in this will? The only thing relied on is the additional annuity given to *Blayne Roper* after the decease of the devisor's wife, which is said to be a partial devise over, and to be equivalent to a remainder over, after the determination of her estate, in so many words. But taking the whole together, the will imports no more than this; (and though if the words had been transposed, it might perhaps have been expressed more clearly, but still the words as they stand are sufficiently clear :) I give all my property to my wife for ever, subject to such and such annuities, one of which is an annuity of 400*l.* to *Blayne Roper*; and if *B. R.* survive my wife, I give him an annuity of 1000*l.* more. How then can the giving of this additional annuity be said to shew an intention in the devisor to retract the devise of the fee before made to his wife? He undoubtedly meant to give her the fee, subject to the charges of all these annuities.

GROSE, J. This is a question of construction, depending on the intention of the testator, as it is to be collected from the words of the will. He begins by giving annuities to three persons severally: subject to these, he then gives all his property, both personal and real, for ever, to Lady *Dacre*, his wife; but if one of the annuitants survive her, he gives him an additional annuity. If he had given all his estate, real and personal, to Lady *Dacre*, charged with these annuities, it is not disputed but that the fee would have passed: then is it not the same thing when he gives her all his property, real and personal, for ever, subject to these annuities?

LE BLANC, J. The Court has had all the assistance in the construction of this will that the ingenuity and ability of an advocate can afford in favour of the heir at law, and therefore it is not necessary to let the case stand over to another day, in order to hear the defendant's counsel, when the Court have no doubt upon the subject. The question depends on the intention of the testator, to be collected from the will. And it has never been doubted that a devise of a man's "estate for ever" would carry the fee; and that I consider as the judgment of the law upon the construction of such words in a will; and the only question in such a case could be, Whether any thing appeared in the will to shew that the testator meant to give less than the fee. Now here Lord *Dacre* having given annuities to several persons, devises to his wife, in the most general words, "all his property, both personal and real, for ever." This

(a) Fitzh. Abr. Devise, pl. 20, states the law to be so from the Year-book of M. 22 Ed. 3. 16, and Bro. Abr. Devise, pl. 33, states the same from *Fitzherbert*, and refers also to the same Year-Book.

shews his intention to give her the fee as clearly as if the devise had been in so many words to her *and her heirs*. It is not indeed denied, that the words of devise to her, first used, would carry the fee; but the argument in favour of the heir at law is built upon the subsequent words giving an additional annuity to *Blayney Roper after her decease*, as shewing, it is said, an intention in the devisor to limit the general meaning of the former words; and if there had been any such intention expressed in the subsequent part of the will to limit the extent of the first devise to her, and to shew that the words were used in a more contracted sense, though the first limitation had been to her and her heirs, we should have given effect to the intention so expressed. It is argued that the giving of the additional annuity, *after the decease* of Lady *Dacre*, is a partial devise over, which shews that he did not mean to give her the fee; but it is only an additional charge on the estate before given to her, in case the annuitant should survive her, and is not at all inconsistent with the former devise to her of the fee. It rather shews, that during the life of his wife he was desirous that she should enjoy the estate incumbered with a smaller annuity than what he meant the annuitant to have in case he survived her. But this can never be considered as a *remainder*; for the testator does not give *Blayney Roper* any portion of the *estate* after the decease of his wife, but merely an increased annuity or charge upon it. No doubt, therefore, can be entertained of the intention of the testator to give his wife the fee; though if there had been any doubt of that, I agree that the heir at law would have been entitled to the benefit of it.

BAYLEY, J. If the case could have admitted of any doubt, I should have wished to have heard the argument on the part of the defendant and the reply; but every argument having been urged by the plaintiff's counsel which ingenuity can devise, and the Court having no doubt, it would answer no good purpose to delay giving our judgment. It has been settled for centuries, that a devise of land to a man *for ever* will give him the fee by the intent of the devisor: but the meaning of those words may be qualified, if a different intention appear from other words of the will. No such different intention, however, is to be collected from the subsequent devise of the additional annuity to *Blayney Roper* after the decease of Lady *Dacre*; but the whole intent to be collected from all the words of the will may be carried into effect by giving the devisee, Lady *Dacre*, the fee, subject to the several annuities. It is said, however, that these annuities, though given in general terms, only operate for life; and that the devise to Lady *Dacre* being also to her, generally, without words of inheritance, should have the same construction: but there is an essential distinction between the two; the word *annuity* alone imports that it is only to enure for the life of the annuitant; but the words of devise to the wife, *for ever*, import a fee simple. Then it is said, that the additional charge on the estate is given *after the wife's decease*: but that does not vary the legal interest which the testator had before given her in the estate. He does not give to *Blayney Roper* any part of the property itself, but only a charge upon it; and it amounts to no more than if he had given in express words to *Blayney Roper* a charge upon his estate of 400*l.* a-year during the life of his wife; and if he survived her, an increased charge of 1400*l.* a-year. There appears therefore, a plain and manifest intent to give the wife a fee by the words of devise to her; and there is nothing to controul the meaning of those words in the subsequent part of the will.

Postea to the Defendant.

Sedley v. White.

11 East, 523. Nov. 16, 1809.

Where a deponent had been a few days before discharged out of prison, but by permission had still continued to lodge there at night, having no other place of residence, his describing himself *bona fide* in an affidavit in court as *late* of such prison is sufficient to satisfy the rule of Court of M. 15 Car. 2, ordering the true place of abode of every person making affidavit in B. R. to be inserted. But a deponent who had left one place of residence, and resided in another would not satisfy the rule by describing himself as *late* of the former.

LAWES had obtained a rule upon the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled on the defendant's entering a common appearance; which was founded upon an objection to the affidavit for holding the defendant to bail, wherein the plaintiff described himself as "*late in the Compter prison of Gilt-spur-street in the city of London.*" And it now appeared upon affidavits, that the plaintiff for some time prior to the 28th of *January* last, was a prisoner there, but had been discharged on that day, and having no particular place of residence in town, was, by the courtesy of the gaoler, permitted to lodge at night in the prison, and had done so up to the 31st, on which day the affidavit in question was made. It was thereupon objected, that "*late of the Compter prison*" was not a proper addition of the place of residence of a deponent as required in every affidavit by the rule of court of M. 15 Car. 2, (a) by which it is ordered, that the true place of abode, and the true addition of every person who shall make affidavit in court here, shall be inserted in such affidavit. And he now contended, that the deponent stating himself to be *late* of such a place was not a compliance with the rule, which required him to state his place of abode at the time of making the affidavit: the word *late* might, he said, be used at any time after the party has changed his abode to avoid being traced.

Reader was now to shew cause. But

The Court thought the description applied well enough to the peculiar situation of the deponent at the time: he having then recently been discharged out of the custody of the keeper of the prison, and therefore having ceased to be a prisoner, though by permission of the keeper he had up to the day of making the affidavit lodged at night within the prison, and had acquired no other determined place of residence: there appearing to be no intention to mislead. But Lord *Ellenborough*, C. J. observed in answer to *Lawes*, that when a party had left one residence and resided in another at the time of making the affidavit, his describing himself as *late* of the place where he had ceased to reside, would be considered as an evasion, and would not satisfy the rule.

Rule discharged.

Sargeaunt and Another v. White.

11 East, 530. Nov. 17, 1809.

By the post-horse duty act of the 44 Geo. 3. c. 98, schedule B. if the hiring be by the day, and the distance be ascertained, as where the hiring is to go from one certain place to another, the duty is payable by the mile; if the distance be not ascertained, it is then payable by the day; and the post-master letting the horses, and not accounting for the duty accordingly in the stamp office weekly account is liable to a penalty of 10*l.* under the stat. 48 G. 3. c. 98. s. 7.

IN debt to recover a penalty of 10*l.* under the post-horse duty acts of the 44 Geo. 3. c. 98, and the 48 Geo. 3. c. 98. s. 7, the declaration stated, that

(a) Vide *Cooke's R. & O. of B. R.*

the defendant, at the time of committing the offence after-mentioned, was a postmaster usually letting horses to hire, and duly licensed for that purpose, and the plaintiffs were the farmers and collectors of the duties on horses let to hire for travelling post or by time within the county of *Middlesex*; and that the defendant after the passing of the stat. 48 Geo. 3. c. 98, and within six calendar months before the commencement of this suit, viz. on the 15th of *March* 1809, did let to hire for a period less than 28 successive days viz. for one day only, two horses to be used in drawing a post-chaise upon a public road from *Bishopgate-street* in *Middlesex* to *Rumford* in *Essex*, and back again, from *Rumford* to *Bishopgate-street*, being a distance in the whole of 24 miles; and which distance was ascertained at the time of such letting to hire; and the said horses were, on the day and year aforesaid, used in going and did go such distance in pursuance of such letting to hire; by reason whereof there became due to the plaintiffs, as such farmers, for the duty payable on such letting to hire, &c. 6s. And then it averred, that though the defendant afterwards, on the 8th of *April* 1809, made out an account as and for the stamp-office weekly account required of him as such postmaster and licensed person, including the day on which the said horses were so let to hire, &c., and delivered the same to the plaintiffs as such farmers, &c. as and for the stamp-office weekly account; yet the defendant did not insert therein, or in any stamp-office weekly account of his, the amount of the duty payable in respect of the same horses upon the said hiring, but neglected and omitted so to do; and on the contrary thereof, inserted in the said account so carried in and delivered by him as aforesaid 3s. 6d. as and for the duty payable on the aforesaid occasion of the letting to hire the said horses; the said sum of 3s. 6d. being less than the defendant ought to have inserted in the said stamp office weekly account as and for the duty aforesaid; contrary to the statute, &c. by force of which the defendant forfeited for his said offence 10l. &c., for which the plaintiffs sue for the king and for themselves. To this there was a general demurrer and joinder.

The stat. 44 Geo. 3. c. 98, schedule B. (page 209,) imposes a duty on every horse, hired *by the mile or stage* to be used in travelling in *Great Britain*, 1 1-2d.; and on every horse hired for a less time than 28 successive days for drawing on any public road any carriage used in travelling post or otherwise, (if the distance at the time of hiring such horse shall be ascertained) for every mile such horse shall be hired to travel, 1 1-2d.: and for every horse, so hired as last mentioned, in any case where the distance shall not at the time of such hiring be ascertained, for each day for which such horse shall be so hired 1s. 9d. Then the stat. 48 Geo. 3. c. 98, which extends the period for letting to farm these duties, requires by s. 7, that persons licensed to let horses to hire shall keep one account of those let by the mile or stage, and a separate account of those let for any period of time less than 28 days, and the number of miles the same shall be hired to go where the distance shall be ascertained; under pain of forfeiting 10l. in case of refusal or neglect so to do.

In the present case, the hiring was *for the day*, but *the distance was ascertained*, being from one certain place to another and back again; and the question made in argument was, whether though the postmaster did not charge the traveller by the mile, but by the day, he were still bound to account for the duty by the mile?

Richardson for the defendant contended in the negative, and relied principally on the stat. 25 Geo. 3. c. 51. s. 4, which imposed the same duties as the latter statute, distinguishing between a hiring by the mile or stage, and a hiring for a day or less, where the distance was ascertained, and where it was not ascertained: yet by s. 12, of that act only two species of tickets are issuable, one denoting a hiring *by the mile*, and the other a hiring *for the day*, according to which the stamp-office weekly returns were to be made. And by the stat. 48 G. 3. c. 98. s. 7, all the regulations, directions, forfeitures, and penal-

ties contained in the 25 G. 3, relative to the stamp-office weekly accounts, not thereby altered, are to remain in force. He also referred to a 23, of the 25 G. 3, whereby, to prevent evasions in filling up tickets where the horses are hired to return in less time than two days, and the distance shall be ascertained, it is enacted that where any licensed person shall let to hire any horse to return in less than two days, *and the number of miles*, instead of the words *for a day, shall be inserted in such ticket*, every licensed person shall fill up the name of the place to which the horses are hired to go, and the true number of miles, &c. on pain of forfeiting 10l. &c. From whence he said it seemed to be left in the discretion of the collector issuing the ticket, in cases where the hiring was for less than two days, either to issue a mile ticket, or a day ticket. And he argued, that the legislature had not provided for the case of hiring by the day when a day ticket is issued, if, because the distance was ascertained, a mile ticket may be demanded by turnpike-gate-keepers; for each of these may demand either the day ticket, or an exchange ticket in lieu of the mile ticket, which is left with the first gatekeeper; but where a day ticket is given, there is no exchange ticket.

Abbott was to have argued for the plaintiffs; but

The Court (Grose, J. absent) were all satisfied, that where the distance was ascertained, though the hiring were for a day, the duty was payable by the mile, by the express words of the act of the 44 Geo. 3. And if the hiring were by the day, and the distance were not ascertained, the duty was then payable by the day. No argument, they said, could make it plainer. And if there were defective provisions in other parts of these acts, the legislature must supply the remedy; but the words of the provision in question were quite plain and express.

Judgment for the Plaintiffs.

Blacket and Another v. Smith.

11 East, 533. Nov. 17, 1809.

The stat. 39 G. 3. c. 69. s. 137, giving to *West India* ships which have discharged their homeward bound cargoes in the Docks of the *West India* Company "the use of the Light Dock for a time not exceeding six months from the time of unloading," on payment of the tonnage duty of 6s. 8d., payable on the entrance of such ships into the Light Dock, does not entitle the owners to ship stores intended for the use of such ships as part of their outfit, over the wharfs of the Light Dock, without payment of wharfage and portorage, as in case of other goods shipped by way of merchandize on the outward-bound voyage: *aliter*, as to necessaries intended for the present use of such ships while lying in the Dock during the time allowed by the act.

THIS was an action for money had and received against the treasurer of the *West-India* Dock Company, which was tried before Lord *Ellenborough*, C. J. in *Middlesex*, when a verdict was taken for the plaintiffs, for 8d. damages, subject to the opinion of this Court upon the following case:

The ship *Speculator*, of which the plaintiffs are owners, on the 17th of *January* 1809, arrived in the *West-India* Docks with a cargo from the *West-Indies*, and the plaintiffs duly paid to the *West-India* Dock Company the rate or duty of 6s. 8d. per ton of the ship's burthen, pursuant to the directions of the stat. 39 Geo. 3. c. 69. s. 137. The cargo having been unloaded, the ship on the 28th of *February* last entered the Company's Dock for light ships; and on the 11th and 13th of *March*, while she remained there, and within 6 months from her unloading, one coil of rope and one barrel of tar were sent by the plaintiffs to the *West-India* Docks, for the use of the ship, and placed by them on the Company's wharf, (which is a legal wharf and quay within the meaning of the said act,) at the ship's side, from whence they were put on board by the plaintiffs, by means of the ship's tackle, and without any assistance from the Company's servants: but those servants were ready and willing and offered to

assist in shipping the said stores, but the plaintiff objected to their interference. The rope and tar were intended for the use of the ship, and were applied to that purpose. Previous to the rope and tar being shipped, demands of 2*d.* for wharfage and portorage in respect of the rope, and of 6*d.* for wharfage and portorage in respect of the tar, were made by the Company; being the usual charges made and paid for similar goods shipped as merchandize on freight from the legal quays and wharfs within the port of *London*: and if wharfage and portorage be liable to be paid for the stores of ships in the said Docks, such charges are reasonable. These demands, however, were then objected to by the plaintiffs; but the Company refusing to permit the rope and tar to be shipped, (although they were informed the same were intended for the use of the ship,) unless those sums were paid respectively, the plaintiffs paid the money, and at the same time gave notice that an action would be brought to recover back the same. The question was, whether the plaintiffs were entitled to recover the said sums of 2*d.* and 6*d.*, or either of them?

Harrison, for the plaintiffs, contended that stores intended, as these were, for the use of the ship, and not for merchandize, were not chargeable with wharfage or portorage to the company. The company cannot impose charges at their own discretion for the use and accommodation of their wharfs, like common wharfingers, but are only entitled to receive that which the legislature has given them as the reward of their monopoly. By the st. 39 Geo. 3. c. 69. s. 86, the Company's quays and wharfs are declared to be legal quays and wharfs for the landing, relanding, discharging, *lading and shipping* of any goods whatsoever within the port of *London*; and such goods are declared by s. 85, to be liable to the like tolls, duties, &c. and to the like regulations, as if landed on or shipped from the then legal quays or wharfs, except in the cases after specified. And then s. 137, ascertains the rates which are to be paid to the Company: and these are, first, a duty of 6*s.* 8*d.* per ton for every vessel entering the Docks with a cargo from the *West Indies*; and this, it is declared, shall be accepted "in satisfaction of the use and conveniency of the said "Docks, and all charges of navigating, &c. from her arrival at the entrance "into the Docks at *Blackwall* until she shall be unloaded and moored in the "Dock for light ships, &c. *together with the use of the Light Dock for any "time not exceeding six months from the time of unloading such ship.*" Now, the owners cannot be said to have the use of the Light Dock for their ship, which is part of the consideration for the payment of the 6*s.* 8*d.* per ton rate, if they be liable to be charged under the name of wharfage and portorage for all the necessary stores passed over the quays and wharfs for the use of the ship, without which she could not be kept in repair or fitted out for any other voyage. The use of the Light Dock for so long a time as six months is given to her for the very purpose of enabling her to be fitted out there more conveniently for her next voyage, than if she were lying in the body of the river, where of course she would not be liable for any such demands. This construction is confirmed, as far as it goes, by the stat. 42 Geo. 3. c. 113. s. 26, which, speaking of the rate appointed to be paid to the Company for new vessels using the Dock to be set apart for light vessels which had not first brought in a cargo from the *West Indies*, and consequently had not paid the 6*s.* 8*d.* rate, recites that, under the former act, vessels which had unloaded there, and paid that rate, would be entitled to go into and remain in the Light Dock, *without incurring any additional charge*; and that inasmuch as new or other vessels might come into the Dock *to take in their outward cargo*, or for their greater safety and accommodation, without being *so as aforesaid entitled to the use of the Dock*, free from additional charge; it proceeds to put such new vessels on the same footing as the others on payment of a 2*s.* per ton rate. The case of goods shipped over the wharfs as merchandize falls under a different consideration, as not being for the use of the ship, and the charge of wharfage and portorage for such goods has never been disputed. But as the

Company's quays and wharfs are put upon the same footing as the old legal quays and wharfs of the port of *London*, it is to all events incumbent upon them, if they claim any remuneration for the use of their wharfs beyond that which is specifically given to them by the act, to shew that the old legal quays were accustomed to charge wharfage and portorage for ship's stores : a fact which is denied by the plaintiffs ; and the case only states that similar charges have been paid for similar goods *shipped as merchandize or freight*. The stat. 1 Eliz. c. 11. s. 2 & 3, for appointing and regulating legal quays within the port of *London* and other ports, relates only to goods shipped *by way of merchandize*.

East, for the Company, said, that in the consideration of the question, for what uses and services the rates given to them by the act of the 39 Geo. 3, were intended, it was necessary always to bear in mind, that they had only a monopoly of the *import* trade from the *West Indies* : but that with respect to the *export* trade, it was still optional for any ship to fit out and load her outward-bound cargo either in the Docks, or in any part of the river below the *Blackwall* entrance, stat. 39 Geo. 3. c. 69. s. 91. So far as the monopoly extended, and it was compulsory on ships to use the Docks, so far as it was reasonable and necessary, for the sake of the public, to limit the compensations to be paid to the Company ; but where there was no monopoly or compulsion, there could be no necessity for any such protection ; but the Company stood in the same situation as any individual dock owner or wharfinger, a candidate for the custom of the merchants, upon the general principle of open competition, by offering better security and accommodation, upon more advantageous terms, than any other persons. In estimating, therefore, the amount of the rates, it was reasonably to be inferred that nothing was included in the calculation but such uses and services as the public were under the necessity of adopting, on the one hand, and the Company were compelled to afford on the other. No use or service but what was compulsory could, indeed, properly enter into such a calculation ; for if the use of the thing were optional on the one side, there could be no reciprocity or justice in limiting the compensation on the other. It follows that for every service performed by the Company, or use made of their premises, for which no special remuneration is directed by the act, they are at liberty to charge what is reasonable and fair, like any other dock owner or wharfinger. From the very nature of the case, and the design of their institution, this must apply to the whole of the export trade of which they have no monopoly ; and therefore it is of no importance to the Company whether the *tolls, dues, &c.* mentioned in the 85th section of the 39 Geo. 3. c. 69, as attaching upon their quays and wharfs in common with the old legal quays, relate to tolls and dues payable to themselves, or to such as are of a public nature ; [*The Court* seemed to be satisfied that they regarded the latter only ;] for they would, without any legislative declaration, be entitled to charge for the use of their wharfs like every other wharfinger, unless where restrained by the act : which brings the question to the construction of the 137th clause. Now the 6s. 8d. per ton rate is throughout confined to the *import* trade. It is to be paid to the Company for every ship *entering into and using* the Docks, &c. It is to be accepted in satisfaction of the use and conveniency of the Docks, and all charges of navigating, &c. such ship *from her arrival at the entrance into the Docks at Blackwall until she shall be unloaded* and moored in the dock for *light* ships, and also of the *unloading or unshipping* of her cargo within the docks, &c. and the cooperage which the cargo may require in the course of such *unlading* thereof ; and this enumeration concludes with giving also the use of the *Light Dock* for a time not exceeding six months *from the time of unloading such ship*. Though all these services and uses are plainly descriptive of the *import* trade, it is now contended that the use of the *Light Dock* for those six months includes also the use of the *quays and wharfs* there for *exportation*. For though,

for the purpose of this argument, a distinction is attempted to be made between stores shipped from the wharves for the use of the ship itself, and stores shipped by way of merchandize, yet no such distinction is to be found in these acts of parliament, or can have any foundation with respect to wharfingers: nor could the Company possibly discriminate, in many instances, between goods of the one sort or the other. And no local or accidental usage of that sort (the existence of which, however, as applied to the legal wharfs in general, is denied and could have been disapproved) can found any legal right on the part of the public in this case: but the very particularity of the clause repels the argument: for as it is plain from the specification of these two, that the legislature did not consider the *unloading* and *unshipping* the cargo to be included in "the use and conveniency of the Docks," which was first mentioned; it is much less likely that under the still more general description of the "use of the *Light Dock*" not exceeding six months, they should have meant to include the loading and shipping of goods for another voyage, which it was in the option of the owner to load there or elsewhere. And this appears still less likely to have been contemplated from the subsequent part of the same clause, whereby it appears that a different rate is payable to the Company upon the unshipping or importation of goods; which rate it is declared, shall be accepted "in respect of the use and conveniency of the Docks and *the quays, wharfs, and cranes*, and other machines which shall belong there-
"to, &c. and *all charges and expences of wharfage*," &c. after such goods are *unshipped*. And this also shews that the legislature considered that the exemption from "all charges and expences of wharfage," &c. which would otherwise have been payable for the transit of goods over the wharfs, was an item of benefit quite distinct from the *use of the Docks*, with respect to the ship itself. An argument also arises from the term of "*Light Dock*," made use of in the very part of the clause relied on by the plaintiff. By this is evidently meant the Dock for *empty or light vessels*: it is so described in the clause referred to, 42 Geo. 3. c. 113. s. 26. The privilege, therefore, must be taken in the strict terms and obvious meaning in which it is granted, which is the use of the *Dock* for the *ship* (not of the *quays and wharfs* for *goods*) and for the ship as a *light or empty ship*: in other words, it was meant for the accommodation of keeping the ship, while in her light or empty state, afloat, in a more secure state than if she were left swimming in the mid-stream of the river, or grounding with the fall of every tide on the banks of it. Then the clause in the act last referred to, so far from impugning, strengthens this construction, not only in the description of the vessels entitled to use the *Light Dock*; but by the description of the services to which the payment of the 2s. rate entitles them; which rate, it is admitted, puts them upon the same footing as vessels entering the *Light Dock* after payment of the 6s. 8d. rate. The 2s. rate is to be taken "in satisfaction of the use and conveniency of
"the said Dock, not exceeding six months, and all charges of the *navigating*,
"*mooring, unmooring, removing, and management* of such ship from her ar-
"rival at the entrance of such Dock until she shall depart therefrom." Then as *expressio unius est exclusio alterius*, this clause puts an express negative upon the right now claimed of shipping goods over the wharf without payment of wharfage. And the recital in the former part of the clause, that vessels may frequently come in to take in their outward bound cargoes, or for their greater safety and accommodation, without being so *entitled to the use of the Dock* free from additional charge, (i. e. as ships were entitled which had paid the 6s. 8d. rate,) merely alludes to the *purposes* for which they might wish to be there; but it only speaks of the ships which had paid the 6s. 8d. rate being *entitled to the use of the Dock*, that is, in the manner before described, for the use of the ship in her character of an *empty or light ship*; but it does not recite that such a ship was entitled to the use of the *wharfs* for shipping goods. Then if the Company were entitled to wharfage, and to portorage for the em-

ployment of their own servants in their own business, (and the whole scope of all the *West-India Dock Acts* is to put the employment of labourers and servants within the Docks under their appointment and controul, for public as well as private purposes,) the plaintiffs cannot deprive them of their reasonable reward, as it is stated to be, by refusing to suffer the Company's servants to assist in shipping the goods. The Company must still retain and pay their own servants for these and the like purposes.

Harrison was then heard in reply. In the course of which

The Court inquired whether the stores in question were necessities shipped for the present use and security of the ship while lying in the Dock, or only for her future use as part of her outfit; for they thought there was a material difference between stores taken in for the one purpose or the other. To this it was answered by the Company's counsel, that it was understood at the time when the case was settled, that the question meant to be tried was, Whether the plaintiffs had a right to ship the stores, as part of the outfit of the vessel, without paying the wharfage and portorage in like manner as for goods shipped by way of merchandize. The plaintiff's counsel said, that he was not apprized how the fact was, as to the particular stores; but he was certainly instructed to contend that "the use of the Light Dock" for six months, given to those who had paid the 6s. 8d. tonnage rate for their vessel, included a right to the use of the Company's wharfs in the Light Dock for the purpose of shipping stores for the use of the ship as part of her outfit on her outward-bound voyage, without paying wharfage or portorage.

Lord ELLENBOROUGH, C. J. then said, That if the stores in question were intended as part of the outfit of the ship, the Court were all satisfied that the Company were not restrained from charging wharfage and portorage as for other merchandize shipped for the outward-bound voyage. If indeed the stores were intended for the necessary use or security of the ship, during the time that she was lying in the Dock, he thought, within the fair meaning of the words, giving her the use of the Dock, she would be entitled to receive them on board free from any additional charge beyond the tonnage rate. The Court, therefore, gave judgment *nisi* for the delivery of the *postea* to the defendant, unless it were agreed before the end of the term to introduce as a fact into the case, that the stores in question were intended for the immediate use of the ship while lying in the Dock, and not as part of her outfit. The rule for judgment for the defendant ultimately stood confirmed.

Williams v. Brickenden, Clerk.

11 East, 543. Nov. 20, 1809.

Claim of conusance made by the Vice-Chancellor of the University of Oxford, in the vacancy of the office of Chancellor by death, on behalf of the University, allowed in a plea of trespass.

THIS came on upon a rule moved for by *The Attorney-General* and *W. E. Taunton*, calling upon the plaintiff to shew cause why the claim of conusance by the Vice-Chancellor of the university of Oxford should not be allowed, and in the mean time proceedings be stayed.

The defendant was served with a writ of *latitat* issued out of this court to answer the plaintiff in a plea of trespass, to which he appeared by attorney on the first day of this term; and thereupon the following claim of conusance was entered.

"And hereupon cometh also into court the Rev. *John Parsons*, Commissary or Vice-Chancellor of the university of Oxford, (the office of Chancellor of the said university being now vacant by and in consequence of the death of the most noble *William Henry Cavendish* Duke of *Portland*, late Chancellor thereof,

and the authority of Chancellor of the said university having in this behalf for and during such vacancy of the said office of Chancellor devolved upon him the said John Parsons, as such Commissary or Vice-Chancellor :) by J. W. his attorney above named, (a) to ask, and claim, prosecute, and defend all and singular the liberties and privileges of him the said Commissary or Vice-Chancellor; and thereupon he the said Commissary or V. C. prays his liberty: that is to say, to have the consuance of the plea aforesaid before the said Chancellor, his Commissary, or the deputy of the said Commissary, to be held at *Oxford*; because he saith," &c. The claim of consuance then proceeded in the same form as set forth in the case of *Welles v. Traherne* in *Willes' Reports*, 234, setting forth the letters patent of Hen. 8th, the statute of confirmation 13 Eliz. c. 29, and the allowance of the claim of consuance in E. 9 Ann. in a plea of trespass then depending in *B. R.* between *Riley* and *Appleby v. Stovell*. And then it proceeded, "and the said Commissary or V. C. prays, that the said record of the said *Easter* term may be seen and inspected, and that his said liberty and consuance of the said plea in the said court here depending, by virtue of the letters patent aforesaid, and by force of the said statute and the allowance aforesaid, may be allowed to him, &c. with this, that the said Commissary or V. C. doth aver, that the said *F. H. Brickenden* mentioned in the said writ or process, and the said *F. H. Brickenden* mentioned in the said warrant of attorney and claim above specified, are the same person. And the said Commissary or V. C. brings here into court the said letters patent of H. 8th, under his great seal, dated 1st of *April*, in the 14th year, &c. and also brings into court the exemplification of the said act of parliament under the great seal of the said Lady *Elizabeth* Queen of *England*. Dated at *Westminster* the 7th of *June*, in the 13th year, &c."

The seal of the office of Chancellor of the university was affixed to this claim of consuance, and also to the power of attorney before referred to; and the affixing of the seal was in each instance verified by an affidavit of the registrar of the university. The claim itself was also verified by affidavits; one from the defendant, stating that he is now and for five years last past has been a constant resident member of the university of *Oxford*, and for the whole of that period, and several years before, one of the fellows of *Worcester* college aforesaid. And that before and at the time of the supposed trespass, he was, and from thence has been and now is, a resident master of arts, and is now and was at the time of the supposed cause of action one of the proctors of the university actually resident and abiding there, and one of the tutors and fellows of *Worcester* college; and that the supposed trespass for which the action is brought was for an act done by him on the 23d of *May* last in discharge of his duty as one of the proctors. That the courts of the Chancellor of the university are regularly holden weekly during term for the trial of all suits and causes within the consuance and jurisdiction of the said court, and that he is liable to be called upon there to answer the plaintiff. That the plaintiff was at the time of the supposed trespass an undergraduate and matriculated member of the university and resident therein. The matriculations of the plaintiff and defendant, and the residence of the latter in the university, were also verified by the affidavit of the registrar of the university, and by extracts from the matriculation book.

Williams, Serjt., and *Abbott* opposed the rule, and took objection to the claim of consuance being made by the Vice-Chancellor, in the vacancy of the office of Chancellor of the university, who, though he states in his claim that during such vacancy the authority of Chancellor in this behalf devolves upon the Commissary or Vice-Chancellor, yet does not shew any charter or other authority to that purpose, as he ought to have done. There is not even any affidavit of the fact of the vacancy. [The Court having asked by whom the

(a) By a power of attorney before entered on the record, as in *Willes' Rep.* 233, n.

Vice-Chancellor was appointed; it was answered, by the Chancellor; but that such appointment must be confirmed by the convocation.] They observed, that the trial in the university court, not being by a jury at common law, but by the civil law, the courts at *Westminster* have always been very jealous of the jurisdiction, and strict in requiring the claim of consuance to be made in due time and form; as in *Welles v. Trahern*, Willes' Rep. 233, and *Leasingby v. Smith*, 2 Wils. 406.

The *Attorney-General*, contra, was stopped by the Court, after observing that the privilege was granted, not to the Chancellor, or to the Vice-Chancellor, but to the university; and that in the vacancy of the office of Chancellor, it necessarily devolved on the Vice-Chancellor, as the head officer of the university for the time being, to claim its privilege: and referring to *Castle v. Lichfield*,^(a) where the consuance was allowed on the claim of the Vice-Chancellor's deputy.

Lord ELLENBOROUGH, C. J. The claim of consuance is on behalf of the body of the university, by a person who appears to us upon the face of the proceeding to be the principal organ of the university by whom the claim is to be made. The university seal is affixed to the claim, which gives it authenticity, and nothing appears to us to negative the authority of the Vice-Chancellor to prefer it.

Per Curiam,

Let the claim of consuance be allowed.

Doe, Lessee of Albemarle Earl of Lindsey, v. Colyear.

11 East, 548. Nov. 21, 1809.

Under a devise to *A.* for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *A.* successively in tail male; with like remainders to *B.* and his sons; with remainder to the right heirs male of *A.* for ever; these last words are words of limitation and not of purchase, notwithstanding the prior estates given to the sons of *A.* and their issue male, which are not of themselves sufficient to indicate an intention in the testator to use those words differently from their legal signification, particularly as such words might, in certain events, operate to advance the general intent of the testator, and let into the succession some male descendants of *A.* who might be excluded from taking under the prior limitations to his first and other sons in tail male. And such ultimate limitation to the heirs male of *A.* to whom a precedent estate for life was given, operating to give him an estate in tail male in remainder, such devise lapses by his death before the testator.

THIS was an ejectment for the manors of *Uffington* and *Tallington*, with certain lands, &c. in the county of *Lincoln*, in which a verdict was taken for the plaintiff at the trial, subject to the opinion of the Court on the following case.

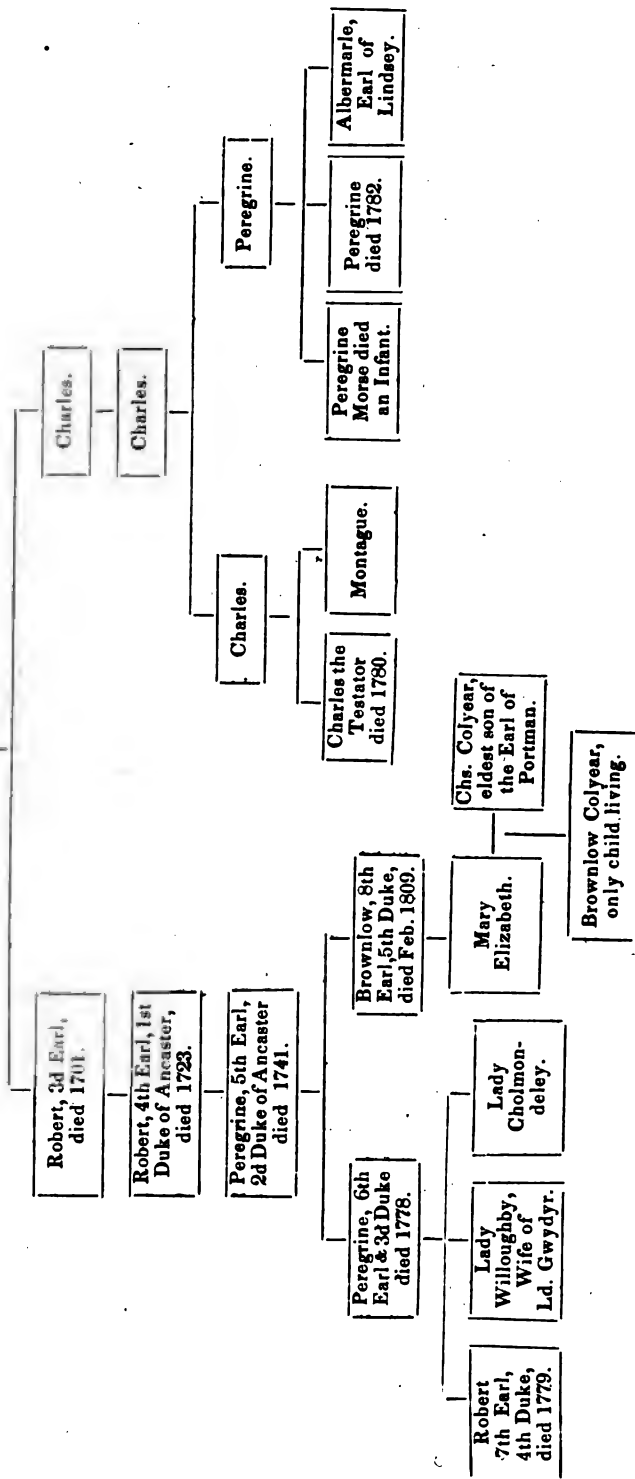
Charles Bertie, of *Uffington* in the county of *Lincoln*, Esq., being seised in fee of the premises in question, by his will dated 9th of Nov. 1759, duly executed and attested, devised to trustees and their heirs the manors of *Uffington* and *Tallington*, and all his freehold messuages, lands, &c. in the county of

(a) Hardr. 505, 8, 10. Lord C. J. *Wilmot* said, in *Leasingby v. Smith*, 2 Wils. 412, that the record of *Castle v. Lichfield*, had been diligently searched for, but could not be found. He also observed that that case which was in *Easter* 21 Car. 2, seemed to be almost the first claim of consuance allowed to the university of *Oxford*. Yet in *Magdalen College* case, M. 25 Car. 2. 1 Mod. 164. Lord C. J. *Vaughan* said, that the University had enjoyed these privileges some hundred years ago. And this claim of Jurisdiction is noticed in 40 ed. 3. 17. 8 H. 6. 18. Bro. Abr. Consuance, pl. 27. It is said there have been two other instances in which the claim of consuance has been made by the Vice-Chancellor; one of *Raymond v. Willis*, 19 Eliz. C. B. Rot. 128; another where the claim was made on behalf of *Wm. Jackson* in C. B. 20 Jac. 1. Rot. 2009; both which claims were allowed: in each of these cases the Chancellor was living.

Lincoln or elsewhere, with all rights, royalties, &c. advowsons, and appurtenances thereof and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, to the uses following: viz. to the use of the testator's brother *Montague Bertie*, for life, without impeachment of waste; remainder to the use of the trustees during the life of *M. B.* to preserve contingent remainders: remainder to the use of the first and other sons of *Montague Bertie* successively in tail male; and for default of such issue, to the use of *Peregrine Duke of Ancaster* for life, without impeachment of waste: remainder to the use of the said trustees during the Duke's life, to preserve contingent remainders; remainder to the use of the first and other sons of the said Duke successively in tail male; and for default of such issue male, to the use of Lord *Brownlow Bertie* for life: remainder to the use of the trustees during Lord *B. B.*'s life to preserve contingent remainders; remainder to the use of the first and other sons of Lord *B. Bertie* successively in tail male; and for default of such issue, to the use of the right heirs male of the said Duke of Ancaster for ever. The testator died on the 21st of February 1780. His brother *Montague Bertie* died without issue in the lifetime of the testator. *Peregrine Duke of Ancaster* also died in the lifetime of the testator, leaving one son, *Robert*, who became Duke of *Ancaster* on his father's death, and also died in the testator's lifetime. Lord *Brownlow Bertie*, who became Duke of *Ancaster* on the death of Duke *Robert*, survived the testator, and on his death entered into possession of the premises in question, and continued in such possession until his death on the 8th of February 1809; having never had any male issue. The Earl of *Lindsey*, the lessor of the plaintiff, is the nephew and heir at law of *Charles Bertie* the testator; and *Brownlow Colyear*, the defendant, is heir at law to the Duke of *Ancaster* lately deceased, being the eldest son of his only daughter who is also deceased. The pedigree annexed is found by the jury as a part of the case submitted to the opinion of this Court. If the Court should be of opinion that the premises in question descended to the lessor of the plaintiff as heir at law to the testator *Charles Bertie*, they find a verdict for the plaintiff: if not, they find a verdict for the defendant.

Robert Bertie, Baron Willoughby of Eresby,
created Earl of Lindsey to him and his heirs
male by patent, dated 22d Nov. 1626, died 1742.

Montague, 3d Earl,
died 1666.



Denman, for the plaintiff, on the ground that there was no valid demise of the ultimate remainder to any person who was capable of taking it under the description of *right heir male of Peregrine Duke of Ancaster*, contended that the reversion necessarily descended to the lessor of the plaintiff, as heir at law of the testator. The only persons who could pretend to claim against the heir are *Peregrine Duke of Ancaster*, or some of his male descendants; but he and his son *Robert* took estates of inheritance as purchasers under the will, which lapsed by their deaths before the testator, according to *Brett v. Rigden*, Plowd. 240; *Goodright v. Wright*, 1 P. Wms. 397, and *Hodgson v. Ambrose*, Dougl. 323, 337. [Lord *Ellenborough*, C. J. mentioned also *White v. Warner*, lessee of *White*, as a leading case which went to the House of Lords,^(a) to the same purpose.] Duke *Peregrine* took under the will either a fee, or an

A devise of all the rest and residue of the testator's estate in the manor and lands of *Bantry*, &c. not already settled on his eldest son *Simon*'s marriage, (except those parts of it before devised to his (second) son *Hamilton*,) together with all remainders and reversions of the said lands settled on the said marriage, to his eldest son *Simon* and the heirs of his body; and for default of issue of *Simon*, then he devised his said entire estate of *Bantry* to his son *Hamilton* in tail, with remainders over; lapses by the death of *Simon* in the lifetime of the testator, and the residue passes to *Hamilton* immediately on the death of the testator, though *Simon* left issue.

HAMILTON WHITE *against* WARNER, Lessee of RICHARD WHITE. B. R. M. 22 Geo. 3, in Error from B. R. in *Ireland*, upon a special verdict.—The special verdict stated, that *Richard White*, being seised in fee of the manor of *Bantry*, and of certain lands in the barony of *Beer* and *Bantry*, by indentures of lease and release of the 24th and 25th of September 1766, being the settlement made on the marriage of his eldest son *Simon White*, conveyed these lands, &c. to trustees and their heirs, as to part of them, to the use of *Simon* for life, remainder to his first and other sons of the marriage in tail male, remainder to *Simon* in tail male; with remainder to *Richard* himself in fee: and as to other parts of the lands, to the use of *Simon* in tail male, with remainder to *Richard* himself in fee. *Richard White* being so seised of these remainders, and being also seised in fee of other lands, and having issue the said *Simon*, his eldest son, and *Hamilton White*, his second son, (the defendant below,) and a daughter, *Margaret*, by his will on the 1st of January 1775, after some pecuniary bequests, devised to his grandson *Richard White* (the lessor of the plaintiff below) and the heirs of his body certain lands; and if he should die without issue before 21, then to his grandson *Simon White* and the heirs of his body; with like remainders over to his grandsons *Hamilton* and *Edward*; with remainder to his own right heirs. He devised other lands to his grandson *Hamilton White* in tail, with like remainders over to his grandson *Edward*, and to his own right heirs. He then devised to his younger son *Hamilton White* (the defendant below) and the heirs of his body certain other unsettled lands; and for default of issue of his son *Hamilton*, he devised over the same to his eldest son *Simon* and the heirs of his body, remainder to his daughter *Margaret* for life, and after her decease to the heirs of her body; with remainder to his own right heirs. He devised other lands to his son *Hamilton* for life, and 1000*l.* to be paid him by his executor *Simon White*. And then followed the devise immediately in question, by which he devised all the rest and residue of his estate in the manor and lands of *Bantry*, &c. not already settled on his eldest son *Simon*'s marriage, (except those parts before devised to his son *Hamilton*) together with all remainders and reversions of the said lands settled on the said marriage, to his eldest son *Simon White* and the heirs of his body: and for default of issue of his son *Simon*, then he devised his said entire estate of *Bantry* to his 2d son *Hamilton* and the heirs of his body; and for default of issue of *Hamilton*, then he devised his said entire estate of *Bantry* to his daughter *Margaret* for life, and after her decease to the heirs of her body; remainder to his own right heirs. He then appointed his eldest son *Simon White*, his sole executor, and devised to him all the residue of his estate, real, personal, and mixed, not before devised, subject to his debts and legacies.

The special verdict then stated, that *Simon White*, the son, died on the 2d of September 1776, in the lifetime of the testator, leaving issue of the marriage *Richard White*, the lessor of the plaintiff, his eldest son, and three other sons and four daughters, all infants. That the testator, who had been a barrister, knew of the death of his son *Simon*, and died on the 27th of the same September. On the testator's death, the defendant *Hamil-*

(a) This came on in B. R. in Tr. 21 Geo. 3, upon a writ of error from *Ireland*, and was decided in M. 22 Geo. 3. Vide a short note of the point in Dougl. 344, n. 4. The following report of the arguments and judgment I had from Mr. Justice *Buller*; the statement of the case is abridged from the appeal papers of the House of Lords.

estate tail. If the estate had been limited to him and his heirs male by deed, he would have taken a fee, by Lit. s. 31; but according to Lord *Coke's* Comment, the law, in the case of a devise, will supply the words "*of the body*," and give him an estate tail; and then according to the rule in *Shelley's* case, 1 Rep. 104, there being a devise to him for life, and afterwards, in the same instrument, a devise to his heirs male; or as it is here to be understood, to the heirs male of his body; the word *heirs* is to be considered as a word of limitation, and not of purchase; the latter limitation operating with the former to give the first taker an estate in tail male. And this rule is not to be departed from, unless, as Lord *Hardwicke* said in *Garth v. Baldwin*, 2 Ves. 646, the

ton White, his son, took possession of the lands devised to him, and of all the other estates of the testator not comprised in the settlement of the 24th and 25th of September 1766, claiming them under his *father's will*; being the lands in question, for which this ejectment was brought.

In *Hilary* term 1780, judgment was given for the lessor of the plaintiff; on which this writ of error was brought; and the case was argued in *Trinity* term 21 Geo. 3, by *Davenport* for the plaintiff in error, and *Bower* for the defendant; and again in M. 22 Geo. 3, by *Wallace*, Attorney-General, for the plaintiff, and *J. Wilson*, for the defendant. The question was, Whether by the death of *Simon* in the lifetime of his father, the testator, the residuary devise to *Simon* of the lands in *Bantry* were lapsed, and whether the remainder to *Hamilton* did then immediately take place?

For the defendants in error they insisted on the intention of the testator, and from the words "*entire estate*," that the time at which the limitation to *Hamilton* should take place was not till the estates in settlement on *Simon* and his issue should fall in, and the whole pass to *Hamilton*. *Holmes v. Meynel*, T. Jones, 172. That there is a distinction between the case where the first devise in tail is heir at law to the testator, and where he is a stranger; a stranger can only claim under the will, and must shew his interest expressly described therein; but the heir looks not for what he takes by the will, but for what is not expressly given away. The presumption is strongly in favour of the heir where he claims against a remainder-man. They denied that the heir at law was first devisee in tail in any of the cases where the remainder-man had taken immediately upon the lapse. The case of *Brett v. Rigden*, Plow. 341, was a devise in fee; and if given to the heir would be without effect, as he would take by descent. In *Hartopp's* case, Cro. Eliz. 243, it was only ruled, that neither the daughter nor the posthumous son of the first devisee, who died before the testatrix, should take: but the Court of Wards made no final determination; but because the office was not fully found, they directed a *melius inquirendum*; which could only be to inquire, whether the first devisee were heir at law to the testatrix; for it would have been absurd to direct it, if in no event either could have taken. In *Fuller v. Fuller*, Cro. Eliz. 422,† ejectment was brought by the heir at law; and the only resolution was that he was disinherited. But *Popham*, C. J. held clearly, that if one devise land to his eldest son in tail, remainder to the second son in tail, remainder to the third in fee; and the eldest son die, leaving issue, in his father's lifetime; his issue would have it, without a new publication; because the intent of the devisor was not to disinherit any of his sons: but otherwise in case of a devise to a stranger; for there the devisee being dead, the intent of the devisor does not appear to carry it from his own heir to the heir of a stranger. This distinction has never been contradicted; but it has been confirmed by Lord C. J. *Parker* in *Goodright v. Wright*, 1 Str. 32; and the reason is adopted, "That the heir of the eldest son is also heir to the devisor, and there appears no intention to disinherit any of his sons." This indeed is omitted in the report in 1 P. Wms. 397. In *Hutton v. Simpson*, 2 Vern. 722, called *Sympton v. Hornsby*, in Prec. in Chan. 439. 452, the first devisee was not heir at law; for one of two co-heirs is not the same as an heir. On a devise of the whole to one of two co-heirs, she takes by purchase. *Russeton v. Reading*, Prec. in Chan. 222. *Goodright v. Wright*, before mentioned, was the case of a stranger, and the decision was in favour of the heir. So must have been *Busby v. Greselate*, 1 Str. 445. *Hodgson v. Ambrose*, Dougl. 337, was also a devise to a stranger; and the words, "for want of such issue," will not postpone the remainder-man. As to any difficulty supposed in saying what estate the heirs of the devisee shall take; some part of the testator's intention must be frustrated; but his pri-

† In that case the testator, having issue *John*, *Richard*, *Edward* and *Henry*, devised lands to *Richard*, the second son, in tail: and after his death without issue, to *Edward* in tail; then to *John*, the eldest in tail; remainder to his own right heirs. *Richard* died in the lifetime of the testator, leaving an eldest son, *Thomas*, who the testator then said should have the land, devised to his father, *Richard*, as if *Richard* had died after him, the testator: then the testator died; and *Thomas* the son of *Richard*, being in possession, *John*, the eldest son of the testator, after entry and ouster, brought trespass.

... or necessary im-
... in the case of
... the cases may be
... case; 1. Where no
... estate of inheritance
... are annexed by the de-
... in its legal sense; and

... or if this be too much, the
... place is not new in law. *Shel-*
... estate-tail by implication from the
... the testator intended the limitation to

... there are clear words of devise, there
... the most technical description of an
... *Rigden*, "that the devise lapses if the
... In *Scrope's* case no distinction was made
... between the devise and the heirs" was holden merely to express
... the quality of the devise, through whom they meant to claim as
... heirs. In *Simpson v. Hutton*. The last case is
... *Hodgson v. Hodgson*. This proves the two rules, 1st, that the
... words heirs of the body and all the quantity of estate given to the first devisee,
... upon whose death the devise lapses. 2dly, That the next remainder
... takes effect between the devise and the heirs of the body. The distinction where the devise is to the heir at law or a
... stranger, this is the opinion of Lord C. J. *Popham*, in *Fuller v. Fuller*;
... but the question is not the same, and stands as his own idea. It is not confirmed
... in *Goodright v. Goodright*. But the Court make the issue of the eldest son take by
... purchase, and not the issue of the others? The case of *Hartopp*
... has been pushed to the other side. If any material fact had been the object of
... the devise, it would have appeared in some report. It must rather have
... been as to the devise in *Anderson v. Anderson* was determined without any consideration
... whether the devise was not at law. They said that *coheirs* stood exactly on the
... same ground as the heirs, when the same estate is devised to either, which would descend
... by law, it goes to the issue. The words "entire estate" in this will were used merely to
... avoid a repetition.

Lord Mansfield after stating the case, *ut supra*. To support the judgment of
the *A. B.* in *Anderson* we must suppose them to have gone upon ground like this; that it
is to be implied, though not expressed, in the will, that the testator meant to provide for
the contingency of the devisee dying in his lifetime, and then that the grandson should
take as a purchaser. In either of the other ways are considered, it will appear ut-
terly impossible to support them. I have a strong wish to support the claim of the plain-
tiff in *Anderson*, and have it put in every possible light to distinguish it from the letter
or reason of the case. Or we can doubt that the intent of the testator is otherwise
defeated. If the matter were entire, this might have weight; but it is so settled, and
the letter and reason of the authorities are so clear, that it would be impossible to shake
them, even if we were more than any one can suppose they are. The case of the de-
vises is a strong proof that the testator happens every day; and many titles depend upon it. It
is proper, therefore, to see what is the established law. At common law lands were not
devisable, and though they were devisable in some places by custom, very little to be
found in the books as to real estates before the statute of Wills. But in personal bequests
it is settled that the legacy is lapsed, because the legatee had nothing; and no represen-
tative, where the principal himself had nothing. The first case after the
statute of *Rigden*, which was a devise to *J.* and his heirs: the Court held
that *J.* in the lifetime of the testator; because the heir was no
heir; but this was only a mode of giving a fee to the principal.
The case was an estate-tail, with remainder over. Originally
there was a distinction between *Brett* and *Rigden*, and the case of an estate-
tail. For the issue in tail is clearly part of the object of the testa-
tor, *per formam doni*; but the authorities put them on the same foot-
ing is material to attend to. It is said there is no difference, because
for a will claims as a purchaser. There are authorities to the same
effect. Therefore the cause must turn on the distinction taken at bar

... from the learned Judge's argument on delivering judgment in the
... Hil. 13 Geo. 3, published by Mr. *Hargrave* in his *Law Tracts*,
... where a general account of the proceedings in this celebrated

4. Heirs of the body have been held to be words of purchase where the deviser has superadded fresh limitations, and grafted other words of inheritance upon the *heirs* to whom he gives the estate, shewing that he meant them to be the stock of a new descent. None of those exceptions will be found to apply here. But it may be said, that as the testator had previously given estates in tail male to the sons of *Peregrine* Duke of A., therefore, to give effect to the residuary devise, and to prevent it from being inoperative, it must be considered that the description of *heirs male* of the Duke was meant to designate the person who might come under that description at the time when that remainder was to attach in possession. But those words are not inoperative, if construed according to their strict legal signification, as giving the Duke a fee simple : (a) and it is more likely that the testator should have meant the Duke himself, whom he knew, to take the fee, than a remote stranger, who, after an indefinite failure of the Duke's issue male, might answer the description of his heir male. And to shew that the fee ultimately limited to the heirs male of the Duke was executed in him, he relied on, *Lewis Bowle's* case, 11 Rep. 79, b., and *Shelley's* case, 1 Rep. 93, b.; in which latter the same argument as to the inoperation of subsequent words of limitation, unless taken as words of purchase, was urged, without effect. But even if the ultimate remainder had been to such person as should be heir male to Duke *Peregrine*, it would not have helped the defendant; for he is not *heir male*, as he claims through a female; (b) nor is he *heir general*; for Lady *Willoughby* and Lady *Cholmondeley* are the heirs general of the Duke. The authority of Lit. s. 23, 24,

between the case of a devise in tail to the heir with remainders over, and that where the first devisee is a stranger: and it is said, that there is no case of such a devise to an heir. I doubt that assertion. *Hutton v. Simpson* seems to be the case of an heir; for there is no distinction between a *coheir* and a *sole heir*: a *coheir* is equally entitled to her share. And there is another old case of *Packman v. Cole*, 2 Sid. 53. 78. In *Hodgson v. Ambrose*, it did not appear to the Court who was heir. If this distinction were admitted, how is the heir to take? Is it under the will, by implication that B. is not to take till the failure of issue of A.? This would be just the same in the case of a stranger; and there is an end of the heirship if he take by the will. Or he is to take by descent *quousque*? This too is the same in the case of a stranger. The last way, and perhaps the best, is that the event overturns the whole, and the heir shall take, not being disinherited by express words. But this begs the question: he is disinherited by express words: giving him an estate-tail excludes any descent. There is really no distinction between the heir and a stranger. The dictum of Lord C. J. *Popham* was upon a point not in the case; and he puts it in a way not attempted to be supported by Mr. *Wilson*; for he would have none of the sons disinherited. There is likewise another dictum of his there, which is certainly wrong, *viz.* that if lands be given to A. and the heirs of his body, and A. is dead, that the heir shall take. Upon every ground, therefore, judgment must be reversed.

WILLES and ASHHURST, Justices, agreed.

BULLER, J. The event was not provided for. In *Goodright v. Wright* it was fully settled, that the words "heirs," &c. are a description of the estate of the first taker. I am inclined to think that *Hartopp's* case was the case of an heir, for it was a brother to the testator. And if there was any distinction between the heir and a stranger, the Court could not have given the judgment they did, without first knowing whether he were actually heir. Lord *Macclesfield* did not intend to confirm Lord C. J. *Popham's* dictum: he only meant to say, that allowing it, it did not extend to the case then before the Court. As to the intent, no intent not to disinherit the heir appears on the will; for the testator has preferred the remainder-man to the issue of the first taker. The Court cannot imply a devise where there is one to the contrary. Nor is the will to be altered by the event, but every part shall take effect which can. I doubt whether Mr. *Wilson* is correct in the case he put; for a devise on failure of issue, and not till then, would still be a remainder, and take effect immediately, if the prior devise were removed.

Judgment.

This judgment of reversal was afterwards affirmed in the House of Lords. 1782. [See a report of this case in Dom. Proc. 3 Bro. Parl. Ca. 435. Tonil. e

(a) Vide Lit. s. 31.

(b) Co. Lit. 24, b. 25, 26, b. and vide Mr. *Hargrave's* Note, 3, to page 24, b through subsequent pages, and citing a variety of authorities to the same purj

and of *Ld. Coke's Comment* is express, that, under a gift in tail to heirs male, the descent must be wholly by heirs male, and the son of a daughter cannot inherit. And it is a general rule established by a current of authorities^(a) that whoever claims as heir male by purchase must be general heir as well as nearest male descendant. The only contradictory authority is that of *Lord Cowper, C. in Brown v. Barkham*,^(b) who held, that a younger brother was capable of taking as heir male, under a devise to the heirs male of the body of the testator's great-grand-father, though the daughter of an elder brother was heir general, but though that decree was ultimately established on special circumstances, yet the general doctrine of *Ld. Cowper* against the opinion of *Ld. Coke* was overruled by *Ld. Hardwicke*^(c) upon a bill of review.

Copley argued for the defendant, that *Brownlow Duke of Ancaster* took a fee in the remainder by purchase, under the description of *heir male of Duke Peregrine*; which fee descended to the defendant from Duke *Brownlow*. The words "right heirs male of the said Duke of Ancaster" are either words of limitation or of purchase: if words of limitation, the Duke, it is said, either took in fee simple, or in tail: but he did not take in fee simple by reason of the word *male*, which limits the course of descent; and the passage cited from *Co. Lit.* has always been considered as applied only to deeds, and not to wills. He could not therefore take in fee simple, without rejecting the word *male*; and that point was not much insisted on. Neither did he take an estate tail; for though it be true in general, that a devise to one and his heirs male will give him an estate in tail male, yet that is by substituting the words "of the body" by implication, in order to effectuate the intention of the testator; which is the reason given in the same passage as that cited from *Co. Lit.*, and is also to be found in other books, as in *Bro. Abr. Devise*, pl. 1, referring to 27 H. 8. 27, a. and in *Baker v. Wall*, 1 *Ld. Ray.* 186. But here there could have been no such intention in this part of the will, and therefore there can be no such implication; for the testator had before given estates in tail male to the first and other sons of Duke *Peregrine*, and had interposed trustees to preserve the contingent remainders to those sons during the life of the Duke, with the like devise over to *Brownlow Bertie*, and the like limitations to his sons: the ultimate remainder therefore to the right heirs male of Duke *Peregrine* was certainly not intended to take effect till after failure of his sons and their male descendants. [*Bayley, J.* Suppose *Peregrine Duke of Ancaster* had a son who had died in the lifetime of the testator, leaving a son, the latter could only have taken as heir male of the Duke.] He would have taken according to my argument, as a purchaser. [*Bayley, J.* But he would also have taken by descent.] Still the different limitations in the order of the will shew, that the testator could not have intended to give Duke *Peregrine* an immediate estate either in fee or in tail male; for this would have been to render nugatory the many intervening remainders. Then if these words neither gave a fee nor an estate tail to Duke *Peregrine*, as words of limitation, they must be construed to be words of purchase: and then the only question is, at what period the devise is to attach on the person answering the description of *heir male of Duke Peregrine*? It could not be in the lifetime of the testator, nor during the life of Duke *Peregrine*, who could have no heir during his life: it must therefore of necessity be fixed at the death of the testator who survived the Duke: there could be no necessity for deferring it to the time when *Brownlow Duke of Ancaster* should die without issue male. In *Jobson's case*, *Cro. Eliz.* 576, it was considered, that if the devisee had at the time of the devise, and at the death of the testator, answered the description

(a) All the authorities are collected in *Mr. Hargrave's Note*, 3, to *Co. Lit.* 24, b. and subsequent pages.

(b) *Preced. in Chan.* 442. 461. *Gilb. Rep.* 116. 131, and 1 *Str.* 35.

(c) *Vide Lord Hardwicke's words*, as collected from a MS. Note in the same Note on *Co. Lit.* continued in p. 33, b.

of "next of his kin of his *name*," she would have been entitled to take in remainder, under that description, after a previous devise to another in tail, who, after the death of the testator, entered and died without issue: but because she had then lost her name by marriage, she was held not to be entitled. Lord *Hardwicke*, indeed, in *Pyot v. Pyot*, 1 Ves. 337, 8, said, that he was not quite satisfied with that case, on the ground that the devise had no regard to the continuance of the *name*, but regarded only the *stock*: but he considered it as a vested remainder, and not depending on the contingency, who should answer the description at the determination of the prior estate tail. And in *Doe v. Over*, 1 Taunton, 263, a devise of land, after a life estate to the wife, to be divided at her decease amongst *the relations on his side*, was held to vest in such of the testator's relations as answered the description at the time of his death. So here the testator meant by the ultimate limitation to the heirs male of Duke *Peregrine*, that after failure of the heirs male of *his body*, to whom the estate was before limited, the person who at the testator's death was the Duke's next heir male should take a vested remainder in fee. *Brownlow* Duke of *Ancaster* was that person; and there can be no doubt that the testator's object was, that the person who should succeed to the dukedom should take the property. Admitting therefore the general rule, that under the description of *heir male* the person who takes must be *heir general*: as well as *heir male*; yet if it appear, that by such description the testator meant to designate a particular class of heirs, the Court will give it that effect. And nothing can turn on the word "heirs" being used in the plural; because it was applied to a class of persons one of whom was to take at the particular time to which the devise referred.

Lord ELLENBOROUGH, C. J. It does not appear that there is any such particular intention expressed on the face of the will as to vary the legal technical meaning of the words used in it. The words themselves are plain. The testator gives an estate for life to *Peregrine* Duke of *Ancaster*; and then, after giving estates in tail male to the first and other sons successively of the Duke, with remainders to Lord *Brownlow Bertie* for life, and to his first and other sons successively in tail male, he gives the ultimate remainder to the right heirs male of the said Duke of *Ancaster* for ever, which necessarily means Duke *Peregrine*. Then by the known rule of law, this last limitation to the heirs male of Duke *Peregrine* operates, with the estate for life before devised to him, to give him an estate of inheritance, either in fee or in tail male: it is immaterial to consider which, as he died before the testator. If this had been a gift by deed, according to the passage cited from Co. Lit. it would have been a fee; but being by will, according to the case cited from the year book in Bro. Devise, it would be an estate in tail male. But whether the one or the other, by the rule in *Shelley's* case,⁽¹⁾ acted upon in *White v. Warner*, and a long string of cases, the devise to *Peregrine* Duke of *Ancaster* lapsed by his death before the testator, and therefore the lessor of the plaintiff, as heir at law to the testator, is now entitled to recover.

LE BLANC, J.(a) This is a clear case on the part of the heir at law. The rule in *Shelley's* case is established, and must govern the present, unless we can find a manifest intention of the testator to the contrary. Having given an estate for life to Duke *Peregrine*, with remainder to his first and other sons successively in tail male, with other remainders, the testator concludes with a limitation to the right heirs male of the Duke for ever. Those words, as they are used in a will, would have given the Duke an estate in tail male in remainder. But the reason of their giving such an estate, it is said, is

(1) As to how far the rule in *Shelley's* case has been recognized by the courts in this country, see *Bishop v. Selleck*, 1 Day 299. *Brant v. Gelston*, 2 Johns. Ca. 384. *Smith & ex. v. Chapman & al.* 1 Hen. & Mun. 240. *Lessee of Findley & al. v. Biddle*, 3 Binn. 139.

(a) *Grose*, J. was indisposed, and absent.

because the words "*of the body*" are supplied by implication ; and that no such implication can be made here, because the testator had before given estates in tail male to each of the sons of the Duke in succession. This argument would perhaps prevail, if these words could be construed to be words of purchase : but we can see no such manifest intention to use them as such, so as to controul the general rule of law, that where an estate of freehold is given to the ancestor, and there is a subsequent limitation in the same instrument to the heirs or heirs male of the same ancestor, that gives him an estate of inheritance.

BAYLEY, J. I am of the same opinion. Where the words of the subsequent devise do not refer to a particular individual or individuals of the family of the same person to whom an estate for life is first given, but to a class of persons, comprehending all of that class who could claim from or through him, there they are considered as words of limitation, and not of purchase. But it is argued, that they cannot be considered as words of limitation in this instance, because the estates before given in succession to all the sons of Duke *Peregrine* in tail male, would comprehend all the *heirs male* of the body of Duke *Peregrine*, and therefore that the ultimate remainder to his heirs male would be inoperative. But that does not follow ; for cases may be put where persons would have taken as "*heirs male*" of the body of the Duke, and yet would not have taken under the limitation to his first and other sons in tail male ; as if the Duke had had an eldest son who died in the lifetime of the testator, leaving a son. Again, suppose *Brownlow* Duke of *Ancaster* had had three sons by three wives, each of those sons would have taken in succession under the description of sons of *Brownlow* : but if his eldest son had died leaving only a daughter, after a remainder in fee had vested in *Brownlow* as heir male of Duke *Peregrine* by purchase, which is contended for ; such remainder would have descended to the daughter of the eldest son ; which would certainly have been contrary to the testator's intention : but the ultimate remainder being to the heirs male of Duke *Peregrine* confines the descent to the male line.

Postea to the Plaintiff.

Powdick v. Lyon, one, &c.

11 East, 565. Nov. 21, 1809.

Where a plaintiff in *scire facias* demanded execution for a certain sum recovered by judgment of *B. R.* for damages and costs, with a *prout patet per recordum*, and also a certain other sum adjudged to him in the Exchequer Chamber, for his damages and costs of a writ of error, without a *prout patet*, &c. held that the demand being divisible, and no objection lying to the sum first demanded, a demurrer to the whole declaration was bad, and the plaintiff was entitled to judgment generally on such demurrer ; the objection to the latter sum demanded being merely formal, and not available but on special demurrer.

THE plaintiff declared in *scire facias*, and set forth the writ to the sheriff, reciting that whereas the plaintiff had sued by bill in *B. R.* and by the judgment of this Court had recovered against the defendant 21*l.* 10*s.* for his damages, as well for non-performance of promises made to him by the defendant, as for his costs and charges by him about his suit in that behalf expended, whereof the defendant was convicted, *as appears of record* ; and also 13*l.* 10*s.* adjudged to the plaintiff in the Exchequer-Chamber according to the form of the statute, &c. for his damages costs and charges which he had sustained on occasion of the delay of execution of the judgment aforesaid, on pretence of prosecuting a writ of error prosecuted by the defendant against the plaintiff in the Exchequer-Chamber before the Justices of C. B. and Barons of the Exchequer, &c. according to the form of the statute : and though judgment

was thereupon given and affirmed in form aforesaid, yet execution of that judgment still remained to be made to the plaintiff: whereupon the sheriff was required to make known to the defendant, that he, at, &c. on, &c. should shew cause why the plaintiff ought not to have his execution against him of the damages costs and charges aforesaid, according to the form and effect of the recovery and adjudication aforesaid, &c. And then he set forth the sheriff's return of *scire feci*, and the defendant's appearance, and then prayed execution of the damages aforesaid according to the form and effect of the said recovery.

The defendant demurred to the whole declaration, and stated as special cause, that it was not alleged therein, that there was any record of the supposed recovery of the said sum of 13*l.* 10*s.* for the damages, costs and charges, of the plaintiff, sustained by the delay of execution of the said judgment on pretence of prosecuting the writ of error by the defendant against the plaintiff in the Exchequer-Chamber; and because there was no reference in the declaration to any such record.

Barnes, in support of the demurrer, began by urging the objection taken to the declaration, that where matter of record was the foundation of the plaintiff's suit, or of the substance of the plea, it ought to be certainly and truly alleged with a *prout patet per recordum*: otherwise where it is but conveyance(a) or inducement. But

Lord ELLENBOROUGH, C. J. interposed, by observing that the demurrer was too large: it went to the whole of the plaintiff's demand in the declaration, when it was clear that he was entitled to recover part of it, namely, the 21*l.* 10*s.* To which *Barnes* answered, admitting the general rule, as laid down in *Pinkney v. The Inhabitants of Rutland*, 2 Saund. 379, that where a declaration is good in part and bad in part, and the defendant demurs to the whole, the plaintiff shall have judgment for that part which is good: yet this, he said, only applied to cases where there was an ulterior proceeding, as a writ of inquiry to assess the damages on that part which was good. But here the plaintiff will be entitled, if he succeed, to take out execution for the sum recovered and the costs.

BAYLEY, J. If the sum demanded be divisible on the record, as it appears to be, and there be no objection to one part of it, the demurrer, which goes to the whole, is bad.(1) And here the objection is merely formal,(b) and the plaintiff is substantially entitled to the whole of his demand.

Lord ELLENBOROUGH, C. J. The two sums are clearly divisible; the plaintiff demands 21*l.* 10*s.* recovered by judgment of this court for his damages and costs, as appears of record, and also 13*l.* 10*s.* adjudged to him in the Exchequer-Chamber, &c. Then the demurrer being too large, and therefore bad, we must give judgment for the plaintiff generally; for we cannot give a judgment that the demurrer is in part good.

Abbott was to have argued against the demurrer.

(a) Co. Litt. 303, a. and vide in support of the particular objection. *Corbet v. Cook*, Cro. Eliz. 466. *May v. Spencer*, T. Ray. 50. *Guilliam v. Hardy*, 1 Ld. Ray. 216. *Alanson v. Butler*, 1 Lev. 211, and Lill. Entr. 644, 5.

(1) Vide *Adams v. Willoughby*, 6 Johns. Rep. 65. *Roe v. Crutchfield*, 1 Hen. & Mun. 361. Lawes on Pleading in Assumpsit 282. 1 Chitty on Pleading, 643.

(b) By the st. 4 Ann. c. 16. s. 1, for the amendment of the law, and the better advancement of justice, the Judges are required, upon any demurrer joined, to give judgment according as the very right of the cause and matter in law shall appear to them, without regarding any defect in the pleading or process, &c. except such as shall be specially set down as cause of demurrer: and no exception shall be taken (amongst other things) for not alleging *prout patet per recordum*, unless specially shewn for cause of demurrer. Here then the demurrer being informal, it was the same as if there had not been any demurrer specially assigning this defect; and then the plaintiff would have been entitled to judgment for the whole sum.

Vere v. Lord Cawdor, and King.

11 East, 568. Nov. 21, 1809.

A plea to an action of trespass, for killing the plaintiff's dog, cannot justify the act by stating that the Lord of the manor was possessed of a close, and that the defendant, as his game-keeper, killed the dog when running after hares in that close for the preservation of the hares: such plea not even stating that it was necessary to kill the dog for the preservation of the hares; nor stating that it was the dog of an unqualified person.

THIS was an action of trespass for shooting and killing a certain dog of the plaintiff. The defendants pleaded the general issue: and the defendant *King* also pleaded specially, that before and at the time when, &c. Lord *Cawdor* was and still is possessed of a certain close within and part and parcel of the manor of *Kidwelly* in the county of *Caermarthen*, of which he was lord, and the defendant *King* before and at the said time when, &c. was the game-keeper of the said manor, duly deputed and appointed by the said lord to preserve the game upon the said manor: and because the plaintiff's dog at the said time when, &c. was in the said close of the said lord, so being part and parcel of the said manor, *running after, chasing, and hunting* divers hares there, the defendant *King* as such gamekeeper, &c. and within the said close, &c. *for the preservation of the said hares*, shot and killed the said dog. To this there was a general demurrer.

Marryat in support of the demurrer, after stating the question to be, whether a gamekeeper of a manor had a right to shoot every dog which he found following game within the boundaries of the manor, and that too in a case where the dog is not stated to have belonged to an unqualified person, (a) or to have been encouraged by the owner to pursue the game; was stopped by the Court who were clearly satisfied that the plea was bad; and observed to the plaintiff's counsel that it did not even state that the killing of the dog was necessary for the preservation of the game.

Scarlett, for the defendant, relied upon the cases of *Wadhurst v. Damme*, Cro. Jac. 45, and *Barrington v. Turner*, 3 Lev. 28, as shewing that the justification need not allege that the killing of the dog was a necessary means of preserving the game; but only, as in the first case, that the dog was divers times killing conies in the warren, and therefore the warriner finding it there at the time when, &c. running at the conies there, killed it. And in the second, that the greyhounds chased a deer in the defendant's park, and there killed her, on which to prevent more mischief by them, the defendant took the greyhounds and killed them. In which latter case, there could have been no necessity for killing the dogs after the defendant had taken them. The cases on this subject, he observed, were collected by Mr. Serjt. *Williams* in a note to the case of *Wright v. Ramscot*, 1 Saund. 84, who refers to a similar precedent of such a plea in 2 Rich. Prac. C. P. 435, (4th edit.) justifying the killing of a greyhound for coursing deer in a park. [*Le Blanc*, J. To make these cases bear upon the present, you must assimilate the hare to rabbits in a warren, or deer in a park, which are the subjects of property.] In *Keeble v. Hickeringill*, 11 Mod. 75, *Powell*, J. says, every man has a property in animals *feræ naturæ* while they are upon his own land *ratione soli*: and in *Sutton v. Moody*, Salk. 556. 1 Ld. Ray. 250, and Com. Rep. 34, the Court say, that "a warren is but a franchise to keep the conies; and the owner has no more property in the conies themselves than any man that has them in his own land. If one start a hare in my close, and kill her there, it is my hare: otherwise if he hunt her into the ground of a third person; then it is the hunter's."

(a) By st. 23 and 23 Car. 2. c. 25, lords of manors may appoint gamekeepers who may take and seize all guns, dogs, &c. to kill game, used by any person who by that act is prohibited from keeping the same.

Lord ELLENBOROUGH, C. J. The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground? And if there be any precedent of that sort, which outrages all reason and sense, it is of no authority to govern other cases. There is no question here as to the right to the game. The gamekeeper had no right to kill the plaintiff's dog for following it. The plea does not even state that the hare was put in peril, so as to induce any necessity for killing the dog in order to save the hare.⁽¹⁾

Per Curiam,

Judgment for the Plaintiff.

Carrington v. Taylor.

11 East, 571. Nov. 16, 1809.

Firing at wild fowl to kill and make profit of them, by one who was at the time in a boat, on a public river or open creek, where the tide ebbs and flows, so near to an ancient decoy on the shore (about 200 yards) as to make the birds there take flight; the defendant having before fired at a greater distance from the decoy, which brought out some of the birds from thence; though he did not fire into the decoy pond; is evidence of a wilful disturbance of and of damage to the decoy for which an action on the case is maintainable by the owner.

THIS was an action on the case, in which the plaintiff declared, that where-as he before and at the time of the grievance after mentioned, and from thence hitherto hath been, and still is, lawfully possessed of and in a certain place, prepared with suitable and proper conveniences for decoying, taking, and catching of wild fowl, commonly called a decoy, situate and being at the parish of *Bedumont-cum-More* in the county of *Essex*, and by means of such decoy during all the time aforesaid, until the committing of the grievance after mentioned, had been and was used and accustomed to decoy, take and catch divers great quantities of wild fowl, to wit, wild ducks, mallards, teal, and widgeon, by reason whereof great profits and advantages had accrued and still ought to accrue to him; yet the defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure and aggrieve the plaintiff, and to deprive him of a great part of the profits and advantages arising from his said decoy, afterwards, and whilst the plaintiff was so as aforesaid possessed thereof, on the 1st of *January* 1809, and on divers days, &c. shot off and discharged divers guns and other engines, and made and caused to be made divers violent and loud noises so near to the said decoy of the plaintiff as thereby then and there greatly to disturb and frighten divers wild fowl then being at or near the said decoy; insomuch that divers wild fowl, to wit, 500 wild ducks, &c. then and there flew away, and wholly quitted the said decoy, and divers other wild fowl, to wit, &c., which were then and there about to enter the said decoy were thereby then and there prevented from entering the same: and by means thereof the plaintiff was prevented from decoying, catching and taking the said wild fowl in such plenty as he otherwise might and would have done, to wit, at, &c., and thereby the plaintiff lost and was deprived of the profits, &c. which might and otherwise would have accrued to him from his said decoy, to wit, at, &c. Wherefore, &c.

At the trial of this case before the Lord C. B. *Macdonald* at *Chelmsford*, the plaintiff's right to the decoy, which was an ancient decoy, was proved; and it also appeared that the defendant sought his livelihood in part by shooting wild fowl from his boat on the water, for which boat with small arms he had a licence from the Admiralty for fishing and coasting along the shores of *Essex*: on one of the salt creeks of which county, called the *Blackwater* river,

(1) [See the case of a dog killed by a concealed dog-spear, whilst running through a close belonging to the defendant, who was held not to be responsible, reported in *Jordan v. Crump*, 8 M. & W. 782.—W.]

where the tide ebbs and flows, near *Walton*, the decoy in question was situated. The only proof of the disturbance by the defendant was, that he, being out in his boat shooting wild fowl in a part of the open creek, first fired his fowling piece within about a quarter of a mile of the plaintiff's decoy, when 2 or 300 wild fowl came out; and afterwards approached nearer, and fired again at wild fowl on the wing at the distance of about 200 yards and upwards from the decoy pond, when he killed several widgeons, and immediately on the noise of the gun 4 or 500 wild fowl took flight from the pond; but it did not appear that he fired into the decoy. The learned Judge left this as evidence to the jury of a wilful disturbance of the plaintiff's decoy by the defendant, for which this action would lie; and the jury found their verdict for the plaintiff with 40s. damages.

Garrow now moved to set aside the verdict, as being against law and evidence: the defendant having a right, he said, to shoot at the wild fowl in the place where he was, which was an open creek or arm of the sea, where the tide flowed and reflowed; and not having gone upon the plaintiff's land, nor fired into his decoy at the birds there.

The Court however said, that they saw no ground for disturbing the verdict in point of law: and *Le Blanc*, J. referred to an old precedent of such an action, (a) which had been followed by one or two others within his own remembrance on the *Norfolk* circuit. And the evidence, they observed, was proper to be left to the jury who had decided upon it.

Rule refused.

(a) The case alluded to is cited in Bull. Ni. Pri. 79, as *Hickeringall's* case, Hil. 5 Ann.; which is reported by the name of *Keeble v. Hickeringall*, in 11 Mod. 74. 130. 3 Salk. 9, and Holt's Rep. 14, 17, 19. From these it appears to have been an action on the case for disturbing the plaintiff's decoy; and after a verdict for the plaintiff, it was moved to arrest the judgment for the insufficiency in law of the declaration. The case appears to have been twice argued, first in Hil. 5 Ann.; and afterwards in *Easter* 5 Ann.; the arguments are best reported in Holt's Rep. 14 and 17. And in p. 14, the facts are stated thus, "that the defendant was lord of a manor and had a decoy; and the plaintiff had also made a decoy upon his own ground, which was next adjoining to the defendant's ground, and pretty near also to the defendant's decoy; and therein the plaintiff had decoy and other ducks, whereof he made considerable profit;" and declares, &c. It does not appear how the facts first mentioned were before the Court upon the motion in arrest of Judgment, as they did not appear upon the face of the declaration; nor did the fact there appear which is afterwards (p. 17,) stated, that the defendant was upon his own close when he shot off the gun; but these facts were probably assumed *arguendo*, as consistent with the allegations of the declaration.* Not that perhaps the introduction of these facts would have varied the question; as the declaration proceeded to charge that the defendant fired the guns which made the disturbance *with design to damnify the plaintiff, and to frighten away the wildfowl from his decoy*; which consequently precluded, after verdict, any consideration of the question, whether he had not a right to do these acts on his own ground as a mean of taking the birds for his own benefit. In the report of the case in 11 Mod. 75, Lord C. J. Holt says "suppose the defendant had shot "in his own ground; if he had occasion to shoot, it would have been one thing; but to "shoot on purpose to damage the plaintiff is another thing, and a wrong." It should seem to be the same thing if he fired for the purpose of disturbing the wildfowl in his neighbour's decoy, that he might take the chance of benefitting himself by shooting them when on the wing in consequence of such disturbance. The following statement of the declaration and judgment in that case, which is taken from a copy of Lord C. J. Holt's own MS. in my possession, shews the true nature of the action, and of the grounds on which it was decided:

* Vide what is said by Holt, C. J. at the beginning of p. 276.

Keeble v. Hickeringill.

Tr. 5 Ann.

An action on the case lies for discharging guns near the decoy pond of another, with design to damnify the owner by frightening away the wildfowl resorting thereto, by which the wildfowl were frightened away and the owner damnified.

ACTION upon the case. Plaintiff declares that he was, 8th November in the second year of the queen, lawfully possessed of a close of land called *Minott's Meadow, et de quodam vivario,* vocat. a decoy pond*, to which diverse wildfowl used to resort and come; and the plaintiff had at his own costs and charges prepared and procured divers decoy-ducks, nets, machizes, and other engines for the decoying and taking of the wildfowl, and enjoyed the benefit in taking them; the defendant, knowing which, and *intending to damnify the plaintiff in his vivary, and to fright and drive away the wildfowl used to resort thither, and deprive him of his profit*, did, on the 8th of November, resort to the head of the said pond and vivary, and did discharge six guns laden with gunpowder, and with the noise and stink of the gunpowder did drive away the wildfowl then being in the pond: and on the 11th and 12th days of Nov. the defendant, *with design to damnify the plaintiff, and frighten away the wildfowl*, did place himself with a gun near the vivary, and there did discharge the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wildfowl was frightened away, and did forsake the said pond. Upon not guilty pleaded, a verdict was found for the plaintiff and 20*l.* damages.

Holt, C. J. I am of opinion that this action doth lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, 1st, this using or making a decoy is lawful. 2dly, This employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, Every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wildfowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not effect any damage, yet are they mischievous in themselves; and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him; though they do not charge him with any crime that may make him obnoxious to punishment; to say a merchant is broken, or that he is failing, or is not able to pay his debts. 1 Roll. 60, 1; all the cases there put. How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit by his employment. Now, there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action; though by grant from the king. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. 22 H. 6, 14, 15. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr. *Hickeringill* had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 H. 4, 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. *Hickeringill* should lie in the way with his gun, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. 29 E. 3, 18. A man hath a market, to which he hath toll for horses sold: a man is bringing his horse to market to sell: a stranger hinders and obstructs him from going thither to the market: an action lies because it imports damage. Action upon

* 2 Inst. 100. *Vivarium* is a word of large extent, and *ex vi termini* signifieth in land or water where living things are kept.

case lies against one that shall by threats fright away his tenant at will. (1) 9 H. 7, 8. 21 H. 6, 31. 9 H. 7, 7. 14 Ed. 4, 7. Vide Rastal. 662. 2 Cro. 423. Trespass was brought for beating his servant, whereby he was hindered from taking his toll; the obstruction is a damage, though not the loss of his service. There was an objection that did occur to me, though I do not remember it to be made at the bar; which is, that it is not mentioned in the declaration what number or nature of wildfowl were frightened away by the defendant's shooting. As in 5 Rep. 34, Playter's case. Trespass *quare clausum suum fregit, et pisces suos cepit*. After a verdict for the plaintiff, and entire damages, it was moved in arrest of judgment, that the declaration was not good, because it was not said of what nature, nor of what number the fishes were; which was held to be a fatal exception, not helped after verdict by the statute of jeofails. Resp. But indeed here is not the number stated. Now considering the nature of the case, it is not possible to declare of the number, that were frightened away; because the plaintiff had not possession of them, to count them. Where a man brings trespass for taking his goods, he must declare of the quantity, because he, by having had the possession, may know what he had, and therefore must know what he lost. This is plain by several authorities. 2 Cro. 123. *Dent v. Oliver*. Trespass for beating and hindering his servant from taking and collecting his toll; objection that it is not said what quantity of toll he was to take: but that could not be known. Owen's Rep. 109. *Escott v. Laureny*. Action upon the case because the defendant hindered him from taking toll of divers pieces of wool, and sheweth not how many; yet the declaration was good. 2 Cro. 435. *Johns v. Wilson*. Trespass *quare clausum fregit, et spinas suas ad valentiam succidit*. Exception was taken to the declaration because the number of the thorns was not mentioned: yet held not to be a good exception. Allyn, 22. *Lodge v. Weedon*. Action upon the case: the plaintiff declared that the defendant killed divers cattle infected with the murrain, and threw the entrails into the plaintiff's field, *per quod diversa averia* of the plaintiff's *interierunt*. After verdict, exception was taken in arrest of judgment, because it did not appear how many cattle of the plaintiff's did thereby perish; yet judgment was given for the plaintiff, because there need not such certainty in an action upon the case, because the plaintiff is only to recover damages for them. 9 Rep. 43, 44. Earl of Salop's case. Action on the case for hindering the plaintiff in taking the profits of his stewardship of such a manor; not shewing what the profits were, or how much they amounted to: it was never questioned but the declaration was good. The plaintiff in this case brings his action for the apparent injury done him in the use of that employment of his freehold, his art, and skill that he uses thereby. Secondly, says Mr. Solicitor, here is not the nature of the wildfowl stated; for wildfowl are of several sorts; ducks, teal, mallard, and indeed all birds that are wild are wildfowl. Resp. It is true in the large signification of the word they are so: and also the word *fowl* comprehends all birds and poultry: but *wildfowl* are taken in a more restrained sense; pheasants and partridges are not thereby understood, for they are fowl of warren. Manwood's Forest Law, cap. 4, sec. 3. 1 Register, 93, 96, F. N. B. 86. Rastal, 585. Wildfowl are known in the law, and described by the statute of 25 H. 8. c. 11, which doth take notice of wildfowl. The title of the statute is "against destroying of wildfowl." It recites, that there hath been within this realm great quantities of wildfowl, as ducks, mallards, widgeons, teals, wildgeese, and divers other kind of wildfowl, which is reasonable to be understood of that sort that do get their prey in that manner. The stat. of 3 & 4 Ed. 6. c. 7, which repeals that of the 25 H. 8, takes notice of wildfowl, and hath the general word *wildfowl*, without coming to particulars. Therefore, when the declaration is of wildfowl, it is not to be understood that sparrows, wrens, or robbin-red-breasts can be thereby included. Besides, *Fluminea Volucres*, in Littleton's Dictionary, are understood *wildfowl*, as being the only words in Latin that we have to express it. Litt. Dict. tit. Wild Fowl. And when we do know that of long time in the kingdom these artificial contrivances of decoy ponds and decoy ducks have been used for enticing into those ponds wildfowl, in order to be taken for the profit of the owner of the pond, who is at the expence of servants, engines, and other management, whereby the markets of the nation may be furnished; there is great reason to give encouragement thereunto; that the people who are so instrumental by their skill and industry so to furnish the markets should reap the benefit and have their action. But, in short, that which is the true reason, is, that this action is not brought to recover damage for the loss of the fowl, but for the disturbance; as 2 Cro. 605, *Dawney v. Des*. So is the usual and common way of declaring.

(1) Upon the same principle it was held, that an action lay against the master of a vessel for purposely firing a cannon at some negroes at *Calabar* on the coast of *Africa*, and thereby deterring them from trading with the plaintiff. *Tarlton & al. v. M'Gawley*, Peake's Ca. 205.

The King v. The Inhabitants of Hardwick.

11 East, 578. Nov. 22, 1809.

A rated parishioner not being bound upon an appeal touching the settlement of a pauper, to give evidence against his own parish, the opposite parish may give evidence of his declarations as to the facts in issue; the weight due to which must depend upon his means of knowledge as to the facts so declared, and the genuineness of the declarations, to be collected from circumstances.

A son apprenticed out by his father to a master living under a certificate in another parish, and not thereby acquiring any settlement of his own, but receiving cloaths from his father, and visiting him from time to time, and returning home to him after the expiration of his apprenticeship, before he was of age; though he went out to service again in two days after receiving more cloaths; is not emancipated from his father's family, and therefore follows a settlement gained by the father while he was so serving as an apprentice.

AN appeal against an order for the removal of *Joseph Vipond*, *Mary* his wife, and their children, by name, was entered at the sessions in the name of "The Churchwardens and Overseers of the Poor of the Parish of *Hardwick* in the County of *Norfolk*, Appellants, and the Churchwardens and Overseers of the Poor of the Parish of *Fulham Saint Mary the Virgin*, in the same County, Respondents." And upon the hearing of the appeal, the Sessions confirmed the order, subject to the opinion of this Court upon a case which stated,

That *John Vipond*, the father of the pauper *Joseph*, was a settled inhabitant of the parish of *Forncett St. Mary*, in *Norfolk*, and about 40 years ago came to reside in the parish of *Hardwick*, in the same county, on a tenement at the rent of 5*l.* 10*s.* per annum. The pauper, *Joseph Vipond*, who is now 37 years of age, was born in that parish: and when he was 15 years old, and during his father's residence on the tenement at the above rent, he was bound apprentice to *S. Warren*, of *Besthorpe*, in *Norfolk*, cordwainer, by indenture, for four years, which time he regularly served with his master, who resided in *Besthorpe* under a certificate from the parish of *Bunwell*, in the same county. During the first year of the son's apprenticeship *John Vipond*, the father, purchased the tenement on which he resided at *Hardwick*, for 87*l.* Whilst the pauper was in the service of *Warren*, he was clothed by his father, whom he occasionally visited on holidays, and at other times with his master's leave. At the expiration of the apprenticeship, the pauper, being then 19 years of age, returned to his father's house in *Hardwick*, where he stayed two days, and received some new cloaths. He then went back to his former master, *Warren*, with whom he made an engagement to work by the piece; and he continued working under such engagement in *Besthorpe* for a year and a quarter. The pauper afterwards worked by the piece with another cordwainer of the name of *Burn*; and with both *Warren* and *Burn* he made his own agreements, but never let himself for a year to either of them, or to any other person. The respondents, in order to prove the pauper's settlement in *Hardwick*, called the father, who being a settled(a) inhabitant of that parish, refused to be examined. They then called the pauper himself, who proved from his knowledge, that his father had resided on the tenement at *Hardwick* for 25 years, and that it was now worth more than 10*l.* per annum. And the Court admitted the pauper to give evidence of his father's declarations to him, that he (the father) had purchased the house when the pauper was 16 years of age for 87*l.* and that he had about 10 years ago laid out above 100*l.* on the premises. The Court were of opinion; that the pauper was not emancipated by his resid-

(a) He was in fact a rated as well as settled inhabitant; though by mistake, as it seemed, that was not stated in the case; but the fact was assumed in the course of the argument, and it was the ground of the objection taken at the Quarter Sessions.

ing in *Besthorpe* under the indenture of apprenticeship, nor by any other act subsequent to it; and therefore confirmed the order.

Alderson, in support of the orders, said, that it had been repeatedly decided, that a pauper under age, who has been put out by his father as an apprentice with a certificated person in another parish, by which no settlement could be gained, returning again to his father's family, is not emancipated, but follows his father's settlement; as in *R. v. Halifax*, Burr. S. C. 806; *R. v. Witton cum Twanbrooke*, 3 Term Rep. 355; *R. v. Collingburn Ducis*, 4 Term Rep. 199; *R. v. Ingworth*, 3 Term Rep. 399. And in *Rez v. Roach*, 6 Term Rep. 247, which was the case of an adult leaving her father's house and going into service, *Lawrence*, J. took the distinction, that if the daughter had gone out to service and returned to her father's house before she was of age, she would have continued to be part of his family. The question then results to this, Whether the pauper's father had acquired a settlement in *Hardwick*? This was sufficiently proved by the pauper's evidence that his father had actually resided for 25 years on an estate now worth above 10*l.* a-year, for which no rent appears to have been paid: which was sufficient for the Sessions to presume that it was his own, and that the original purchase-money was above 30*l.* But if that were not enough, the declarations of the father, that this estate was his own by purchase for 87*l.*, would be let in, upon the authority of *The King v. Woburn*, 10 East, 395, 402, as the declaration of one of the parties to the cause; objection having been made on that ground to his examination by the adverse party; and the letting in such evidence being, as *Le Blanc*, J. observed in that case, a necessary consequence of the principal point there decided, that one who was a rated inhabitant of one of the litigant parishes could not be compelled by the other to give evidence against his own parish, being in effect a party to the cause. [Lord *Ellenborough*, C. J. observed, that the point was not directly raised in that case; though he did not mean to suggest that there was any difficulty in the point itself, or any desire in the Court to get rid of it upon the present occasion. At the same time he observed, that there was evidence enough stated in this case for the Sessions to have founded their judgment upon, without having recourse to the evidence of the father's declarations. The mere occupation of land for 25 years without payment of rent was evidence enough of the father's seisin; and the rent of 5*l.* 10*s.* paid for it 40 years ago was evidence of the purchase money being above 30*l.*]

Garrow and *Frere*, Serjt., contra, contended that without the evidence of the father's declarations as to the time when the purchase was made, for above 30*l.* the respondents could not make out their case; for it did not appear that the annual value of the estate was 10*l.* at the time when the pauper returned under age to his father's family: and he afterwards went out to service with different persons after he came of age. It is therefore material to the respondents' case, 1st, to sustain the evidence of those declarations, in order to shew that the father had gained a settlement in *Hardwick* at the last period when it appears with certainty that the pauper continued part of his father's family which was on his return to his father's house when he was 19, or at furthest within two years after that when he came of age; for he is stated to be now 37 years old, and it does not appear that he has ever resided with his father since he came of age: and, 2dly, the respondents must shew that the son was not emancipated at the time when the father acquired the settlement in *Hardwick*.

With respect to the last question; as the relevancy of the cases cited was indisputable, supposing the pauper to have returned home to his father's, after the expiration of his apprenticeship, before his coming of age; and supposing the father's settlement in *Hardwick* to have been then gained, which was clear if his declarations were evidence; this part of the case was not much debated; though it was at first insisted, that if the father's settlement were not gained till after the son was apprenticed out under the controul of

his master, which was incompatible with the continuing authority of the father; and if the son were never afterwards regularly domiciled with his father, before he came of age; which was contended to be the case here; the occasional visits on holidays, and for two days after his apprenticeship expired, would not make the father's house the home or domicile of the son: and it did not appear that the pauper so considered it, as in some of the cases cited. On this point

Lord ELLENBOROUGH, C. J., observed, that what the pauper considered does not signify, but what he did. Here he went to his father's house after his apprenticeship, as to his home; he treated it as his home; and was received and treated as one of his father's family. When he returned there he was in the same plight as when he left it. His father continued clothed with all his rights over him; and he betook himself to his father's house with all the rights belonging to a member of his father's family.

On the principal point, the appellant's counsel submitted that it did not necessarily follow from the determination in *The King v. Woburn*, 10 East, 395, that because a payer of the parish might refuse to answer as a witness when called by the adverse party, therefore his declarations upon the subject might be given in evidence; for nothing would be more easy, if such a rule were laid down, than to fabricate evidence upon parish appeals. The father, naturally wishing his son to be settled in the same parish with himself, would make declarations to him not upon oath, which the son might truly swear to have heard from his father, though the facts so declared might be wholly unfounded. This point was not in judgment before the Court in *Rex v. Woburn*; and though one of the learned Judges intimated that opinion in the course of the argument, no opinion upon it was ultimately delivered by the Court after taking time to consider of their judgment. The common case, where declarations of parties have been given in evidence, is where they are parties on the record; whereas the nominal parties to an appeal of this sort are the parish officers. The rule was considered to be so technical in *Bauerman v. Radenius*, 7 Term Rep. 663, that the declaration of a trustee, who was the nominal plaintiff on the record, was admitted to defeat the action of his cestui que trust, the real party. [Bayley, J. That case only decided that the declarations of the nominal party on the record were evidence against him; but not that the declarations of the real party would not also have been evidence.(a)] Then, taking the inhabitants of the parish to be the real parties to the appeal, still they are not such parties whose declarations are admissible within the true meaning and sense of the rule; which is founded upon a reasonable presumption that no person will make any declaration against his interest, unless it be founded in truth; but the interest of all aggregate bodies, such as corporators, hundreds, parishioners, and the like, upon a matter affecting the whole community alike, is too minute to insure an accurate attention to declare nothing but the truth. Upon this ground of the minuteness of their interest, they have in some cases(b) been held to be witnesses. [Le Blanc, J. In *The King v. Woburn* the parishioner was not rejected as a

(a) In *Bauerman v. Radenius*, 7 T. R. 665, a case was cited in argument, of *Duke v. Aldridge*, before Lord Mansfield, where one of the parties was a sheriff, who was indemnified by a third person; and Lord Mansfield permitted the declarations of that third person to be given in evidence against the sheriff.

(b) *Frere* referred in particular to the city of London case, 1 Ventr. 350, and generally to 12 Vin. Abr., Evidence, Y, where cases on this subject are collected; but the current of them tend rather to establish the objection against such witnesses, unless where it has appeared that the particular individual, called to give evidence on behalf of the general body suing or being sued, could not derive any benefit to himself, or suffer any detriment, however small, by the event. And in the particular case cited, that of a corporator, there was one Judge against three, and a bill of exceptions was tendered; but it became unnecessary to consider the matter further, as the disputed witnesses were withdrawn, and the plaintiff's case proved by others.

witness on the ground of interest; for his interest was opposed to that of the party who wished to call him: but he was held to be privileged from answering, on the ground of his being one of the real parties to the suit.] The objection was there made to the party proposed to be called as a witness, on the ground of his being rated and paying to the poor-rates. [*Le Blanc, J.* The objection to the witness, because he was a rated inhabitant, has always been made where he was called as a witness to support the case of the parish in which he was inhabiting, and the objection has been made by the adverse party against whom he had an interest.] Considering him as a party, yet as the interest of each inhabitant is several, his declarations would not be evidence to charge the others; as an admission made by one of the defendants in trespass is no evidence against the others. The inconvenience of letting in this evidence will be very great in practice.

LORD ELLENBOROUGH, C. J. Evidence of an admission made by one of several defendants in trespass will not, it is true, establish the others to be co-trespassers: but if they be established to be co-trespassers by other competent evidence, the declaration of the one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object. With respect to the case at the bar, two questions have been made; but that which has been argued most at length, and is considered to be of most importance, is, Whether the declaration of the father, as proved by the son, were admissible evidence? If, from the occupation of this estate by the father for 25 years, within the knowledge of the son, now only 37 years old, during the greater part of that time, as it would appear, without any payment of rent, added to the facts that 40 years ago the estate was rented at 5*l.* 10*s.* per annum, and is now worth above 10*l.* a-year, the Justices at the Sessions had drawn the inference, which they might fairly have done, that the father had purchased it before the son came of age for above 30*l.*, we might have been saved this discussion: but as it is, the question becomes material to be decided. The question then is, Whether the declaration of a parishioner respecting the circumstances of a settlement, of which he could not be compelled to give evidence as a party to the appeal depending, be admissible in evidence? I consider all appeals against orders of removal, though technically carried on in the names of the churchwardens and overseers of the respective parishes, yet in substance and effect to be the suits of the parishioners themselves, who are to contribute to the expence of maintaining the paupers. The parishioner, therefore, being a party, could not be called upon as a witness.

Then what is there to differ this from other cases of aggregate bodies, who are parties to a suit. In general cases it cannot be questioned that the declarations of the parties to a suit are evidence against them; and how is this case distinguishable from those upon principle? What credit is due to such evidence is another consideration: his declaration does not conclude the parish; but will be more or less weighty according to his means of knowledge, the genuineness of the declaration, and other circumstances of which the Court would judge. A declaration made by such a party loosely, and without competent grounds of knowledge of the fact, would not be entitled to weight; but the credibility of such evidence is quite a different question from its competency: and it is always open to contradiction like other evidence. Here, however, the father had very competent means of knowledge as to the fact declared by him: but it is sufficient for us to say, that the evidence was competent to be received. The other point made is as to the emancipation of the son, who, having gone from his father at the age of 15, and served as an apprentice under indentures for four years to a certificated master in another parish during the residence of his father in *Hardwick*, and not having thereby acquired any settlement of his own; and having returned to his father again at the expiration of his apprenticeship, and requiring and receiving the further

assistance of his father; must be considered as re-incorporated on his return into his father's family, and entitled to all the rights of one of its members; and therefore he followed the settlement which his father had in the mean time acquired in the parish of *Hardwick*. None of the cases of emancipation which have been decided on the ground of the children's marriage, or obtaining a settlement of their own in another parish, or being under a different controul incompatible with that of their parents till after the age of 21, apply to this case. The consequence is, that the order of Sessions must be confirmed.

LE BLANC, J.(a) The facts of the case are shortly these: The father of the pauper, being originally settled in another parish, about 40 years ago, came to reside in *Hardwick* upon a tenement under 10*l.* a-year, which at first he rented, and during his residence there, and while his settlement continued in the parish to which he originally belonged, he put his son, then 15 years of age, out apprentice to a person residing in the parish of *Bunwell* under a certificate. About a year afterwards, while the son was residing with his master in *Bunwell*, the father acquired a settlement in *Hardwick*, by purchase for above 30*l.* of the tenement which he before rented; and then the first question is, whether that settlement were communicable to the son; and that depends upon whether the son continued a part of his father's family, or, in the language of the books, were emancipated. Now, during all the time that he lived with his master he was clothed by his father, whom he occasionally visited on holidays, and at other times with his master's leave; and at the expiration of his apprenticeship he returned to his father's house in *Hardwick*, and staid there two days, and received new cloaths from his father. The question is, Whether, being then only 19 years of age, he continued under the controul and as part of his father's family? When he left his master he went to his father's house as to his home, and his father supplied him with cloaths as he had done before: and none of the circumstances occur in this case which in other cases have been held to constitute an emancipation. The father's settlement, therefore, was of course communicated to the pauper his son. The next question is, Whether the Sessions have received evidence of these facts which was not admissible? On reading the case it appears as if it had not been necessary for the Sessions to raise this question; for the evidence was sufficient, without the hearsay of the father, for them to have found the true state and condition of the father's property in the parish, sufficient to establish his settlement there. But it appears that they received the evidence of his declaration in consequence of his having refused, on the ground of his being a party to the appeal, to be examined when called as a witness by the opposite party. And as we do not know that they founded their decision upon the other circumstances of the case, independent of his declaration, though they might well have done so, we must now decide whether they did right in admitting that evidence. In the case of *The King v. Woburn*, 10 East, 395, we considered that such an appeal, whether entered in the names of the churchwardens and overseers of the poor, or of the inhabitants of the parish, was in effect the suit of the inhabitants paying to the rates: they being the parties really interested in the suit touching the settlement of a pauper in the parish; and that such an inhabitant of one of the litigant parishes in that case could not as a party to the suit, be compelled by the other parish to give evidence against his own parish. The Court did not decide that the declaration of such an inhabitant could be given in evidence against his parish; and it has been truly said at the bar, that the opinion thrown out by me upon that point was not the decision of the Court; for the point did not necessarily arise in that case; and therefore it comes now to be judicially considered, for the first time, whether such a declaration be receivable in evidence: whether when a suit be pending against a great number of per-

(a) *Grose*, J. was indisposed and absent.

sons who have a common interest in the decision, a declaration made by one of those persons concerning a material fact within his knowledge be evidence against him and all the others parties with him to the suit? And it still seems to me to follow as a corollary from the decision of the Court in the former case, that such a person, not being liable to be called upon to give evidence upon oath of the fact, as being a party to the suit, his declaration of it must be evidence for the opposite party. And though I am sorry that so important a point of evidence, as to its general consequences, comes to be decided in a settlement case, where our decision cannot be revised; yet being obliged to decide it, we must do so according to what appears to us to be the conclusion of law upon principle.

BAYLEY, J. I consider that the pauper was not emancipated when the settlement was gained by his father in *Hardwick*. The pauper had not gained a settlement elsewhere, nor been married and become the head of another family, nor was he out of the controul of his father, at the time that the latter gained a settlement in *Hardwick*: he therefore followed his father's settlement. I also consider that every rated inhabitant of a parish is a party to the suit upon an appeal against an order of removal, between his parish and another; and that every such rated inhabitant may refuse to give evidence in such suit when called upon by the opposite parish. I also think it follows from thence, that the declaration of every such rated inhabitant, as to the matters in question, made at the time he was a rated inhabitant, is evidence. But unless the opposite party first offered to call such inhabitant as a witness, which was objected to, I do not think that in ordinary cases the magistrates should give any weight to mere declarations of that kind; though there may be occasions when the declaration of such a party would have great weight.

Orders confirmed.

The King v. The Sheriff of Surry.

11 East, 591. Nov. 23, 1809.

The sheriff having been served in proper time with a rule to return the writ of *test. fi. fu.* which expired on the last day of term is attachable at the rising of the Court on that day, if no return be made before; and the rule for the attachment is regular, though he make his return on a subsequent day in vacation before he was actually served with the rule; and though immediately after such service he tendered the sum levied, deducting his poundage.

ON the 15th of last *June* the sheriff was served, in the cause of *Martin and Another v. Hobbs*, with a rule to return the writ of *testatum fieri facias*, which expired on the 21st, the last day of *Trinity* term; and no return being made, the plaintiff moved for an attachment at the rising of the Court. The sheriff, however, returned the writ on the 27th, and afterwards on the same day, having been served with the rule for the attachment, he tendered the amount of the sum levied, deducting his poundage, and also served the plaintiff's attorney with notice of moving the Court, on the first day of the ensuing term, to set aside the rule for the attachment for irregularity; which notice was given before the attachment issued, but it afterwards issued on the same day. The Court was accordingly moved in this term for a rule to set aside the attachment for irregularity, which was now opposed by

The Attorney-General and Comyn, who relied on the practice in support of the attachment in this case. The rule of Court of M. 32 G. 3, 4 Term Rep. 496, directs, that all writs shall be returned by the sheriff on the day on which the rule for returning the same shall expire: and in default thereof, it says, that the plaintiff is to be at liberty to move for an attachment on the next day: but as the latter part of the rule is inapplicable to cases where the writ is returnable on the last day of the term, since no attachment can be moved for

out of term, it has been the common practice, they said, to move for the attachment in such cases on the rising of the Court on the last day of the term: the contempt being then incurred. And this practice, they observed, had been expressly confirmed in *C. B.* by a rule of Court, 1 Bos. & Pull. 312, made for that purpose.

Garrow and *Bolland*, contra, contended that as the writ was not returnable till the last day of the term, and the sheriff had the whole of that day to the very last moment of the rising of the Court to make the return, no attachment could be moved for on that day; and that therefore the sheriff had till the first day of the ensuing term to make his return, and was in time if he returned the writ before the attachment was moved for on that day. And this they said was the true construction of the rule of Court of M. 32 G. 3: which concluded with saying, that in case of default made by the sheriff in not returning the writ on the day on which it was returnable, the plaintiff should be at liberty to move for the attachment on the *next* day; which must mean the next day on which the Court sat. And in *The King v. The Sheriff of Berks*, 5 East, 386, where the sheriff was only served two days before the end of the term with a six days rule to return a writ of *feri facias*, the Court held, that he had the whole of the first day of the ensuing term to file his return: and they also declared, on inspection of the rule of Court of M. 32 G. 3, that it only applied to writs returnable within the term, where an attachment could be moved for on the *next* day within the term. And they observed, that the practice in *C. B.* stood upon a special rule of that Court for the regulation of their own practice.

The Court, however, after consulting the Master as to the practice in this respect, said, that it had prevailed in this Court with sufficient notoriety, in conformity to what had been more formally declared by the rule of Court in the same respect in *C. B.*: and therefore they declared the attachment to have been regularly issued, and discharged the rule for setting it aside.

Thomas Foster, T. Usher and Eliza Deborah, his Wife, Maria Catherine Foster, Valeria Dorothy Fergus, Widow (late Foster,) Emma Louisa Keith Foster, John Foster, T. Smith, and Charles Foster, v. The Earl of Romney, John Foster, George Foster, Henry Foster, Frederick William Foster, John Frederick Foster, an Infant, and Joseph Foster Barham.

11 East, 594. Nov. 24, 1809.

A testator devised one of three estates to trustees and their heirs, until his nephew Thomas son of his brother William, should attain 21 or die, and on his attaining 21, to the said Thomas for life, sans waste; and after the determination of that estate, to the trustees during Thomas's life to preserve contingent remainders, &c.; and after the decease of Thomas, to all and every the son and sons of the body of Thomas severally and successively one after another in priority of birth, &c.: and for default of such issue, to the trustees until his nephew John, son of his brother Samuel, should attain 21 or die; and in case John attained 21, then to him for life, sans waste; and after the determination of that estate to the trustees during John's life to preserve contingent remainders; and after his decease, to all and every the son and sons of the body of John severally and successively one after another in priority of birth, &c.; and after the determination of that estate (or, as it stood here in the limitation of one of the other estates "and for default of such issue,") to the trustees, until his nephew S. W. should attain 21 or die, &c. and so repeating all the former limitations as to S. W. and his sons, and the like with respect to a fourth nephew F. W. and his sons; concluding—and for default of such issue, to the testator's brother Joseph for life, sans waste; and after his death to his son Joseph and his heirs. The testator repeated the same set of limitations twice more with respect to two other estates, only varying the priority of his four first-named nephews in the disposition of them, but concluding af-

ter each set of limitations to those four nephews, with the same devises to his brother *Joseph* for life, and to *Joseph's* son in fee.

The nephews *Thomas* (the heir at law) and *S. W.* had issue male after the testator's death, but none of the nephews had any son born during the testator's lifetime. Held that the four first-mentioned nephews and their sons only took estates for life respectively, for want of words of limitation, or other tantamount words; the words, "*for default of such issue*," meaning for default of son or sons, &c.

THIS was a case directed by the Lord Chancellor for the opinion of this Court, the facts of which were these:

Thomas Foster, being seised in fee of plantations called *Elim*, *Waterford*, *Lancaster*, and *Two-Mile-Wood*, and of other real estates in *Jamaica* and elsewhere, by his will dated the 8th of *April* 1762, duly executed and attested, devised his estates of *Elim*, *Waterford*, *Lancaster*, and *Two-Mile-Wood*, and all other his estates in *Jamaica*, and also all his lands, &c. in *Great Britain*, to Lord *Romney* and Sir *Edward Hawke*, and their heirs, to the use of *R. Drake* and *B. Long*, their executors, &c. for a term of 99 years, if his, the testator's wife, should so long live, without impeachment of waste, upon the trusts therein mentioned: and after the expiration, or other sooner determination by the death of his wife, of that term, he devised the same plantations, lands, &c. in case he should leave a child living at the time of his death by his wife, or his wife should be then ensient of a child to be afterwards born, to the use of Lord *Romney* and Sir *E. Hawke* and their heirs, until such child should attain his or her age of 21 years, or be married; and on such child's attaining 21 or marriage, to the use of such only child for life, without impeachment of waste; and from and after the determination of that estate, to the use of the trustees to support the contingent remainders thereafter limited. And from and after the decease of such child, he devised the said estates as follows: "As touching and concerning my said estates of *Elim*, and *Waterford*, "to the use of Lord *R.* and Sir *E. H.* until my nephew *Thomas Foster*, son "of my brother *William Foster*, shall attain the age of 21 years, or die. "And on my said nephew, *Thomas Foster*, attaining his said age of 21 years, "to the use of the said *T. F.* for his natural life without impeachment of "waste. And from and after the determination of that estate, to the use of "Lord *R.* and Sir *E. H.* and their heirs during the life of the said *T. F.* in "trust to preserve contingent remainders, &c.; and for that purpose to make "entries, &c., but nevertheless to permit the said *T. F.* and his assigns to "receive and take the rents, issues and profits thereof during his natural life. "And from and after the decease of the said *T. F.* to the use of all and "every the son and sons of the body of the said *T. F.* lawfully to be begotten, "severally and successively one after another, as they and every of them shall "be in priority of birth and seniority of age. And for default of such issue, "to the use of Lord *R.* and Sir *E. H.* and their heirs, until my nephew *John*, "son of my brother *Samuel Foster*, shall attain the age of 21 years or die. "And in case my said nephew, *John Foster*, shall live to attain his said age "of 21 years, to the use of my said nephew *J. F.* for his natural life, without "impeachment of waste. And from and after the determination of that estate, to the use of the said Lord *R.* and Sir *E. H.* and their heirs, during "the natural life of the said *J. F.* in trust to preserve the contingent uses, "&c. (following the usual terms as in the prior limitation. And from and "after his (*John Foster's*) decease, to the use of all and every the son and "sons of the body of the said *J. F.* lawfully to be begotten, severally and successively one after another, as they and every of them shall be in priority of "birth and seniority of age. And from and after the determination of that "estate,(a) to the use of Lord *R.* and Sir *E. H.* and their heirs, until my

(a) Instead of these words, "and from and after the determination of that estate," the words here introduced in the limitation of the *Lancaster* estate after mentioned were "and for default of such issue."

"nephew, *Samuel Warren Foster*, shall attain the age of 21 years or die :
 "and on the said *Samuel Warren Foster's* attaining his age of 21 years, to the
 "use of the said *S. W. F.* for his natural life, without impeachment of waste.
 "And from and after the determination of that estate, to the use of Lord *R.*
 "and Sir *E. H.* and their heirs during the natural life of the said *S. W. F.*
 "in trust to preserve the contingent uses, (following the usual terms as in the
 "first limitation.) And from and after his (*S. W. Foster's*) decease, to the
 "use of all and every son and sons of the said *S. W. F.* lawfully to be begot-
 "ten, severally and successively one after another, as they and every of them
 "shall be in priority of birth and seniority of age. And for default of such
 "issue to the use of Lord *R.* and Sir *E. H.* and their heirs until my nephew
 "*Frederick William Foster* shall attain the age of 21 years or die. And on
 "the said *F. W. Foster's* attaining his said age of 21 years, to the use of the
 "said *F. W. F.* for his natural life, without impeachment of waste. And
 "after the determination of that estate, to the use of Lord *R.* and Sir *E. H.*
 "and their heirs, during the natural life of the said *F. W. F.* in trust to pre-
 "serve the contingent remainders, &c. (following the usual terms as in the
 "first limitation.) And from and after his (*F. W. Foster's*) decease, to the
 "use of all and every the son and sons of the said *F. W. F.* lawfully to be
 "begotten, severally and successively one after another, as they and every of
 "them shall be in priority of birth and seniority of age. And for default of
 "such issue, to the use of my brother *Joseph Foster Barham* for the term of
 "his natural life, without impeachment of waste ; and after his death, to the
 "use of his son *Joseph Foster Barham*, his heirs and assigns forever."

"And as touching all my estates in *England*, and also my estate or planta-
 "tion called *Two-Mile-Wood*, and also a tract of land called *Horse Savanna*
 "*Pen, &c.*" the testator devised the same in precisely the same terms, with
 all the same limitations as he had before devised in respect to his estates of
Elim and *Waterford*; with this difference only, that in the devise of his
 estates in *England*, and of *Two-Mile-Wood*, and *Horse Savanna Pen* in
Jamaica, the nephew first named was *John Foster*, (who was secondly named
 in the limitations of the former estates ;) then *Samuel Warren Foster*, (who
 was thirdly named in the first set of limitations ;) then *Thomas Foster*, (who
 was first named in the first set of limitations ;) then *Frederick William Fos-*
ter, (who preserved the same place in this as in the first set of limitations ;) *and*
 then the ultimate limitations of these estates concluded in the same terms :
 "To the use of my brother *Joseph Foster Barham* for the term of his natural
 "life, without impeachment of waste. And after his death, to the use of his
 "son *Joseph Foster Barham*, his heirs and assigns for ever."

"And as touching my said estate or plantation called *Lancaster, &c.*" the
 testator here repeated all the same limitations in *totidem verbis*,^(a) except-
 ing that the nephew first named was *Samuel Warren Foster* (who was thirdly
 named in the first, and secondly named in the second set of limitations ;) then
Thomas Foster, (who was first named in the first, and thirdly named in the
 second set of limitations ;) then *Frederick William*, who preserved the same
 place in the order of the limitations as before : and then there followed the
 same concluding limitations as to this estate, "to the use of my brother
 "*Joseph Foster Barham* for the term of his natural life : and after his de-
 "cease, to the use of his son *Joseph Foster Barham*, his heirs and assigns for
 "ever."

The case also stated another clause in the will wherein the testator stated,
 that, "having myself experienced great inconveniences from the condition an-
 nexed by my father's will to the three estates called *Elim*, *Dawkins*, and *Lan-*
caster, which he devised to me and my brothers, *William* and *John Foster*,
 since dead, the last of which estates did upon my brother's death vest in me as

(a) With the variation before noticed in note (a) of p. 284.

his eldest brother and heir under my father's will: the condition was, that the heirs of the devisee of each particular estate should, upon the death of such devisee succeeding to this estate, pay to the surviving brothers and sisters an additional legacy of 1000*l.* a piece; I have, therefore, in order to exonerate my estate of *Elim*, and all such other estates as were devised to me by my father, from so great an incumbrance, duly barred the entail and the devise of such last mentioned estates by proper deeds, &c.: and in conformity thereto, I do hereby expressly direct, that no such additional legacies shall be charged upon or paid out of my estate real or personal. And it is my express will, that all and every the limitations and devises hereinbefore given of my real estate in manner and form aforesaid to my several nephews are upon this further condition, that if any or either of my said nephews shall refuse to comply with this my will, with respect to the non-payment of the said additional legacies, or in any other respect whatsoever, or shall directly or indirectly oppose the execution thereof according to the plain intent of the same, my will is, that the devise of the whole estate and estates to the person or persons, so refusing to comply with the directions of this my will, &c. shall cease and be void. And it shall be lawful for such person or persons, who, by virtue of this my will, shall be next in remainder of the premises to enter into and enjoy the same, as if the person or persons making or guilty of such opposition, &c. was or were naturally dead."

The testator died soon after making his will, without leaving any issue either born in his lifetime or after his decease; and leaving the said *Thomas Foster*, the devisee, his nephew and heir at law, and *John Foster*, *Samuel Warren Foster*, and *Frederick William Foster*; his nephews in the will named, and also the said *Joseph Foster Barham* the elder (long since dead,) and *Joseph Foster Barham* the younger, and the said *Mary Foster*, his widow, him surviving. And soon after his decease *Beeston Long* (who survived *Drake*) took possession of all the said estates comprised in the term of 99 years, and continued in the receipts of the rents and profits until the death of *Mary Foster* in 1776. The testator's nephews *Thomas Foster*, and *Samuel Warren Foster* now dead, had each issue male since the death of the testator; and *Thomas Foster* the younger (since dead) was the eldest son, and *William Smalling Foster* (also dead) was the only other son of *Thomas Foster*, the nephew: and *Charles Foster* is the only son of *Samuel Warren Foster*; but neither of the testator's nephews, *Thomas*, *John*, *Samuel Warren*, or *Frederick William Foster*, had any son born at the time of making the testator's will, or at his death.

The question submitted by the case was, What estate the plaintiff *Thomas Foster*, the nephew, and his eldest son *Thomas Foster*, the younger, deceased, and *Samuel Warren Foster* deceased, and his only son *Charles Foster*, the plaintiff, respectively took under the will of *Thomas Foster*, dated the 8th of April 1762, in the estates or plantations in *Jamaica*?

Abbott, for the plaintiffs, contended, either that the unborn sons of the nephews took estates tail, or that the nephews themselves took such estates. The ultimate limitation in fee is not to the heir at law; and therefore the question is to be decided, without prejudice to the plaintiffs in that respect, between different classes of devisees. The testator had considerable property, and having divided his estates into three parts, meant to distribute those parts in certain interests, present and future, amongst his four nephews, who were the principal objects of his bounty; and providing, in case of the failure of issue of all those four nephews, that the whole should center in his brother *Joseph Foster Barham* and his son. It seems evident from the whole scope of the will, that he must have intended in some way or other to give estates tail to the families of his four nephews in the order appointed in the will, and that each estate should not go over to another nephew till failure of the issue of the nephew to whom it was before given. The limitations are repeated

twelve times over with little or no variation. When the testator meant to give a life estate, he does so in express terms. After each life estate to the nephews, he interposes trustees to preserve contingent remainders, as is usually done when estates of inheritance are afterwards given to the children of the first takers. He also gives over the next limitation "from and after the decease of the respective nephews." It also appears, that he knew how to give a fee by appropriate words of inheritance. From the whole order and disposition of the will he appears to have intended to give estates tail to the families of his nephews; and on the first reading of the will he appears to have done so. The limitation is to the first and other sons of the body of *Thomas Foster*, &c. And it is matter of surprize not to find those words followed immediately by words of limitation to the heirs of the bodies of such sons. The limitation is to the sons *severally and successively*, &c., which are usual words of limitation in tail. Lord *Hardwicke* laid stress on the word *successively* in *Lomax v. Holmden*, 1 Ves. 296, as being a word of large meaning when applied to an estate in a family, from whence to imply an estate tail: though the case was decided on another ground. But if the words of the will (for want of words of limitation) be not sufficient to give estates tail to the unborn sons of the nephew; then, secondly, as it is evident that the general intent of the testator was to give estates tail to the families of the nephews, the Court must give such estates to the nephews themselves, in furtherance of such general intent, though it may defeat the particular intent expressed, to give them only estates for life: and this will be warranted by construing the words, "*and for default of such issue*," after the limitation to the unborn sons of the body, with reference to *issue male* of the nephews; taking the words "first and other sons" to mean *issue male*. And then the will may be read as if it had been a limitation to his nephew *Thomas* for life, and if *Thomas* should have issue male, then that he should take an estate in tail male; but if he should have no issue male, or for default of such issue; then it should be limited in like manner to his nephew *John*, &c. [Lord *Ellenborough*, C. J. observed, that by this reading the word *such* was rejected; and that Lord *Mansfield*, in *Denne d. Briddon v. Page*(a) had said, that "if, after the limitation to the daughters

(a) *Denne, on the Demise of Rd. Briddon and Mary his Wife v. Page and Bowler.*

M. 24 G. 3. Nov. 14, 1783. MS. *Buller*, J.

A devise to *S. N.* the son of *T. N.*, for life; remainder to trustees, &c.; remainder to the first and other sons of the body of *S. N.* and the heirs male of their respective bodies; and for default of *such issue*, to the use of all and every the daughters of the body of *T. N.* begotten or to be begotten; and for default of *such issue*, to the right-heirs of *T. N.* for ever. *T. N.* died leaving issue *S. N.* and two daughters; held that the daughters took only estates for their lives.

IN an ejectment for an estate, a verdict was taken for the plaintiff, subject to the opinion of this Court on the following case.

Mary Trollope, being seised in fee of the premises in question, on the 18th of December 1734, devised as follows. After directing a certain sum to be expended on her funeral: And as touching the rest of my temporal estate, I give and devise all my lands, &c. at *W.* and elsewhere to *J. T.* (a trustee) to the use of *Thomas Nash* and *Mary* his wife, for a term of 99 years, if they, or either of them shall so long live; remainder to the use of *Samuel*, son of the said *Thomas Nash*, for life; remainder to trustees to preserve contingent remainders; remainder to the use of the first son of the body of the said *S. Nash*, and of the heirs male of the body of such first son; and for default of such issue, to the use of the second and every other son and sons of the body of the said *S. N.* severally and successively, and in remainder one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons, and the heirs male of his and their body and bodies: and for default of *such issue*, to the use of the second and every other son and sons of the body of the said *Thomas Nash* upon the body of the said *Mary* his wife begotten or to be begotten, severally and successively, and in remainder one after another, as they shall be in seniority of age and priority of birth, and of the several and

of *T. Nash*, the words had been 'and if they die *without issue*,' generally, the Court would have implied an estate tail: but he adds, that there the words

respective heirs male of the body and bodies of all and every such son and sons, and the heirs male of his and their body and bodies lawfully issuing; and for default of such issue to the use of all and every the daughter and daughters of the body of the said *Thomas Nash* on the body of the said *Mary* his wife begotten or to be begotten; and for default of such issue, to the right heirs of the said *Thomas Nash* forever. After the death of the testatrix, *Thomas Nash* and *Mary* his wife entered upon and enjoyed the estate during their several lives, and died, leaving issue *Samuel*, and two daughters *Mary* and *Jane*. *Samuel* entered and was seised of the premises, and died in the lifetime of his sisters, *Mary* and *Jane*; leaving no issue male, and only one daughter, *Mary*, one of the lessors of the plaintiff. *Jane*, upon the death of her sister *Mary*, daughter of *Thomas Nash*, suffered a recovery; and the defendants claim under her. The question reserved was, Whether *Jane* took an estate for life, or in tail? If she took only for life, then the verdict was to stand; if in tail, it was to be entered for the defendants.

Balguy, for the plaintiff. As to the testatrix's professed intention of disposing of the rest of her temporal estate, that will not supply the defect, if she has not in fact done so. *Right v. Sidebotham*, Dougl. 730. It will be contended that the words, "for default of such issue," will give the daughter an estate tail; but it cannot be contended that the same words will give an estate tail in the former part of the sentence; for there they evidently mean only "for default of such sons." No estate raised by implication in a will can destroy an express estate. *Bamfield v. Popham*, 1 P. Wms. 54, is in point. *Blackborn v. Edgeley*, ib. 605. If an estate tail were to be implied in this case, shall it be a general estate tail, or an estate in tail male? If the first, it would be giving a greater estate than is given to the sons: and as to the second, the words will not warrant it.

Hill, Serjt. contra. The intention of the testatrix was to give an estate in tail general. The words, "for default of issue," after the limitation to the sons, cannot be confined to a failure of sons, but must extend to the sons of those sons. The words, "for want of such issue," hath often been held to enlarge the preceding estate, and give an estate in tail general; and that too in cases where particular issue had before been designated; as in *Wyld v. Lewis*, 1 Atk. 432, where *R. W.* devised all his lands not in jointure, to his wife, generally; and if it shall happen that she shall have no son nor daughter by me, and for want of such issue, then over; decreed to be an estate tail in the wife. He also cited *Evans d. Brooke v. Astley*, 3 Burr. 1570, where words like the present were held to give an estate tail, though no issue were before expressly mentioned; and *Power v. Campbell*, Tr. 1773.

Balguy in reply. There is no question between us, supposing the intention to be plain; but the question is, Whether that intention be plain on the will? The case in *Barrow* went on the word "descendants," who were to take the name and arms. If the words "for default of such issue," in the first part of the will, do not enlarge the former limitation, they shall not enlarge the after limitation in question.

Lord Mansfield, C. J. This case does not admit of argument: it does not admit of any cases to be quoted: every case on a will must depend on its own circumstances. The rule of law is clear, that a grant of an estate by words of purchase only, without words of limitation, enures for life only. When wills came in vogue, it pleased the Judges to consider them with analogy to the rules of law in the construction of deeds, and not as the Roman appointment*; therefore in those cases the estate is for life only. But indeed there is hardly an instance where the words of a devise are restrained to carry a life estate only (i. e. according to another MS. "for want of words of limitation"), but such a construction is against the intention of the testator; for common men do not know the difference between a devise of land and of money. Such, however, being the general settled rule, Courts have been astute to find out, if possible, from other parts of a will, what the testator really intended; and it is with pleasure that they have found, in hundreds of cases, sufficient to warrant them in giving full effect to that intention. The question then comes to this, Whether there be enough upon the face of the will to say certainly what his intention was; for we must not go upon conjecture. I conjecture, indeed, that this was a blunder, or slip, and that another limitation was intended; but I do not know what limitation; whether to the heirs general, or special. Is there any authority which will enable us to supply the defect, and make another will? If after the limitation to the daughters of *T. N.* the words had been "and if they die *without issue*," we would have implied an estate tail; but here the words are "for default of such issue," which can only mean the issue mentioned before. The Court have no power to strike out the word *such*; and if they did, what are they to supply it with; tail general, or tail male? That shews there is no intention apparent on the will for the Court to go upon.

Per Curiam,

Postea to the Plaintiff.

* Vide Cowp. 305.

were, 'and for default of *such* issue,' which must mean the issue before mentioned, namely, *sons*." He then said, he should endeavour to shew that this case was distinguishable from that, and also from *Hay v. Lord Coventry*, 3 Term Rep. 83. But first he referred to *Milliner v. Robinson*, Moor, 682, where the devise was to his brother *John*, and if he died having no son, that the land should remain to *William* for life; and if he died without issue, having no son, it should remain to the right heirs of the devisor: and it was held that the first brother took an estate in tail male. And to *Richardson v. Yardley*,^(a) where *Popham*, C. J. said, that a devise to one and the children of his body makes a good entail: and he referred to a case, as in *Bendloe's* Rep. 4th of Eliz. which was a devise to one for life, and after his death to the men children of his body, which was held to be an entail male in the father. And also to *Sonday's* case, 9 Rep. 127, where the devise was of a house to his wife for life, and after her decease his son *William* to have it; and if his son *William* have any male issue lawfully begotten of his body, then his son to have it; if he have no male issue lawfully begotten of his body, then his son *Samuel* to have the house; if *Samuel* have issue male of his body lawfully begotten, that then his son to have the house after his decease; if no issue male, then his son *Thomas* to have the house, and so on, *in totidem verbis* with the devise to *Samuel*: and like devises to *Richard* and *Daniel* and other sons. And it was resolved, that the sons had several estates in tail male, for three reasons; the first of which was, because the testator further saith, "If he (*Thomas*) hath no issue male, his son *Richard* to have it;" which is as much as to say, if *Thomas* die without issue male; which words are sufficient to create an estate tail in him. He also referred to the comments of Lord *Hale* on *Wild's* case in *King v. Melling*, 1 Vent. 231, where the devise being to *Wild* and his wife, and after their decease to their children, it was adjudged only an estate for life in *Wild* and his wife; first, because having before limited a remainder in tail to the prior taker by the express and usual words, (*viz.* to him and the heirs of his body) if he had meant the same estate in the second remainder, it is likely he would have used the same words. 2dly, the devise was not after their decease "to the children of *their bodies*;" for then there would have been an eye of an estate tail. But 3dly, the main reason was, *because there were children at the time of the devise*; and this he says was the only reason the resolution in the Exchequer-Chamber went upon. None of those reasons apply in the present case; and here there were in fact no children of the nephews at the time of the devise; which Lord *Hale* seemed to think made all the difference in *Wild's* case. He observed, however, that here the words were not, *for default of issue*, generally, but for default of *such* issue; to which word, *such*, effect was given in *Denne d. Briddon v. Page*,^(b) and in *Hay v. Lord Coventry*, 3 Term Rep. 83. But he endeavoured to distinguish this from them, by observing that in those cases there were express estates in tail male given to the first and other sons of the parent stock; which were omitted to be given to the daughters. And as the remainder over, for default of *such* issue, i. e. the daughters, was to the right heirs of the parent in fee, there was nothing improbable, as Lord *Kenyon* observed in *Dacre v. Doe*, 8 Term Rep. 116, in supposing that the testator, having provided for the sons of the heirs male of the family, who were the principal objects of his bounty, by giving them estates tail, should next provide life estates for the living generation of the daughters of the parent stock, before the daughters of the sons; who in default of issue male of the sons would take under the ultimate limitation to the right heirs of the parent.

Holroyd, contra, contended that no estates were given to the four nephews or their sons beyond estates for their lives. The words themselves of the devising clauses carry no greater estate, and there are no words in any other part

(a) Ib. 397, which is the same as *Wild's* case, 6 Rep. 16, b.

(b) Ante, 603.

of the will to shew that the testator intended to give them any greater estates than the words of the devising clauses import. And it would be strange to raise such an implication from the situation of the testator's family, and the conjecture of what might have been his intention, when, in the first part of the will, where he is even devising all his estates to his own child, if he had any, he expressly gives that child only a life estate. After the devise to the first and other sons of the several nephews in succession, without words of inheritance, the limitation over is "for default of *such issue*," not for default of *issue* generally; which must be confined to the first and other sons, the only issue spoken of, and is the same in grammatical construction as if he had said, "in default of such first and other sons." There is nothing in the whole will to shew that the testator did not intend what he has said, according to the plain and grammatical import of the words. For he makes present provision for three of his nephews and for their sons, for their lives, and gives the fourth nephew and his sons a chance of succeeding to the three estates; and it is only after the death of those four nephews and their sons, that he limits the whole ultimately to his brother *Joseph* for life, with remainder in fee to his nephew *Joseph*, the son of that brother. It is rather to be inferred from the whole will; that the testator knew how to give estates for life and in fee; that he also knew how to create estates tail if he had intended to do so; and the whole of the will is very artificially drawn. Upon the whole he contended, that looking to the words of the will, and collecting the intention of the testator from them, and not from conjecture, nothing appeared to shew an intention to give the four nephews estates tail; but if such intention could be conjectured, it was sufficient to say with Lord *Kenyon*, in *Hay v. Lord Coventry*, 3 Term Rep. 86, *voluit sed non dixit*. [Lord *Ellenborough*, C. J. You contend that *nec voluit nec dixit*.] He also cited an opinion delivered a few days before by the Lord Chancellor in *Wild v. Crisp*, that the Courts were bound to construe a will according to the words of it, unless an implication absolutely necessary to give effect to the testator's intention required a construction different from the ordinary sense of the words: and referred to what was said by Ld. Ch. J. *Vaughan* in *Gardner v. Sheldon*, Vaugh. 261—3, to the same purpose: and also to *Beveston v. Hussey*, Skin. 335, 562. And though this, he observed, was not a question between a devisee and the heir at law; yet being between the devisee and the *hæras factus*, it must receive the same construction. But he relied principally upon the cases of *Denne d. Briddon, v. Page*, (a) and *Hay v. The Earl of Coventry*, 3 Term Rep. 83, as being very closely in point: and denied that this had been distinguished in principle from them, because there the issue of the sons were provided for; as the question had arisen upon the limitations to the daughters, which were the same as those to the sons in the present case. And here, to make the nephews take estates tail would manifestly enable them to defeat the testator's intention, as they might cut off the entail and prevent the sons from taking, who it was clear the testator meant should take as purchasers: besides, that express estates for life only were given to the nephews by the will. And as to the cases or *dicta* where a devise to one and the children, or men children of his body, had been held to give him an estate tail or in tail male; that was by reading *children* of the body as *issue* of the body, where there were no children in being at the time of the devise. And in *Sonday's* case the limitations over were, if the preceding taker had no *issue* male; which altogether distinguishes it from the present.

Abbots was heard in reply, in the course of which he principally endeavoured to distinguish this from the cases of *Denne v. Page* and *Hay v. Ld. Coventry*, by saying that he was not precluded from arguing, that "in default of *such issue*" meant *issue* of the nephews, as the counsel in those cases were by reason of the previous provision there made for the issue of the sons. But he

admitted, that he could not succeed, unless he could satisfy the Court that there was a general intention of the testator to give estates of inheritance to the respective families of his nephews. And having again urged that the Court could have no leaning in this case against such a construction of the will as would favour the general intent, against one who was himself only a devisee, and not the heir at law, who was always favoured in the construction of wills; *Bayley, J.* said, that he knew of no favourites in courts of law: but the Court would give the estate to those to whom the testator had given it: and if he had not disposed of it, the heir at law took it of course. And

Lord ELLENBOROUGH, C. J. said, that the heir at law, or the *hæres factus*, would equally take that which the testator had not given away to any other. And it having been intimated, that the property in dispute was of great value, and that gentlemen had taken notes on both sides for a second argument if the Court entertained any doubt; his Lordship added, that the learned counsel who had argued the case had made the best of their materials; but that the arguments urged for the plaintiffs had not raised any doubt in the mind of the Court, nor were the Court likely to feel any doubt before the time of sending their certificate to the Lord Chancellor. There was not only no necessary implication, as there must be to warrant giving to the sons of the nephews a larger estate than for life; but it did not appear that there was even a probable intention in the testator that they should take larger estates.

The following certificate was afterwards sent to the Lord Chancellor.

THIS case has been argued before us by counsel: we have considered it, and are of opinion, that the plaintiff *Thomas Foster*, the nephew, *Thomas Foster* the younger, deceased, the eldest son of the said *Thomas Foster* the plaintiff, the said *Samuel Warren Foster*, and the plaintiff *Charles Foster*, his only son, respectively took estates for life only, under the abovementioned will of the testator *Thomas Foster*, in the said estates or plantations in the island of *Jamaica*.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAXLEY.

Nov. 28, 1809.

Boldero and Another, surviving Partners, &c. v. Jackson.

11 East, 612. Nov. 24, 1809.

The defendant, being indebted to the plaintiffs, his bankers, in nearly 30,000*l.*, about 21,000*l.* of which was secured by bonds, (a considerable part of which was advanced by them when stocks were below 50*l.*), agreed with them that they should place 25,000*l.* to his credit in account; for which he was to purchase 50,000*l.* stock, (then at 51 & 1-4) in their names, and account to them for the dividends upon such stock as from the last dividend day; after which agreement the plaintiffs, acting upon the basis of it, (though the defendant never purchased the stock so agreed upon) entered in their books the sum of 25,000*l.* to the credit of the defendant, and continued to honour his drafts from time to time, crediting him also with other sums actually paid by him, and wrote off the amount of his bonds to his credit, and delivered them up to him.

Held that this agreement to repay the new credit of 25,000*l.* by the purchase of stock as at 50*l.*, when in fact it was more at the time of the agreement made, though it had been less when a considerable part of the money was actually advanced upon his general credit, was usurious and void: but that nevertheless, the sum of 25,000*l.* credited under that agreement by the plaintiffs to the defendant in his banking account, was to be reckoned against them upon balancing the account of debtor and creditor between them.

THIS was an action brought under the order of the Lord Chancellor, and tried before *Lord Ellenborough, C. J.* at *Guildhall*, in which a verdict was found for the plaintiffs, with such damages as the Court should direct to be entered in manner hereinafter mentioned, upon the following case.

The declaration was in covenant, and contained two counts; the first on a

deed dated the 1st of *September* 1794, between the defendant and the plaintiffs and their late partners; whereby the defendant, after reciting that he was considerably indebted to the plaintiffs and their late partners, for moneys advanced by them to him, the amount whereof could not then be exactly ascertained, covenanted with the plaintiffs to pay all such sums as he was then indebted to them for moneys advanced by them to or for his use, or on any other account whatsoever, and also all such further and other sums which they or any of them should thereafter lend or advance to him, with interest. A breach was then assigned in not paying the money then due, money advanced during the lives of each of the deceased partners, and since their deaths. The second count was on a deed made on the 4th of *March* 1797, between the defendant and *Alexander Shaw*, and the plaintiffs and their late partners; whereby, after reciting that the defendant was then indebted to the plaintiffs and their late partners, upon bond, and for moneys advanced, lent, and paid by them for his use and on his account, in 30,000*l.* and upwards; the defendant covenanted with the plaintiffs and their late partners, that he would, from time to time, within a calendar month next after request made to him, pay to the plaintiffs, &c. or the survivor, *all money already due, with interest, and all such money as they, or any of them, should at any time or times hereafter advance, lend, and pay to and for the use or on the account of the defendant, with interest from the respective times of the advance.* A breach was then assigned as in the first count.

The pleas, as far as they relate to the question before the Court, were, first, payment generally; and secondly, as to 25,000*l.*, part of the money in the second count mentioned to have been advanced after the making of the deed in that count mentioned, an usurious agreement made on the 16th of *October* 1798, that the plaintiffs and their late partners should advance, lend, and pay to the use of the defendant the said 25,000*l.*, in consideration whereof the defendant should purchase in the names and for the use of the plaintiffs and their late partners 50,000*l.* Bank 3 per cent. cons. ann. and in the mean time, and until such stock should be purchased, should account to the plaintiffs and their late partners for the dividends thereon from *Midsummer-day* then last past; and that for the purpose of securing to the plaintiffs, &c. and realizing the said purchase, the defendant should deposit in their hands certain bills of exchange to the amount of 18,000*l.*, drawn upon *Beckford* and *Keighley*, and accepted by them, together with other bills of lading and policies of insurance equal to the sum required to purchase the said 50,000*l.* stock, as soon as the same should come to the hands of the defendant. That the sum required to purchase the said 50,000*l.* stock exceeds 25,000*l.* by a large sum, and that the dividends on the said 50,000*l.* stock amounted to 1500*l.* a-year, which exceeds 5*l.* per cent. on the 25,000*l.* advanced. Thirdly, a similar plea as to 25,000*l.* part of the sums mentioned in the first and second counts. The replication denied the corrupt agreement stated in each of the two last pleas, and concluded to the country.

It was proved, that the defendant had in 1780 opened an account with the plaintiff's house. Between that time and the 20th of *May* 1794, very large advances were made by the house to the defendant. On that day, he gave them a bond for 10,000*l.*, and on the 22d of *May* 1794, he gave them a bond for 10,900*l.* When these two bonds were carried to the defendant's credit, there remained a balance in his favour of 35*l.* 19*s.* 3*d.*, and a new account was opened, in which he was credited for that sum. On the 1st of *September* 1794, the deed mentioned in the first count was executed. The defendant's debt continued to increase, and further security was demanded: upon which the deed of the 4th *March* 1797, mentioned in the second count, was executed. On the 30th of *June*, 1798, the defendant was indebted to the house, exclusive of the two bonds, in 8534*l.* 6*s.* 2*d.*, making, with the sums for which those two bonds were given, 29,434*l.* 6*s.* 2*d.* After some negotiation, an

agreement was made, the purport of which was stated in the following letter, which it was also agreed should be written and signed by the defendant: *London, October 16th, 1796. Messrs. Boldero, Adey, Lushington, and Boldero. Gentlemen, in consequence of your having placed to the credit of my account with your house the sum of 25,000*l.*, I hereby engage to purchase in your names the sum of 50,000*l.* Bank 3 per cent. consolidated annuities, and to account to you for the dividends thereon from Midsummer-day last. And for the purpose of securing to you and realizing the above said purchase, I promise to deposit in your hands certain bills of exchange to the amount of 18,000*l.* sterling drawn upon the firm of Beckford and Keighley, accepted by them, together with other bills of lading and policies of insurance, equal to the amount of the sum required to purchase the said 50,000*l.* Bank 3 per cents., as soon as the same shall come to my hands: and which sum of 25,000*l.* has been thus applied by you, at my desire, for my accommodation. (Signed) Henry Jackson."* The 3 per cents. were on that day 51 1-4. They had for some time before, and when large advances had been made by the house of the defendant, been lower than 50*l.* In pursuance of the above agreement, the 25,000*l.* was put in figures to the defendant's credit in his running cash account, although no money was paid to the house by him. On the same 16th of *October 1796*, the house debited the defendant with 2568*l.* 16*s.* as for the purchase of 5000*l.* stock, at the price of the day, 51 1-4. The house continued as before to honour his drafts, and to make and receive payments on his account; the balance of which payments, subsequent to the date of the letter, and up to the time of his bankruptcy, which took place in *October 1803*, amounted to a sum exceeding 25,000*l.* A regular interest account was kept. Before the bankruptcy of the defendant, credit was given to him in account for the amount of the bonds before mentioned, and they were delivered up to him by the plaintiffs. No stock has ever been purchased in pursuance of the agreement. The question was, Whether in stating the balance due by the defendant to the plaintiffs upon the covenant in the declaration, he were entitled to credit for the 25,000*l.* and interest, for which he had credit in account on the 16th of *October 1796*? If he were, then the balance due to the plaintiffs will be 26,991*l.* 2*s.* 6*d.*; for which the verdict in that case is to be entered: If he were not, then the balance due to the plaintiffs will be 58,241*l.* 2*s.* 6*d.*, for which the verdict in that case is to be entered.

Dampier for the plaintiffs. It appears upon the case that the plaintiffs have really advanced to the defendant in principal and interest sums equal to the larger balance now claimed by them; and the defendant attempts to reduce that balance by considering the fictitious credit of 25,000*l.* with the interest thereon, agreed to be carried to his account by the plaintiffs as a real payment made by him under the circumstances of the case, and principally under the agreement of the 16th of *October 1796*. It must be admitted that this agreement, made when the stock to be purchased by the defendant was above 50*l.* stipulating for such purchase to be made at the rate of the stock at 50*l.* was illegal and invalid; though it were made to reimburse the plaintiffs' house for advances made by them by the sale of stock when it was under 50*l.* If the agreement then cannot stand in their favour, it ought to be set aside, *in toto*, and the account should be taken between the parties upon the real advances and payments which have taken place; that is by debiting the defendant with the money actually received by him from the house, with legal interest thereon, and crediting him only with the sums actually paid by him. The whole account, as it now stands upon paper, is unreal: the credit of 25,000*l.* agreed to be given to him, with the interest thereon, is merely fictitious; and it is by means of that fictitious credit only, that the defendant now seeks to liquidate the principal sums and interest due on his bonds, as if that amount in cash had been paid to the house. The plaintiffs do not claim this 25,000*l.* as an advance: they say that it was not advanced: it is the defendant who

says it was an advance; though he insists that he is not to be charged with it by reason of the usurious agreement: and yet he claims to have the benefit of the payments made by means of this fictitious advance. An invalid agreement has been entered into upon the basis of a fictitious advance, which in truth was not made; but upon the assumption of such fictitious advance the sums really due upon legal securities have been given up: and the defendant now insists on giving effect to the illegal agreement, so far as he is to be benefitted by the surrender of those securities: while he endeavours to avoid it in respect to the consideration agreed to be paid by him for the benefit he has received. [Lord *Ellenborough*, C. J. Would not this argument apply as a cure for usurious contracts in general. It may be said, that there was no contract for a loan, because the contract was illegal. If the parties agreed to consider this credit as a sum paid in hand at the time upon a new agreement, why should it not be so considered in a court of justice?] If a payment in money had actually been made, the legal consequences arising upon the facts must have attached: in that case the house would at least have had the benefit of the payment in money, instead of putting down so many figures upon paper, which was all that passed upon the occasion: but the plaintiffs have derived no benefit from the agreement: it has never been carried into effect: they have given up good securities for that which turns out to be waste paper, and they only desire that the credit for 25,000*l.* which has been carried in figures to the defendant's account, without any actual payment or value for it, may be struck out, and each party be put in the same condition as before this void agreement.

Scarlett, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. How can it be said, that this agreement has not been carried into effect? The transaction is treated as an imaginary one, and the credit given to the defendant for the 25,000*l.* agreed upon is said to be a fictitious credit; but I cannot call it so: it is a real credit. On the one hand, the plaintiffs carried that sum to the credit of the defendant in their account with him, as if it were so much money paid by him into his banking account: on the other hand, he drew upon them in consequence of such credit for different sums as he wanted them: it can make no difference in this respect whether he drew for a part or for the whole.

GROSE, J. agreed.

LE BLANC, J. The 25,000*l.* was entered in the plaintiff's books as an article of credit to the defendant's account, and he drew for it as he wanted it. The credit cannot therefore be said to be fictitious.

BAYLEY, J. If the plaintiffs had advanced the money to the defendant with one hand, and received it back with the other, in discharge of the bonds; no objection could have been made to it as a fictitious credit. But this is in effect the same thing; the plaintiffs, upon the faith of the agreement stated in the case, have given the defendant credit for the 25,000*l.* as so much money paid by him into his account; and they have given him credit for the amount of the bonds, which were delivered up to him: and now they would throw these items of credit out of their books as fictitious.

Verdict to be entered for
26,991*l.* 2*s.* 6*d.*

Sir Walter Stirling and Others v. Vaughan.

11 East, 619. Nov. 25, 1809.

A prize taken by the navy and army conjointly is insurable on account of the interest of the captors, under the st. 45 G. 3. c. 72. s. 3, which grants prize so taken to the joint captors after condemnation, subject only to the apportionment of the crown as to the respective shares.

THIS was an action on a policy of insurance effected by the plaintiffs, as

agents, upon a ship called the *Prize*, No. 3. and her cargo from *Monte Video* to *London*. The subject of insurance was a prize taken from the *Spaniards* by the conjoint forces of the army and navy upon the expedition to the river *Plata*: and the interest was averred by the first count, to be in the King; by the second, to be in the captors; and the third count, without averring any interest, alleged that it was not in his majesty, or in any of his subjects. The loss was alleged to be by the perils of the sea on the voyage home. At the trial before Lord *Ellenborough*, C. J. at *Guildhall*, Admiral *Murray* was called as a witness to shew on whose account the insurance was effected; and he deposed, that after the capture of this and other prizes by the conjoint forces employed on the expedition, a Mr. *Blacker* was appointed prize agent for ships by the naval and military commanders, to act *on behalf of all interested in the capture*; and from him orders were received at home to insure every thing in which the captors were interested; but it did not appear that *Blacker* had received any appointment or direction from the Treasury or any other department of government authorizing him specifically to insure or take care of the interests of the crown, further than as such an authority might by law be inferred from his appointment as prize agent by the captors, and the directions received by him from them to *act on behalf of all interested in the capture*. Neither was there any evidence of the King's having repudiated such an authority. The prize was lost by the perils of the sea in her voyage homewards, and before any condemnation of her in the Court of Admiralty. Under these circumstances Lord *Ellenborough*, C. J. left it to the jury to infer an authority from the crown to the captors to cause insurance to be made, or an adoption of it when made on behalf of its interest in the prize, in which the captors themselves had at least an eventual interest: and considering that the plaintiffs were entitled to recover either on the first or second count: though he relied principally at the time upon the former; his Lordship advised the jury to find a verdict for the plaintiffs; which they did accordingly.

A new trial was moved for in this term upon two grounds; 1st, That, admitting the King to have an insurable interest in a prize before condemnation, yet that there was no evidence to shew that the insurance was authorized by or in fact made on account of his majesty, so as to warrant the verdict for the plaintiff on the first count. That the direction given by the captors to their prize agent, to insure on behalf of *all interested in the capture*, was evidently meant only to express the interests of the captors themselves, which in the event of condemnation would have been vested in them: and there was no contemplation at the time of the separate interest of the crown. 2dly, That the verdict could not be sustained on the second count, which averred the interest to be in the captors; for before condemnation they had no insurable interest: they had not even a right to call for an adjudication in the Admiralty Court: for the crown might release the capture at any time before condemnation; as was established in the case of the *Elsebe*, 5 Rob. Adm. Rep. 173; and the captors could not then proceed further to call for an adjudication.

The *Attorney-General*, *Garrow* and *Taddy* now shewed cause against the rule for a new trial, and insisted strongly upon the plaintiff's right to sustain the verdict upon the second count, alleging the interest to be in the captors. This point, they said, was decided in the *Omoa* case, *Le Cras v. Hughes*, Park on Ins. (6th ed.) 358, the prize there insured was made by the joint capture of the army and navy, and one of the counts averred the interest to be in the captors: and the Court expressly decided, that they had an insurable interest before condemnation. And though that decision has been questioned by individual judges of great respect and authority^(a) supposing it to have been de-

(a) See the sum of all the opinions in the report of *Lucena v. Craufurd*, in Dom. Proc. 2 New Rep. 269, where the whole subject of insurable interests is very amply discussed.

cided upon the ground that a mere expectation of a grant from the crown after condemnation was insurable; yet that case is not denied to be supportable on other grounds; and it has never been over-ruled by the judgment of any court. And now, since the stat. 45 Geo. 3. c. 72. s. 3, vesting the property of all prizes, taken by the conjoint force of the army and navy, in the conjoint captors, after condemnation; the doubt, which was suggested against that decision, that part of the captors there, namely the army, had no interest in the prize even after condemnation, and could only have been entitled to share by the mere grace of the crown, is done away. It is true, that the crown may still release the prize before condemnation; but that grows out of its prerogative of making peace or war, and has no relation to the question, of property. For, since the act in question, though the property is still condemned in point of form to the crown, yet the joint captors, (as the navy before had under the naval prize act and the king's proclamation,) have the absolute interest in the property immediately upon condemnation: and this was held in *Morrough v. Comyns*, 1 Wils. 211, to relate back to the time of the capture. [Lord *Ellenborough*, C. J. said, that the right of releasing before condemnation was an implied exception in the grant of prize by the crown. The grant of the subject-matter must be understood with this proviso, that it remains in the crown to grant up to the time of condemnation: for the crown cannot do any thing in disparagement of its own grant any more than a subject.] At all events, the captors had in the mean time a lawful possession, authorized by the king's command to seize the property of the enemy, which gave them a special property in the prize, subject to vest absolutely upon condemnation; and this was sufficient to give the captors an insurable interest. The power of the crown to release the prize to the captors before condemnation is only a qualification of the right of the captors; the crown can no longer take the prize to its own use or give it to another. But supposing there were any technical objection to considering this as an insurable interest, against the plain understanding of mankind upon the subject, and the long established practice of insuring captures made by the King's ships or by privateers at sea, it seems to be admitted on all hands that the crown has an insurable interest in prizes made by its own officers, and which are ever proceeded against and condemned in the name of the crown. Then, in furtherance of the interest of the crown in the prize, the captors, who are acting by the command and for the benefit of the crown, may well be considered as having an implied authority to insure the captured property. The insurance was directed to be made for all interests. The King might, if he pleased, have repudiated the insurance so far as his separate interest was concerned: but, without an express renunciation, it may fairly be assumed that the captors had his authority for doing every thing usual and proper for the preservation of the captured property, and among other things for insuring. [Lord *Ellenborough*, C. J. The law will presume, if nothing appear to the contrary, that every person accepts that which is for their benefit. And here it is for the benefit of the crown to preserve the prize, if it were only for the purpose of securing to the captors the reward which its bounty had provided for them in the event of condemnation. Besides, the *de facto* captors have a special property in the thing captured, founded upon a lawful possession, which they hold for those who are ultimately found to be interested in it: and unless it be shewn to be a mere tortious capture, it must be taken to be a lawful capture and possession by them. That view of the subject relieves it from all question, whether, a mere expectation of a subsequent grant from the crown be insurable as an interest in the subject matter.] Insurances are constantly effected by the orders of a supercargo, and no inquiry is ever made at the trial as to his authority: it is taken to arise from the nature of his employment, which is to superintend and preserve the property of his employer committed to his charge. So here,

it is equally the duty of the captors to preserve by all reasonable care the property, when captured from the enemy, as to make the capture; and insurance is one of the most ordinary means of preserving naval capture.

Park, Marryat, and Carr, on behalf of the defendant, the underwriter, argued, First, that the evidence did not support the first count, averring the interest to be in the king; for the policy refers to *Blacker's* letter; stating that the vessel was "valued at 6000*l.* as per *W. Blacker's* letter of the 10th of September;" and in that letter *Blacker* requires the insurance to be made on account of the captors. And though Admiral *Murray* said at the trial, that *Blacker* was appointed agent of the prizes for the benefit of all interested, that must be understood in the sense in which the parties themselves meant it at the time, which was evidently intended only to apply to the captors themselves, without any contemplation of the interest of the crown. Then, though every person may be presumed to ratify that which is done for his benefit; yet it must first be shewn that the thing done was intended for the benefit of the party whose ratification is implied. And the cases of *Lucena v. Craufurd*, 2 New Rep. 269, &c. and *Routh v. Thompson*,^(a) shew that, where the insurance is effected with another view, the assured cannot secure themselves by averring an interest in the crown, whose benefit was not intended at the time, though the crown had an insurable interest. [Lord *Ellenborough*, C. J. observed, that in the latter case it was specifically found as a fact, that the insurance was made on account of the captors: and it appeared that they had no insurable interest in the subject-matter at the time of the capture made.] In *Lucena v. Craufurd* evidence was given, by Mr. *Rose* of the Treasury, to shew the adoption of the insurance by the crown. At any rate, they added, the crown could not be entitled to the benefit of the insurance as upon an implied authority, if it would not have been liable also to the expence of the premiums; which liability they denied, in the absence of any proof that the crown had adopted the act of the agent. And it would be strange to imply an authority from the crown to insure prize ships in its name for the benefit of the captors, when it never insured its own ships. It may even be questioned whether, *a priori*, it be for the benefit of the crown to insure in general; though it may happen to be so in a particular case in the event. Secondly, they argued that the captors had no insurable interest, as well on the general ground, which has been so often before discussed, as on the recent statute 45 Geo. 3. c. 72. s. 3, which, they observed, only gave the interest and property in any prize, taken by the conjoint forces of the navy and army, to the captors "after final adjudication thereof as lawful prize" in the Court of Admiralty; and that too, subject to the King's apportionment as to the shares: and till condemnation the interest remains entirely in the crown, because, as it appears by the case of the *Elsebe*, 5 Rob. Adm. Rep. 173, the crown may release it. With respect to the captors having an insurable interest on account of their having a lawful possession; it was, they said, begging the question; for till condemnation it could never be ascertained whether the possession were lawful or not: and the liability over of the captors for costs and damages applied rather to an illegal than to a legal capture. [Bayley, J. Lord *Eldon*, in the case of *Lucena v. Craufurd*, 2 New Rep. 323, did not deny that captors might have an insurable interest, grounded upon a lawful possession, coupled with the liability to answer for it. Lord *Ellenborough*, C. J. They might maintain trespass or trover against a wrongdoer upon that possession.] It was doubted in *Lucena v. Craufurd* whether the commissioners could have maintained such actions. [Lord *Ellenborough*, C. J. The doubt there arose upon the particular circumstances of the case; because the commissioners had not the possession, nor any right to the possession, of the prize till it was brought into port: and that was the great difficulty of the case.

(a) Ante, 428.

But I cannot consider this as a mere expectative interest.] It is a sufficient answer to the second count, that the captors had no property in the goods, by the late act, before condemnation; and without property^(a) they had no insurable interest in them. And as to the first count, if it were a matter of fact, whether the captors had an authority from the King to insure, and did insure on his account, and it were not necessarily to be presumed from the relation in which they stood to the crown; then the defendant was entitled to have that fact found in the negative upon the evidence laid before the jury at the trial.

LORD ELLENBOROUGH, C. J. A general verdict has been given for the plaintiff upon the declaration in this case, which contains three different averments of interest in so many counts; one of them averring the interest to be in the King; another, in the captors; and a third in some person other than his majesty or any of his subjects. The latter count is out of the question; no evidence having been given of any authority from such other person to insure; the verdict, therefore, must be sustained, if at all, either upon the first or second count. The subject-matter of the insurance was a prize taken by the army and navy conjointly; and the words in which the authority is stated to have been given to *Blacker* to insure were, that he was appointed prize agent for ships by the naval and military commanders, *to act on behalf of all interested in the capture*; and under that authority he directed the insurance in question to be made. The inclination of my mind at the trial was, that this might be considered as a specific authority to act on behalf of the King as well as of the immediate captors; but I would not rely altogether on that, when, according to the more obvious and probable meaning of the words, the authority was meant to be given for the benefit of the captors, under the appropriation of the crown by virtue of the prize act of the 45 Geo. 3. That brings it to the question of interest in the captors under that statute; Whether before condemnation they have such a vested interest in the subject-matter as is by law capable of being insured? And therefore my opinion will not clash with any opinion delivered in any other case, nor with the letter or spirit of the stat. 19 Geo. 2. (c. 37,) against gambling or wagering policies. But though the verdict would be sustainable upon this short ground, yet I wish to consider the case more at large. For all valuable purposes, the captors, as such, must be taken to represent the crown: and in the case of *Lucena v. Craufurd* it was considered by the same noble and learned person, *Ld. Eldon*, 2 New Rep. 323, whose opinion has been adverted to, that the King has an insurable interest in a prize before condemnation: and yet that till condemnation, there remains something wanting to complete the vesting of the full property in the crown,^(b) and to enable the crown to grant it to others as against the original owners. It is the sentence of a Court of Admiralty upon the question of prize which concludes the question of property against the original owners, according to the case of *Hughes v. Cornelius*, 2 Show. 232. T. Ray. 473, and Skin. 59. Then by the act of the 45 Geo. 3, the crown gives up its right in the prize to the captors, subject, however, as before, to the final adjudication of the property, as prize, by the Court of Admiralty. But it is said, that the crown may still release the prize to the captured before condemnation, and therefore the captors cannot have an insurable interest in the property. But that right of the crown trenches no more upon the insurable interest of the captors under the statute, than upon that of the King himself. It is then objected, that the property in the prize may never become vested in the captors. It is vested, however, as far as the crown has any right to vest it, defeasible no doubt by an adjudication of the Court of Admiralty against the captors to restore the prize to the former owners: but is it not in

(a) Vide 2 New Rep. 307.

(b) Vide *id.* 319, 320.

common experience that a defeasible interest is insurable? It is the case of every consignee of goods under a bill of lading: the goods on their passage home are liable to be stopped *in transitu*, and his interest defeated: yet can it be said, that the property is not so far veated in the consignee as to entitle him to insure. The indefeasibility of the property therefore is not the criterion of an insurable interest. Again, what is the case of an executor? Probate is necessary to complete his title: yet before probate, he has title sufficient to enable him to insure. The captors have the actual possession of the subject-matter of insurance by the grant of the King, the only person in the kingdom who could contest the title with them. They have the possession, with a partial right of disposing of the thing immediately, liable indeed to have their right devested by a sentence of restoration. But what difference is there between the right of the captors and of the crown itself in these respects? The assignees of the crown, as they may be styled, must stand in the same situation in this respect as the crown itself. This is not like insuring a mere expectation, nor like the case of the *Dutch* commissioners, who had no interest in the ships insured till they came within the ports of the realm. But these captors had a present possession and a right to maintain trespass against any person attempting to take the prize from them. Even with respect to captors in general; supposing the prize not to have been acquired tortiously, but *jure belli*, I should think that in respect of such their lawful possession and special property, they might insure; but it is not necessary in this case to decide that general point, because here the captors had a more perfect right; they had not only a right of possession, but a right of property, as far as the crown had the power of granting it, liable only to be dispossessed by the release of the crown before condemnation, or by sentence of restoration.

GROSE, J. The plaintiffs stand in the situation of captors in actual possession of the prize insured, and having every right of property which the crown could confer upon them; I have, therefore, no doubt that they had an insurable interest.

LE BLANC, J. The interest is first averred to be in the King, and secondly in the captors. The verdict is general, for the plaintiffs. And it does not appear to me to be material, for the purpose of disposing of the rule for a new trial, to consider how far the verdict might be supported upon the first count, because it may certainly be supported on the second, which avers the interest to be in the captors. The case has been argued, first, as if this had been a naval capture solely; and next, upon the stat. 42 Geo. 3, as a capture by the navy and army conjointly. But though the terms of this act and of the former act for the distribution of naval capture be somewhat different, yet there is no material variation in the meaning of them: the latter statute meant to give the property of the prize to the joint captors in the same manner as the former statute had done to the naval captors; subject only to an appropriation by the crown of the respective proportions, but reserving no part of the property to the crown itself. So that now the joint military and naval captors have as much a vested interest in the prize, as the sole naval captors had before. The question then is, whether that interest be insurable? Now, it never was contended, that an absolute indefeasible vested interest in the subject-matter was the only interest insurable. The case of a consignee of goods is decisive to the contrary. And in the case of *Wolfe v. Horncastle*, 1 Bos. & Pull. 316, not the original consignee, but one who agreed, on the refusal of the other, to take the cargo, and who accepted a bill drawn by the consignor, was held to have an insurable interest in the cargo to the extent of his acceptance. Is this then a mere expectation? I cannot consider that to be a mere expectation which is a right vested by act of parliament, no longer subject to the absolute will of the crown, but only subject to its power of releasing to the captured before condemnation. It seems to me, that the captors, under this act

of parliament, have a better right to insure, in respect of their interest in the prize, than the consignee in the case of *Wolfe v. Newcastle*: they had the absolute possession of the property, and their right to retain it was only subject to the release of the property by the crown to the original owners before condemnation.

BAYLEY, J. I agree entirely with my Lord and my Brothers, that there was an insurable interest in the captors. And when one applies common sense to the subject, and excludes technical reasoning, it is clear that they had a right to the property insured. They had this right, unless the crown released to the captured before, or did not think proper to proceed to, condemnation; but the faith of the crown was pledged to proceed to condemnation, and not to release the prize, except under special circumstances involving the interest of the public. It is said, that the legal interest remains in the King; and so it does, because he may release before condemnation, and he may also change the proportions; but the King can take nothing for himself, nor give it to any third persons; and when it is condemned, it must go to the captors. The captors have the possession of it, and they are liable in damages to the original owners if the capture has been irregularly made: and there have been many cases where, though the capture was properly made under the circumstances, yet the captors were decreed to restore the ship and cargo, in whole or in part: they, therefore, ought to be in a condition to restore the value in case of loss, if ultimately they should be directed by the Court of Admiralty so to do. The interest in the prize is so far vested in the captors, that in case of the death of any of them before condemnation, his share, when condemned, goes to his representatives. The case of a consignee of goods is not so strong as that of a captor in favour of an insurable interest. He has no present possession of, he may have no beneficial interest in, the goods; and in case of his death, his lien on the consignment is lost. On reading the note of what fell from Lord Eldon in the House of Lords upon the case of *Lucena v. Craufurd*, it appears to me that his Lordship considered that captors would have an insurable interest upon the ground on which he put their claim.

Rule discharged.

Howell v. Thomas Richards.

11 East, 633. Nov. 27, 1809.

Releasors covenanted, that, for and notwithstanding any act, &c. by them, or any or either of them, done to the contrary, they had good title to convey certain lands in fee; and also, that they, or some one of them, for and notwithstanding any such matter or thing as aforesaid, had good right and full power to grant, &c. and likewise, that the Releasee should peaceably and quietly enter, hold, and enjoy, the premises granted, without the lawful let or disturbance of the Releasors, or their heirs or assigns, or for or by any other person or persons whatsoever, and that the Releasee should be kept harmless and indemnified by the Releasors and their heirs against all other titles, charges, &c. save and except the chief rent issuing and payable out of the premises to the lord of the fee. Held that the generality of the covenant for quiet enjoyment against the Releasors and their heirs, and any other person or persons whatsoever, was not restrained by the qualified covenants for good title and right to convey, for and notwithstanding any act done by the Releasors to the contrary. But if the covenant for quiet enjoyment were to be restrained to the acts of the Releasors by any qualifying context, then the declaration in covenant, stating it by itself in its own absolute terms, without such qualifying context belonging to it, seems to be an untrue statement of the deed in substance and effect, which the defendant may take advantage of upon the general issue of *non est factum*, as a variance and ground of nonsuit, or of a verdict for him.

THE plaintiff declared, as heir of one *Rd. Howell*, upon a covenant in an indenture of the 30th of May 1783, made by the defendant, and also by *Joseph Richards*, Anne his wife, and *D. Richards*, to the said *Rd. Howell*, for the quiet enjoyment of a certain tenement, which was thereby conveyed to the

said *Rd. Howell* and his heirs; upon which covenant the defendant was thus impleaded. And the defendant, did by the said indenture above brought into court here, *covenant in manner following*, viz. that he, the said *Rd. Howell*, his heirs and assigns, should and might, from time to time, and at all times thereafter, peaceably and quietly enter into, hold, occupy, possess and enjoy the premises thereby granted, &c. without the lawful let, suit, trouble, denial, claim, or demand, entry, eviction, &c. interruption, or disturbance whatsoever of or by the said *J. Richards*, *Anne* his wife, the defendant, and *D. Richards*, or any or either of them, their or any or either of their heirs or assigns, *or of or by any other person or persons whatsoever*; and that freely, and clearly, and absolutely acquitted, exonerated, released, and discharged, or otherwise by the said *Jos. Richards*, *Anne* his wife, the defendant, and *D. Richards*, and each of them, their and each of their heirs, &c. well and sufficiently saved, defended, and kept harmless and indemnified of, from and against all former and other gifts, grants, &c. jointures, dowers, right and title of dower, &c. uses, trusts, &c. wills, statutes merchant, of the staple, recognizances, judgments, executions, &c. rents, arrears of rent, annuities, &c. forfeitures, re-entries cause of forfeiture and re-entry, debts, &c. and of, from and against all other estates, titles, troubles, charges, and incumbrances whatsoever, *save and except the chief rent* issuing out of or payable for the said premises to the lord of the fee of the same, if any such should be due. The plaintiff then proceeded to assign a breach, that since the death of *Rd. Howell*, whose heir he was, he had not been permitted nor was able to hold, occupy, possess and enjoy the premises, &c.; but that after the death of *Rd. Howell*, he was evicted upon an ejectment brought by one *Mary Howell*, widow, who at the time of making the said indenture, and continually from thence until and at the time of the eviction after mentioned, had and still has lawful right and title to the premises.

The defendant pleaded, that the indenture in the declaration mentioned was *not his deed*; and also pleaded several special pleas, not material to the question; which arose upon the production of the deed in evidence; whether the variance between that and the covenant declared on were so material in substance and legal effect, as to be available for the defendant upon the plea of *non est factum*. The covenants in question in the deed ran thus: And the said *Joseph Richards* doth for himself and for the said *Anne* his wife, and for their and each of their heirs, &c. and the said *Thomas Richards* (the defendant) and *D. Richards*, for themselves severally, and respectively, and for their several and respective heirs, &c. do covenant with the said *Rd. Howell*, his heirs, &c. in manner following, viz. that they the said *Joseph, Anne, Thomas*, and *D. Richards*, *for and notwithstanding any act, matter, or thing, by them, or any, or either of them, done to the contrary*, now at the time of the sealing, &c. are, or some or one of them is or are lawfully, rightfully, and absolutely seized of and in, or well and sufficiently entitled to the premises hereinbefore mentioned to be granted, &c. of an absolute and indefeasible estate of inheritance in fee simple, &c. without any manner of condition, trust, &c. or any other matter, restraint, cause, or thing whatsoever to defeat, &c. or incumber the same estate; and also that they the said *Joseph, Anne, Thomas*, and *D. Richards*, some or one of them, *for and notwithstanding any such matter or thing as aforesaid* now have, or some of them hath, at the time of the sealing, &c. in himself, herself, or themselves, good right, full power, and lawful and absolute right and authority to grant, &c. the said premises unto and to the use of the said *Richard Howell*, his heirs, &c. in manner aforesaid, and according to the true intent and meaning of these presents; *and likewise*, that he the said *Rd. Howell*, his heirs, &c. shall and may from time to time, and at all times for ever hereafter, peaceably and quietly enter into, hold, occupy, possess, and enjoy the premises hereby granted, &c. without the lawful let, suit, trouble, denial, claim, or demand, entry, eviction, &c. or disturbance whatso-

ever, of or by the said *J. Richards, Anne* his wife, *T. Richards*, and *D. Richards*, or any or either of them, their, any or either of their heirs or assigns, or for or by any other person or persons whatsoever; concluding as stated in the declaration.

Whereupon it was objected at the trial at *Westminster*, before Lord *Ellenborough*, C. J. that the deed proved did not support the issue on the *non est factum*, inasmuch as it shewed, by comparing the part of the covenant declared on with the antecedent paragraphs, which it was said made but one entire covenant, that it was, in effect, not a covenant for quiet enjoyment generally against the title of all persons, but only a covenant against the acts of the covenantors themselves, and those claiming under them, by reason of the prior words, "*for and notwithstanding any act, matter, or thing by them or any or either of them done to the contrary, &c.*" which pervaded the whole covenant. Lord *Ellenborough*, C. J., however, was then of opinion, that the defendant could not take advantage of this objection on the plea of *non est factum*: but that if he meant to insist on any other covenants in the deed as varying the legal effect and true import of the covenant declared on, he ought to have cravedoyer of the indenture, and set out such other covenants on the record, in order that the court might judge of their application to the covenant set forth in the declaration, and their effect upon its construction. Though he agreed, that if any material part of the same integral covenant were omitted, which varied the sense and meaning of the other part declared on, on proof of such variance, it would negative the fact of its being the deed of the defendant. But his Lordship gave the defendant's counsel leave to move to enter a nonsuit, if the Court should think the objection well founded.

Abbott moved accordingly in the last term, and renewed the objection to the variance made at the trial, and cited *Sands v. Ledger*, 2 *Ld. Ray.* 792, the case of an indenture set out imperfectly to shew that advantage might be taken of the variance, upon the plea of the general issue, at *nisi prius*. And he also referred, amongst other cases, to *Browning v. Wright*, 2 *Bos. & Pull.* 13, where a covenant in general terms, that the covenantor had full power, &c. to convey, was held to be qualified by all the other special covenants being against the acts of the party himself and his heirs. And he adverted to the general rule, that deeds were to be pleaded according to their legal effect, and not merely in the words used.

The Attorney-General, Peake, and Lord, shewed cause against the rule in the same term, and contended that from the true construction of the terms of the deed, compared with the particular covenant for quiet enjoyment declared on, the latter was properly pleaded, as a general covenant, according to its true sense and legal effect, and was not qualified by the terms of the covenants for title and for the right to convey: and that if the whole had been set out, the construction must have been the same. That, therefore, there was no foundation in substance for the objection. And they observed the difference between the words of the covenant in *Browning v. Wright*, 2 *Bos. & Pull.* 13, and in this case; for there *Wright* covenanted that he, *for and notwithstanding any thing by him done to the contrary*, was seised of the premises in fee, and had good right to convey: which marked that he was covenanting against his own acts: and that covenant did not contain the large words which are to be found in the covenant in question; viz. where the releasors covenant against eviction or disturbance by themselves or their heirs, or by any other person or persons whatsoever. The saving as to the chief rent also shews that the parties did not mean to confine the covenant for quiet enjoyment merely to their own acts. The words of every covenant are to be taken most strongly against the covenantor. And in *Gainsford v. Griffith*, 1 *Saund.* 59, a covenant in a lease, that it was good and indefeasible, was held to be general, and not restrained by the subsequent covenant for quiet enjoyment without any let or disturbance of the defendant. But supposing that the generality of

one covenant were controuled by the particularity of others, they urged that objection could only be taken of it by setting out the deed upon oyer, and demurring; as in *Browning v. Wright*; *Smith v. Yeomans*, 1 Saund. 316; *Sacheverell v. Froggatt*, 2 Saund. 366, and other cases referred to in the notes to the two last cases. And they said there was no case where the objection of such a constructive variance had prevailed upon the plea of the general issue: in *Elknot v. Blake*, 1 Lev. 88, and T. Ray. 65, such an objection was over-ruled: and in *Ball v. Squarry*, Fortes. 354, it is said, that "you cannot take advantage of any covenant omitted in the plaintiff's declaration, on an action of covenant, without craving oyer."

Park and *Abbott*, in support of the rule, argued, first, upon the words of the respective covenants: that, taking the whole together, the meaning of the covenantors was only to covenant against their own acts, by reason of the preliminary words "*for and notwithstanding any act, matter or thing by them &c. done to the contrary*," &c. which extended, they said, to the latter covenant for quiet enjoyment by the connecting words, "*and likewise*," which made it all one sentence. And as to the words "*or for, or by any other person or persons whatsoever*," they were to be understood, according to the whole context, of any persons claiming from the covenantors. As in *Broughton v. Conway*, Moore, 58, where a condition is an obligation by the vendor of a lease for years, that he would not do, nor had done, any act to disturb the plaintiff in his possession, but that the plaintiff should hold and enjoy peaceably, without the disturbance of the defendant *or any other person*, was held to be restrained to the disturbance of other persons through any act of the defendant himself. It was nugatory, to restrain the former covenants to the covenantors' own acts, if the covenant for quiet enjoyment were meant to be general. They also relied on *Browning v. Wright*, 2 Bos. & Pull. 13, as being the stronger case against the objection, because there was a separate covenant interposed between the qualifying and qualified covenants. And *Gainsforth v. Griffith* was distinguished as being a case of leasehold. Then if the covenant for quiet enjoyment were in legal construction a qualified covenant, the rule is clear, as laid down in *Penny v. Porter*, 2 East, 2, and *Miles v. Sheward*, 8 East, 8, that it is a fatal variance to state it as a general covenant: in this respect there can be no difference in principle between contracts under seal, and other contracts; and the case of *Sands v. Ledger*, 2 Ld. Ray. 792, shews that advantage may be taken of this upon the general issue in an action on the deed.

LORD ELLENBOROUGH, C. J. said, that the question raised was of general importance sufficient to require the Court to look into the cases before they delivered their opinion. The case accordingly stood over for consideration till this term, when his Lordship delivered the opinion of the Court.

This was a motion made last term for leave to enter a nonsuit, upon the ground of a supposed variance between the covenant declared upon, and the covenant proved at the trial, upon the plea of *non est factum*. It was an action of covenant brought by the plaintiff, as heir of one *Richard Howell*, against the defendant as a several covenanting party in a deed of release, whereby one *Joseph Richards* and *Anne* his wife, the defendant *Thomas Richards*, and one *David Richards*, released a messuage and lands in the county of *Carmarthen* to the said *Richard Howell*, the ancestor of the plaintiff, and his heirs. The covenant, for the breach of which the action was brought, was the covenant for quiet enjoyment: the breach was alleged to be by the eviction, by due course of law, of the plaintiff, the heir, after the death of his ancestor, the immediate covenantee *Richard Howell*, by one *Mary Howell*, who was a stranger. The covenant for quiet enjoyment was, that *Rd. Howell* the grantee, and his heirs, should enjoy, "without the lawful let, suit, trouble, denial, claim, or demand, entry, eviction, ejection, molestation, hindrance, interruption, or disturbance whatsoever, of or by the said *Joseph*

"*Richards, Anne his wife, the defendant, and David Richards, (the several releasors,) or any or either of them, or any or either of their heirs or assigns, "or for or by any other person or persons whatsoever," &c.* The covenant to indemnify and save harmless, which follows, is in the most comprehensive terms, and concludes thus: "Of, from, and *against all other estates, titles, "troubles, charges and incumbrances whatsoever;"* with this single saving, viz. "Save and except *the chief rent issuing out of or payable for the said premises to the lord or lords of the fee of the same, if any such should be "due."* This covenant for quiet enjoyment, it may be observed, is special and particular in its terms, as well as general: it is against the disturbance of the defendant and others, the releasors, by name, their heirs, &c. and also, against the disturbance of *any other person whatsoever.* It was contended at *nisi prius*, that the general language of this covenant for quiet enjoyment was in fair construction to be qualified and restrained by reference to the antecedent covenants for title, and for the right to convey, which were special and limited, and run in the terms following; "that *they the said defendant, and "others, (the releasors,) for and notwithstanding any act, matter, or thing, by "them, or any, or either of them, done to the contrary,"* then were or stood, or some one of them was and stood lawfully, rightfully, and absolutely, seized of an indefeasible estate of inheritance in fee simple in the premises granted and released: and that they, the several releasors, or some one of them, "*for or "notwithstanding any such matter or thing as aforesaid"* (i. e. notwithstanding any act, matter, or thing, done *by them or any of them,* to the contrary) then had in them, or some of them "good right, full power, and lawful and "absolute right and authority, to grant, bargain, sell, alien, remise, release, "and confirm the premises thereby granted and released," &c. And the question is, whether the general words of the latter covenant *for quiet enjoyment* are in necessary construction to be restrained by the language of the antecedent covenants *for title and right to convey*, and which certainly are covenants of a limited kind, and provide only against the acts of the releasors themselves? If the words of this latter covenant are to be so restrained, then the stating of this covenant *for quiet enjoyment*, by itself in its own absolute terms, without the qualifying context which belongs to it, would be (it may for the purpose of this argument be admitted) an untrue statement, in point of substance and effect, of the deed in that respect, and would have therefore entitled the defendant to a nonsuit, on the ground of a variance, or to a verdict on the plea of *non est factum*.

The covenant *for title*, and the covenant *for right to convey*, are indeed what is somewhat improperly called synonymous covenants; they are however connected covenants generally of the same import and effect, and directed to one and the same object; and the qualifying language of the one may therefore properly enough be considered as virtually transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser, that the grantor has the very estate in quantity and quality which he purports to convey, viz. in this case an indefeasible estate in fee simple. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon. For the purpose of this covenant, and the indemnity it affords, it is immaterial in what respects, and by what means, or by whose acts, the eviction of the grantee or his heir takes place: if he be lawfully evicted, the grantor, by such his covenant, stipulates to indemnify him at all events. And it is perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment. He may suspect, or even know, that his title is in strictness of law in some degree imperfect; but he may at the same time know, that it has not become so by any act of his own; and

he may likewise know, that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it: he may therefore very readily take upon him an indemnity against an event which he considers as next to impossible, whilst he chooses to avoid a responsibility for the strict legal perfection of his title to the estate, in case it should be found at any future period to have been liable to some exception at the time of his conveyance. He may have a moral certainty that the existing imperfections will be effectually removed by the lapse of a short period of time, or by the happening of certain immediately then impending or expected events of death, or the like: but these imperfections, though cured, so as to obviate any risk of disturbance to the grantee, could never be cured by any subsequent event, so as to save the breach of his covenant for an originally absolute and indefeasible title. The same prudence, therefore, which might require the qualification of one of these covenants might not require the same qualification in the other of them, affected as it is by different considerations, and addressed to a different object. And indeed, in looking at the case of *Browning v. Wright*, 2 Bos. & Pull. 19, in which almost all the cases on the subject are collected and considered, I do not find any case in which it is held, that the covenant for quiet enjoyment is all one with the covenant for title, or parcel of that covenant, or in necessary construction to be governed by it, otherwise than as, according to the general rules for the construction of deeds, every deed (as was said by *Hobart*, C. J., Winch. Rep. 93. *Sir Geo. Trenchard v. Hoskins*) is to be construed according to the "intention of the parties, "and the intents ought to be adjudged of the several parts of the deed, as a "general issue out of the evidence; and intent ought to be picked out as "every part, and not out of one word only." Consistently therefore with that case, and with every other that I am aware of, we are warranted in giving effect to the general words of the covenant for quiet enjoyment; and which are entitled to more weight in this case, inasmuch as they immediately follow and enlarge the special words of covenant against disturbance by the grantors themselves: and to restrain the generality of these words, thus immediately preceded by express words of a narrower import, would be a much stronger thing than to restrain words of like generality by an implied qualification arising out of another covenant where no such general words occurred. The person using the general words could not forget that he had immediately before used special words of a narrower extent. If the covenant containing both the special and general words stood by itself, there would be no pretence for refusing effect to the larger words; and if this could not be done in favour of express words of a narrower import in the same covenant, I cannot possibly understand upon what ground it should be done in favour of implied words of narrower import which occur in another separate covenant, addressed, as has been before said, to a distinct object. It appears to us, therefore, that the covenant for quiet enjoyment is not in point of necessary construction to be restrained in the manner contended for on the part of the defendant; and that it is therefore truly stated in substance and effect, when it is stated, as it is in the declaration, by itself, and without the other covenants which have been argued to be necessary to be stated on the record along with it, in order to its due construction: and consequently, that there is no ground for a nonsuit in this case, on the supposition of a variance in this respect between the declaration and the instrument declared upon.

Rule discharged.

Lees and Others v. The Company of Proprietors of the Canal Navigation from Manchester to Ashton-Underline and Oldham.

11 East, 645. Nov. 27, 1809.

Where by a statute a canal company were empowered to take such rates as should be fixed at a general assembly of the proprietors, not exceeding 1d. &c. per ton, per mile, upon coal; and they were also empowered to reduce the rates at a general assembly held on certain notice; but no reduction was to be made without the consent of the major part in value of the proprietors: a contract made by individuals with the company, but not at such general meeting; whereby in consideration that those individuals would make a navigable cut to convey water from their collieries through land, not within the statutable line of the canal, into the canal, and convey the same to the company, the latter should permit them to carry their coals through the cut and along the canal, for 1s. per ton, *the company paying back 6d. per ton*, is illegal and void; 1st, As a speculation by which the company might gain more or less than the legislature intended they should take under similar circumstances from the public in general. 2dly, As extending in effect the power of the company to purchase land beyond the limits assigned by the act. 3dly, As enabling them to raise more capital than they were entitled by the act to do, by means of paying for land or works by a total or partial sale of their tolls; which tolls are made a security for the money subscribed or taken up on mortgage. 4thly, Because the tolls could in no instance be reduced but at a general assembly, &c.; and this in fact operates as a reduction of the tolls *pro tanto*. Also *quære*; 5thly, Whether such a contract be not void, as diminishing the inducement (by favouring individuals) to a general reduction of the tolls, when proper, for the benefit of the public.

THE plaintiffs declared in covenant upon an indenture under seal, made the 30th of July 1795, between themselves and the company, whereby, reciting that the plaintiffs were the owners of collieries within the townships of *Oldham* and *Chadderton* in *Lancashire*, and that the company were desirous that the water to be raised by engines erected, or to be erected for draining the said collieries, should be conveyed into their canal for the better supplying it with water; and that the plaintiffs had contracted with the company that all the plaintiffs' coal, raised after the canal should be made navigable from *Stake Leach* to *Manchester*, should be navigated on the said canal, and on no other; and that for that purpose they should make a navigable cut from their collieries to join the company's canal at *Stake Leach*, through which cut the water from the collieries was to be conveyed into the canal; it was witnessed, that in consideration of the payments and allowances thereafter covenanted to be made by the company to the plaintiffs, the latter covenanted that before the canal should be made navigable from *Stake Leach* to *Manchester*, they would, *at their own charge, purchase so much land as should be wanted for the navigable cut* to communicate with the canal, and would cause such land so to be purchased, and all the works belonging thereto, *to be well and effectually conveyed to and vested in the company, their successors and assigns, for ever, or to some person to be nominated by or in trust for them, free from all incumbrances whatsoever*; and that the plaintiffs would make and finish the navigable cut (before described, in the manner therein mentioned) and make certain works (therein mentioned) according to plans furnished by the company: and that the plaintiffs should at all times during the continuance of their estate in the said collieries turn the water raised and drained thereout into the intended cut; and from thence into the canal, for the better supplying it with water; and would navigate all their coal on the canal; and would always have at some wharf at or near *Pease Green* (on the canal) 1000 tons at least of coals for sale; and also would pay to the company, their successors or assigns, 1s. per ton for all their coals put on board any boat on the cut or on the canal, whether the coals were navigated the whole length of the cut and of the canal, or any of its branches, or only on part or parts thereof; such payments to be made half

yearly; and also would for that purpose, when required by the company, deliver to them a true account in writing of the quantities of the coal raised and put on board, &c. And it was further witnessed by the indenture, that *in consideration of the covenants and agreements* before mentioned on the part of the plaintiffs, the company covenanted, that they, their successors and assigns, would pay to the plaintiffs for the cutting, &c. and completing the intended navigable cut, and erecting the said buildings and works, &c. 4000*l.* when as and such works should be from time to time well and sufficiently completed, by instalments of 200*l.* from time to time; but 500*l.* thereof to be always retained by the company until the whole of the works should be completed, and then to be paid. And that the company, their successors and assigns, would permit all the coals raised from the plaintiff's collieries, after the intended cut and the works thereof were completed, to be navigated on the said cut and canal, or any part thereof, on payment of the tonnage before mentioned. And also, that the company, their successors and assigns, would, *in consideration of the charges which the plaintiffs might be put to in raising up the water from the said collieries, and conveying the same into the cut and from thence into the canal as aforesaid, and also in consideration of the extra expence which the plaintiffs might be put to in the execution of the said works, pay to the plaintiffs 6*d.* per ton for coals put on board any boat on the cut or on the canal, and for which the tonnage of 1*s.* per ton shall be paid as aforesaid.* And it was mutually covenanted, that the cut should be public and open to all persons, and be navigated by all persons (except the plaintiffs in respect of the coal out of their said collieries) on the same terms and conditions as the said canal from *Manchester to Ashton*, &c.: and that the cut should be considered as part of the canal, and be repaired by and subject to the management of the company, and that the tolls collected on the cut should be the property of the company: and that as between these parties all the rules, orders, penalties, and forfeitures, &c. contained in the acts for making the canal and its branches, should be applicable to the cut and the works thereof, and the vessels and goods navigated thereon, as fully as if they had been mentioned in such acts. The plaintiffs then, after avering general performance of their covenants, alleged that afterwards, on the 1st of *January 1796*, the canal was made navigable from *Stake Leach to Manchester*, and the navigable cut and works thereof were completed, and conveyed to the company, in manner and form as covenanted by the plaintiffs. And although the plaintiffs in execution of the said works were put to an extra expence, beyond the said 4000*l.*, of 3800*l.*,) and though they have always conveyed the water raised by the engines, &c. into the cut, and from thence into the canal, for better supplying the canal with water; part of such water being raised by engines within 2000 yards of the canal, and other part by engines raised at a greater distance, &c.; and in so doing the plaintiffs were put to great charges, *viz.* 1000*l.*: and though the company did from the time of the canal being navigable, and from the completion of the navigable cut until the 5th of *August 1806*, permit the plaintiffs to navigate their coal from their said collieries on payment of 1*s.* per ton, and during the same time did pay to the plaintiffs 6*d.* per ton for all such coals, for which 1*s.* per ton was paid as aforesaid: and although the plaintiffs from the said 5th of *August 1806*, have been ready and willing to convey other large quantities of coal raised from the said collieries, &c. on the said cut and canal, and to pay 1*s.* per ton for the same, &c. yet (1st) the company, though requested, would not permit any of the said coals to be navigated on the cut or canal on payment of the 1*s.* per ton: but refused so to do, and demanded and took more, *viz.* 5*s.* per ton, &c. (2dly) The company would not allow, and refused to pay the plaintiffs 6*d.* per ton on a large quantity of their coals raised from their said collieries and navigated on the cut and canal, for which the plaintiffs had paid to them not less than 1*s.* per ton; to the plaintiff's damage of 5000*l.*

To this the defendant pleaded, 1st, That the said land purchased according to the covenant, and all the works thereto belonging, *were not well and effectually conveyed to the company, &c.* (in the words of the covenant) free from all incumbrances whatsoever, in manner and form, &c. 2. That the lands and works so covenanted to be conveyed to and vested in the company and their successors, &c. *are not the lands and works* which the company had at the time of making the said indenture, or at any time since, *power and authority to purchase* by virtue of the statute in that case made and provided, *without incurring the penalties and forfeitures of the statute of mortmain*; but are other and different lands and works: and that neither the king nor any of his predecessors at the time, &c. granted to the company any licence to purchase or hold in mortmain in perpetuity or otherwise the said lands or works. 3. That by the statute in that case made and provided it was enacted, that it should be lawful for the company from time to time and at all times thereafter to demand, take and recover for their own use, for tonnage of all goods navigated or conveyed on the said navigation, such rates as should be fixed by the company at any general assembly not exceeding, *viz.* for every ton of coal, &c. not passing through locks *1d. per mile*: and for every ton of coal, &c. passing through locks *1 1-2d. per mile*: and that it should be lawful for the company from time to time at any general assembly to be held for that purpose, on notice, &c. to lessen or reduce all or any of the rates thereby granted as they should think proper; and afterwards from time to time at any general assembly, of which such notice should be given, to advance and raise all or any of the said duties so lessened to any sum not exceeding the respective rates therein before granted; and *no reduction of the said rates should be made without the consent* of the major part in value of the proprietors, &c. for the time being. And then the defendant averred, that the canal was 20 miles long, and contained 20 locks; and that the tolls so granted for navigating every ton of coals the whole length of the canal amounted to *2s. 6d.*, which is more than *1s. per ton*, subject to the re-payment of *6d. per ton*, as by the said indenture is agreed. That the rates are by the said agreement reduced, and that such reduction was not made at any general assembly of the proprietors, &c. as provided by the statute. 4. That the tolls were reduced as stated in the former plea, without consent of the major part in value of the proprietors of shares. 5. That the reduction of the rates so made in manner before mentioned, was so made as to concern only the parties to the said indenture, and for their benefit only, and did not concern any other persons using the canal or navigation, and was contrary to the statute. 6. That after making the said indenture, *viz.* on the 25th of July 1806, at a general assembly of the company held for that purpose, pursuant to the statute, it was ordered that the rate of *1s. per ton* mentioned in the indenture should be no longer taken, and that for the tonnage of all coal, &c. thenceforth navigated on the canal there should be taken, without exception, for every ton not passing through locks *1d. per mile*: and for every ton passing through locks *1 1-2d. per mile*; and that the *6d. per ton* mentioned in the said indenture should thenceforth be no longer paid by the company to the plaintiffs; and thereby that agreement and rate of tonnage was rescinded, and the tolls for the same were raised according to the form of the statute, &c.; whereupon the company during the time mentioned in the breaches of covenant assigned, have refused to permit the plaintiffs to navigate on the canal the coal there mentioned on payment of the tonnage of *1s. per ton*, and have refused to pay them the *6d. per ton, &c.* 7. That the plaintiffs were not, on the execution of the works in the indenture mentioned, put to any extra expence beyond the 4000*l.* covenanted to be paid by the company. 8. That no part of the water in the declaration mentioned was drained by means of any engine, &c. or level erected or made on lands or mines not within 2000 yards of the canal. And 9. That no part of the water was raised for supplying the canal with water to a greater height than

was necessary for draining the coal mines. To these pleas there was a general demurrer.

This case was argued in the last term; and the questions made in argument by *Richardson* for the plaintiffs, and *Yates* for the defendants, were, first, on the 1st, 7th, 8th and 9th pleas, whether the matters therein respectively alleged were dependent covenants, or conditions precedent to the plaintiffs' right of action, as they were contended to be by the defendants; or mutual and independent covenants, as the plaintiffs insisted that they were. Secondly, upon the second plea, whether the contract were illegal and void, as exceeding the powers given to the company by the canal acts; or as violating any of the statutes of mortmain; with respect to which it was insisted by the plaintiffs, that at any rate, as the matter rested at present entirely in covenant, and no conveyance was actually made to the company, the time for raising the objection was not arrived, and a licence from the crown might be obtained before the conveyance was executed. Thirdly, which was the principal point, arising upon the 3d, 4th, 5th, and 6th pleas, whether the contract in question were lawful within the provisions and spirit of the canal acts respecting the reduction of tolls; or whether it were void, as not having been agreed to at a general meeting of the proprietors held upon due notice, or by the major part in value of the proprietors of shares; or as being a *partial* reduction of the tolls for the benefit of *particular individuals* only, and not of the public; or as having been rescinded at a general meeting of the proprietors lawfully convened.

The Court considered, at the time, that there was great weight in the last class of objections urged on the part of the defendants, and directed the case to stand over for consideration on those grounds. And now

Lord ELLENBOROUGH, C. J. delivered the judgment of the Court.

This was an action of covenant. By indenture of the 30th of July 1796, the plaintiffs contracted with the company to make a given cut, to communicate with the company's canal, and to do certain other works, and to send by the canal, and by no other conveyance, all the coals they should raise from certain collieries of which they were owners, or so much as could be disposed of at *Manchester*, or at or near the line of the canal: and the company covenanted that the plaintiffs should be permitted to carry their coals along the whole or any part of the canal, on payment of 1s. *per* ton, and that the company would pay back to them 6d. *per* ton. This is the substance of the contract, and as much of it as is necessary to state for the purpose of understanding the question now in judgment before the Court. And for the not allowing them to carry at 1s. *per* ton, and not paying back the 6d. *per* ton, the plaintiffs have assigned breaches. The company having pleaded amongst others, the following pleas, 1st, (which is the substance of their 3d plea,) that by their canal act they were empowered to take such rates as should be fixed by the company at any general assembly, not exceeding 1d. *per* ton, *per* mile, upon coal not passing through any locks; and 1 1-2d. upon what did pass locks. That they were also empowered to reduce the said rates at a *general assembly to be held at three months' notice*; but that *no reduction was to be made without the consent of the major part in value of the proprietors*. That the canal is of great length, &c.; that the tolls so granted for passing the whole length of the canal amount to more than 1s. *per* ton, *viz.* to 2s. 6d.: that the rates are therefore reduced by this indenture, and that such reduction was not made at any general assembly held upon a three months' notice. 2dly, (by their 4th plea,) That the reduction by this indenture was made without the consent of the major part in value of the proprietors. 3dly, (by their 5th plea,) That this reduction was made, so as to relate to the plaintiffs only, and not to other persons using the canal. 4thly, (by their 6th plea,) That before the times in the plaintiffs' breaches the company made an order, at a general assembly held for that purpose, that the 1s. *per* ton mentioned in this inden-

ture should be no longer taken, nor the 6*d.* *per*-ton returned; but that the tonnage should be 1*d.* *per* mile for what did not pass through locks, and 1 1-2*d.* for what did. To these pleas the plaintiffs have demurred generally: and the question for the consideration of the Court is, whether the company could bind itself by the bargain which this indenture contains? Other points were raised upon the argument upon certain other pleas; but they were disposed of at the time: and this is the only one which stands now reserved for the judgment of the Court.

The bargain between the parties in effect is, that in consideration of what the plaintiffs contracted to do for the company, and of their sending all their coals by the canal, they should be at liberty to send at 6*d.* *per* ton what, but for this bargain, might be chargeable with a much higher tonnage. The bargain might be highly advantageous to the company, if the expence of what they were to do was large, and if from the state, &c. of their collieries, the quantity of coal they should be able to send should be small; but upon the reverse of these positions, it would be advantageous to the plaintiffs, and might be prejudicial to the company. It was a speculation which might benefit either the one party, or the other, according to events. But has such a company a power so to speculate? Or if it have, were the checks imposed upon this company in this instance complied with? Under every canal act the proprietors have rights, the public has rights, and mortgagees, if there be any, have rights. The acts under which this company was established limit the extent of the canal to be made: the company, therefore, could not purchase land, or extend their canal beyond the limits prescribed by the act. They could not, therefore, contract with any persons to make for them, and on their account an extension of the line of their canal beyond the limits prescribed by the several acts, so as to vest in the company the canal so extended, and subject it to the rates and controul imposed by the act. Again, by the several acts, the company are restricted as to the money to be raised, which is to be employed for the purposes of the canal; and beyond the sum so prescribed they are prohibited to raise any money. But by paying for any works to be done, in cutting the canal, or extending it, by a total or partial sale or mortgage of the tolls, or any reduction of them, the company in effect indirectly raise more money than they are authorized by parliament to do. And the rates and tolls being made by the act a security for the money raised or subscribed, a grant of any partial diminution or exemption from toll is a prejudice to the security of the proprietors and mortgagees. Again, by the acts 32 G. 2. c. 84. s. 64. 33 G. 3. c. 21. s. 11. 38 G. 3. 40 G. 3. 45 G. 3, relating to these canals the company is entitled to take for the tonnage of *all* goods such rates, not exceeding the sums now claimed, as shall be fixed by the company at any general assembly; and they have no right again to reduce them but at a general assembly held upon three months' notice; nor then, without the consent of the major part in value of the proprietors. The proprietors, therefore, had a right originally to have upon *all* goods such tonnage, within the limits prescribed by the act, as a general assembly should fix; and nothing but a general assembly could abridge or vary that right. This bargain had not the sanction of any general assembly; and it does abridge the right of the proprietors to have the tonnage which the acts specify upon the goods of the plaintiffs: it takes away, therefore, the rights of the proprietors in a way which the acts have not authorized, and on that account is not binding upon the proprietors. If this bargain could stand, others might be made in the same way with the different individuals using the canal: and instead of the security of one general rate, to the extent the acts allow, upon *all* the goods carried on the canal, the proprietors might have nothing upon *any* but the partial rates agreed upon by the different individuals and the keepers of the seal of the company. To say that the company shall pay for their works in money is only requiring them to do what was

expected would be done when the act passed; is keeping them within the powers of the act; and securing to the proprietors the benefit of the check they were intended to have. On the other hand, to allow them to sell an indefinite right of carriage, without the consent of the proprietors, would be doing what was never intended, and what might ruin the concern. This argument seems equally to apply when the rights of the public are considered. The public have an interest that the canal shall be kept up, and whatever has a tendency to bring it into hazard is an incroachment upon their right in it. They have also an interest that the tolls shall be equal upon *all*: for if *any* are favoured, the inducement to the company to reduce the tolls, *generally*, below the statute rate is diminished. But as it is sufficient in this case to say, that this bargain is not binding upon the company of proprietors, inasmuch as it abridges their rights in a way the statutes do not warrant, it is unnecessary to give an opinion whether it so interferes with the rights of the public, as to be on that ground also void.

Judgment for the Defendants.

Doe, on the several Demises of Richard Henry Kenrick and Others, v. Lord William Beaucherk and Others.

11 East, 657. Nov. 27, 1809.

Under a devise of a mansion and family estate to several successively for life and in tail; with a proviso that whatsoever person should, by virtue of the will, become possessed of or entitled to the estate, should from the time he became so possessed, take upon himself the surname of *Thelwall*, and make the mansion his usual and common place of abode and residence; held that a tenant in tail in remainder succeeding to the possession, who had also become *heir at law* to the testator, not being found to have had notice of the will of her ancestor containing such condition, her title could not be impeached by the remainder-man over, who brought ejectment after her death against her husband, by whom she had issue which died before her; she having also in fact suffered a recovery about four months after she came of age, within which period it was contended that she ought to have complied with the condition of residence to enable her to make a good tenant to the *præcipe*.

THIS case was removed into this court by a writ of error from the Court of Great Session for the county of *Denbigh*. The ejectment was brought to recover certain messuages and lands in that county: the lessors of the plaintiffs laid their demises on the 2d of May 1803; and at the trial before the Chief Justice of *Chester* a special verdict was found, which stated in substance as follows:

Thelwall Price, of *Bathafarn Park* in the county of *Denbigh*, being seised in fee of the premises in question, on the 5th of January 1767, duly made his will, whereby, after charging all his real and personal estates with his debts and funeral expences, he devised his said estates, lands, &c. in the several counties of *Denbigh*, *Flint*, &c. and also all his personal estate, to *J. Moyston* and *Owen Wynn*, and their heirs, upon trust, in the first place, to apply his personal estate to the payment of his debts, funeral expences, and legacies. And as to all his real estates, subject to his debts and charges, he devised the same to his cousin *Richard Price*, only son of *Wm. Price* of *Rllisolas*, for life; remainders to the first and other sons of the body of the said *Richard Price* in tail male; and in default of such issue, to the first and every other daughter of the body of the said *R. Price* in tail general; remainder to the Rev. *Robert Carter* for life; remainder to the first and other son and sons of the body of the said *R. Carter* in tail male; remainder to the first and every other daughter and daughters of the said *R. Carter* in tail general; remainder to *Richard Kenrick* for life; remainder to his first and other sons in tail male; remainder to his first and other daughters in

tail general. Then followed this proviso, on which the question turned, "Provided always, and I do hereby expressly declare that it is my will and purpose, that the said *R. Price*, or whatsoever other person or persons shall, by virtue of this or any other will or wills to be by me at any time made, become possessed of or entitled to my said estates in manner hereinbefore mentioned, shall, from the time he, she, or they, become so possessed, take upon himself, herself, or themselves, the surname of *Thewall*, and shall make the mansion of *Bathafern Park* aforesaid their usual and common place of abode and residence: and in case the said *Rd. Price* shall refuse or neglect to reside at and make use of *Bathafern Park* as his usual place of residence, and to take upon himself the name of *Thewall*, then and in such case I do hereby declare this my will to be void to all intents, in respect to him; and every other person and persons claiming under him, who shall so refuse to comply with such direction: and in like manner I direct, and my will is, that the same be utterly void in respect to the said *Robert Carter* and *Rd. Kenrick*, and every other person and persons claiming under them by virtue of this or any other will or wills to be by me at any time made, in case he or they shall refuse to take the surname of *Thewall*, and reside at *Bathafern Park* as aforesaid. And in such case of refusal, or for want of issue by the said *Rd. Price*, or *Robert Carter*, or the said *Rd. Kenrick*: then my mind and will is, and I do hereby devise all my said real estates whatsoever to my own right heirs forever." The testator died seised on the 28th of *December* in the same year, leaving the said *Wm. Price* of *Rlisulas* his heir at law. On the death of the testator, *Rd. Price*, the son of the said *Wm. Price* of *Rlisulas*, entered by virtue of the will, as the first devisee, and was seised thereof for his life, and complied with the conditions of the will, and died seised on the 21st of *March* 1775, without issue; upon whose death the said *Rev. Robert Carter*, the next devisee, who had become and then was the heir at law of the testator, entered and was possessed thereof, and enjoyed the premises until the 18th of *October* 1807, when he died at the said mansion house of *Bathafern Park*, leaving issue of his body *Charlotte Carter Thewall*, his only child, born on the 20th of *April* 1769. *Robert Carter* and his daughter *Charlotte Carter* assumed and used the surname of *Thewall*. Upon the death of *Robert Carter Thewall*, *Charlotte Carter Thewall*, who then was the heir at law of the testator, and also a devisee described in the will, entered upon the devised premises, and was possessed thereof and enjoyed the same: and on the 19th of *October* 1787, left the mansion-house of *Bathafern Park*, and resided during her minority with *Sir John Nelthorpe*, her guardian, in *Lincolnshire*. After she came of age, on the 20th of *April* 1790, she resided partly in *London*, and partly at *Redbourne* in *Lincolnshire*, where she had an establishment suitable to her rank and fortune, and did not make the mansion house of *Bathafern Park* the usual or common place of her abode and residence. By indentures of the 1st and 2d of *July* 1790, she, by her name of *Charlotte Carter Thewall*, made a tenant to the *præcipe*; and afterwards a writ of *quod ei deferriat* was sued out, and a common recovery with double voucher was in due form suffered at the Great Session of the county of *Denbigh*, on the 14th of *August* in the same year. On the 21st of *July* 1791, *Charlotte Carter Thewall*, being still in possession and enjoyment of the premises, married the defendant, *Lord Wm. Beaucherk*, and had issue by him one child, who died an infant in the lifetime of the said *Charlotte*, and she herself died without issue on the 15th of *September* 1797. *Richd. Kenrick*, named in the will, died on the 20th of *December* 1802, leaving issue *Rd. Hen. Kenrick*, his eldest son, *G. W. Kenrick*, and *C. G. Kenrick*, his other sons, the three several lessors of the plaintiff. Upon this special verdict judgment was given below for the defendant: to reverse which this writ of error was brought.

This case was argued in last *Trinity* term, by *Manley*, Serjt. for the plaintiff, and *Williams*, Serjt. for the defendant. By the former it was contended,

that the proviso in the will of *Thebwall Price* as to residence, though containing words in themselves of strict condition, yet by reason of the limitation over, particularly where the person taking was heir, amounted to a *conditional limitation*: and that by the non-residence of *Charlotte Carter Thebwall* in the mansion of *Bathfern Park*, even before she came of age, but certainly afterwards, and before the recovery suffered by her, the estate conditionally limited to her ceased, and thereupon the limitation over to *Richard Kenrick* took effect; of which the lessors of the plaintiff might take advantage; the assumption of the name being only necessary upon entering into possession of the property. And he denied that notice of the will and condition was necessary to be given to *Charlotte Carter Thebwall*, in order to induce a forfeiture of her estate; she being entitled to take as tenant in tail under the will, although she was also heir at law of the testator, at the time when she entered on the estate. On the other hand, it was contended, that the proviso amounted to a *condition* only, and that too a *condition subsequent*, and not a *conditional limitation*: and that not *Charlotte Carter Thebwall* or her father, but *Wm. Price*, was heir at law at the death of the testator, to which period the consideration of the question was in this respect to be referred. That the estate vested in her on the death of her father; and there could be no breach of condition or forfeiture before she came of age; and there was not time sufficient to incur any in the very short period between her coming of age and the suffering of the recovery; the law always allowing reasonable time to do every act: and that only the heir at law of the testator could take advantage of a condition broken. That *Charlotte C. T.* being entitled as heir at law at the time of her entry could not incur any forfeiture without express notice of and refusal to perform the condition. But that, even if a forfeiture were incurred, the lessors of the plaintiff were not entitled to take advantage of it, by reason that they had not taken the name as they ought to have done if the estate by her forfeiture were immediately vested in them.

These points, except the last, which was not much insisted on, were argued at great length; but as the Court in giving judgment only went on the ground of want of notice of the condition to the heir, it is unnecessary to enter at large upon the other points. After taking time to consider the case,

LORD ELLENBOROUGH, C. J. now delivered judgment, (after stating the substance of the special verdict.)

Upon these facts the Court of Great Session has given judgment for the defendant; and we are of opinion that that judgment is right, and ought to be affirmed. Many questions were discussed upon the argument; but the point, upon which our opinion is formed, is this: that as *Charlotte Carter Thebwall* was heir at law to the testator, and was therefore entitled by descent, if the testator had made no will, she was not bound to residence until she had notice that there was a will, and could not lose the estate by non-residence, without such notice. The verdict does not find that this lady ever had notice of this will; and as nothing can be presumed upon a special verdict, the case must be taken as if she never had any. The first case in which the necessity of notice to an heir, or to a person having an independent title, was considered, was *France's* case, 8 Co. 89, b. There *R. F.* was seised in fee, and devised to his eldest son and heir for 60 years: he afterwards made a feoffment to the use of himself for life; remainder to his eldest son for 60 years; with a proviso, that if his eldest son disturbed *F. F.* in the enjoyment of certain other lands and certain goods, the use to him should cease. The eldest son did disturb *F. F.*; but he had no previous notice of the feoffment. And it was resolved, that as he had no notice of the feoffment, his disturbance of *F. F.* did not put an end to his term: for had there been no feoffment, he would have had title either under the will, or as heir; and it would be against reason to bind him by a condition of which he was not apprised, where he would have a title, if there were no such deed as that which contained the condition. This

case, though rather differently put, is adopted in *Shep. Touchstone*. 148. The passage there is this—"If a man make a lease for years on condition: and the lessee doth not know of it; and after the lessor doth by will give the land to the lessee, without condition, and the lessee doth such an act as is a breach of the condition; in this case the condition is not broken: for the lessee must have notice of the condition ere he can break it." The learned author, therefore, of that work must have thought, that a party who would have title, if there were no such deed as that which contains the condition, is not answerable or liable to lose his estate by a breach of the condition, unless he has notice of the deed which contains it. In *Porter v. Fry*, 1 Vent. 199, reported also 1 Mod. 300, and Sir Thos. Raym. 236, the distinction is taken between persons who would have no title, if there were no such instrument as that which contains the condition, and those who would have title without such instrument: and notice is considered necessary to subject the latter to the consequences of a breach of the condition. In that case there was a devise to A. K. in tail, upon condition that if she married without consent, the estate should go over to the lessor of the plaintiff: she did marry without consent and upon an ejectment and special verdict, one question was, Whether the want of express notice of the devise would save the forfeiture? She was not the testator's heir; and *Rainsford*, Justice, said, I take a difference where the devisee who is to perform the condition is heir at law, and where a stranger: the heir must have notice; because he, having title by descent, need not take notice of any devise, unless it be signified to him; and so is *France's* case, 8 Co. And per *Hale*, C. J. "In *France's* case, there had been no need of notice had not the devise been to the heir; which is the only thing wherein it materially differs from this case." Judgment was given for the plaintiff, because A. K. was not heir, and had therefore no title but under the devise. A bill had been filed for relief; and Lord Keeper *Bridgman*, who was assisted by Ld. C. J. *Keeling*, and *Vaughan*, and Lord C. B. *Hale*, said, (1 Mod. 314,) had A. K. been heir, it might have made a great difference. This case, therefore, though not an adjudication that notice was necessary in case of an heir, is a strong authority, as far as the dicta of the Judges go upon that point. The case however of *Walloon v. Fitzgerald*, 3 Mod. 28, and Skinn. 125, is a decision upon the point. In that case, *Fitzgerald* conveyed to the use of himself for life; remainder to *Catherine*, his only daughter and heir, in tail; with a proviso, that if she married without consent, &c., the estate was to go over to the lessor of the plaintiff. She married, contrary to the condition: but had no proper notice of the settlement. Judgment was given in *Ireland* for *Catherine*, and on error brought here, the case was twice argued. *France's* case, and *Porter v. Fry*, were cited, and the difference was insisted on between the case of a stranger and that of the heir; "for the heir having title by descent, if there be any conveyance by the ancestor to defeat that title, and to which the heir is a stranger, he ought by the rules of law and reason to have notice of it." And after time to consider, the Court were unanimous, that *Catherine's* estate was not determined for want of notice, according to the resolution in *France's* case, from which they said they could not distinguish this: and judgment was affirmed. There are, therefore, two express decisions upon the very point, besides the dicta in *Porter v. Fry*. There is however one authority the other way, that of *Rundall v. Eeley*, Cart. 92, 170. In that case the testator had four sons, *John*, *Robert*, *William*, and *Matthew*; and he devised to *John* in tail male; remainder to each of the others successively in tail male; with a proviso, that if *John* married a woman with less than 1000*l.* portion, the lands should go to the three younger sons and their heirs, as before was limited, equally. *John* married a woman with less than 1000*l.* portion, and died leaving two daughters only; so that his estate tail ended. *Robert* and *Matthew* died without issue; and then *William* levied a fine of the whole, and devised to the plaintiff's lessor, and died without issue. *John's* daughters en-

tered; and ejectment was brought against them; and upon a special verdict found, *Bridgeman*, C. J. delivered the opinion of the Court; and after noticing that the words created a limitation, and not a condition, he says, "the next thing is, that notice should have been given; *John* being heir at law should have had notice of this will and limitation; but yet I say, it is not necessary notice should have been given, though he was heir. And the estate in *John* having ceased, the question is, what estate *Robert*, *William*, and *Matthew* had afterwards?" And after discussing that point, he concluded that the estates limited to them in succession ceased; that they took under the proviso, "if *John* married," &c., an estate tail in common, leaving the fee in the testator's heir. That when *Robert* and *Matthew* respectively died, their respective thirds passed to the defendants as the testator's heirs, and the defendants became tenants in common with *William*: that his fine, therefore, did not affect their two thirds, but his own only: And as to those two thirds, judgment was given for the defendants; and as to the other third, judgment was given for the plaintiff. This, therefore, was a solemn decision upon a special verdict on the very point: for unless it had been considered that the estate passed immediately upon *John's* marriage to the other three brothers in common, *William* would have been entitled to the whole at the time he levied the fine under the limitation to the brothers in succession; and then the fine would have operated upon the whole; whereas it was adjudged to operate upon a third only. It is singular, indeed, if Lord C. J. *Bridgeman* delivered this opinion in Hil. 18 & 19 Car. 2; as the report supposes, that he should have used the expression ascribed to him in 1 Mod. 314. "that if *A. K.* had been heir, it might have made a great difference." It is singular that this decision should not have been referred to either at the bar or by the bench, either in *Porter v. Fry*, which was decided Pasch. 24 Car. 2, or in *Walloon v. Fitzgerald*, which was decided Pasch. 36 Car. 2. It is observable too, that in *Rundall v. Eeley* the rights of the heir were not in question: *John's* right had clearly ceased, because he was dead without issue male; and the question was, how the estate was afterwards to go over; whether in succession, as it had at first been limited; or in common, according to the limitation, if *John* married a woman with less than the specified fortune. Without questioning, however the report of *Rundall v. Eeley*, and admitting the decision to have been as *Carter* reports, it is clearly inconsistent with *France's* case, with *Porter v. Fry*, and *Walloon v. Fitzgerald*; and the reason of the thing is so decidedly with those cases, that we have no hesitation in abiding by them, and holding *Rundall v. Eeley* not to be law. Where a party is really ignorant of the existence of the instrument in which the condition is contained, and where he would have good title if there were no such instrument, it seems unreasonable to hold that a neglect of the terms of that condition should subject him to a loss of the estate: it would encourage the concealing of the instrument till a breach were incurred, so to decide: and no substantial inconvenience can result from holding that the person entitled to avail himself of a breach should take care that the condition was known to the person who was to comply with it. Upon this ground, therefore, that *Charlotte Carter Thehall* never had notice of *Thehall Price's* will, or of the condition it contained, we are of opinion that the judgment below was right, and ought to be affirmed. If it were necessary, we might lay some stress upon the wording of the proviso, which speaks of a refusal to reside, &c. by *Robert Carter*, or those claiming under him, not of a mere neglect: and a refusal imports that the thing refused was proposed to the refusing party. But our opinion is founded on the broad ground, that neither neglect or refusal will subject the heir, &c. to lose the estate, unless he has notice of the condition. Without, therefore, discussing the several other arguments which have been used, which appear to us to make strongly against the claim of the plaintiff on other points: we are perfectly satisfied that, on this point, the

judgment which has been given for the defendant is right, and must be affirmed.

Doe on the joint and several Demises of Sarah Strong and Others v. Wm. Goff.

11 East, 668. Nov. 27, 1809.

A testator devised one estate to his wife for life, and after her decease to his daughter *Mary*, and to the *heirs of her body* begotten or to be begotten, *as tenants in common*, and not as joint tenants; but if such issue should die before he, she, or they, attained 21, then to his son *Joseph* in fee: and then he devised another estate to his wife for life, remainder to his son *Joseph* and to the *heirs of his body* begotten or to be begotten; but if he died without issue, or such issue all die before he or they attain 21, then to his daughter *Mary* and the *heirs of her body* begotten or to be begotten; such issue, if more than one, to take *as tenants in common*: held that the daughter *Mary* only took an estate for life in the first estate, with remainder to all her children equally as purchasers.

IN ejectment for certain messuages and tenements at *Henley-upon-Thames*, a verdict was found for the plaintiff for four undivided fifth parts of the premises, and for the defendant for the other undivided fifth, subject to the opinion of the Court upon the following case.

William Matthews being seised in fee of these and other premises, by his will dated the 18th of *Sept.* 1773, devised the premises in question thus:—I give and devise unto my wife, *Mary Matthews*, and her assigns, during the term of her life, all those my messuages and tenements, &c. and from and immediately after the decease of my said wife, then I give and devise the same messuages and tenements unto my daughter *Mary*, the wife of *Wm. Goff*, and to the *heirs of her body* lawfully begotten or to be begotten, *as tenants in common, and not as joint tenants*. But if such issue should depart this life before he, she, or they, shall respectively attain their age or ages of 21 years, then I give and devise the same premises unto my son *Joseph Matthews* his heirs and assigns for ever. And by another clause of the will he devised the said other premises thus—I also give and devise unto my said wife and her assigns during the term of her natural life all and singular my messuages or tenements, lands, &c. in *Hart-street* and *Duck-street* in *Henley*: and from and immediately after her decease, then I give and devise the said last-mentioned premises unto my said son *Joseph Matthews*, and to the *heirs of his body* lawfully begotten or to be begotten. But if my said son *Joseph* shall happen to depart this life without issue, or such issue shall all die before he or they shall attain their age of 21 years, then and in such case I hereby give and devise the said mentioned premises unto my said daughter *Mary*, the wife of the said *Wm. Goff*, and to the *heirs of her body* lawfully begotten, or to be begotten; such issue, if more than one, to take *as tenants in common, and not as joint tenants*.

The testator died seised in 1778, leaving his said widow and his daughter *Mary Goff*, him surviving. *Mary* the widow of the testator proved his will, and entered upon and enjoyed the premises in question during her life; and upon her decease *Mary Goff* entered upon and enjoyed the same until about five years ago, when she died, leaving issue *Sarah Strong*, *Mary* the wife of *Robert Mears*, *Elizabeth* the wife of *James Reeves*, and *Sophia Goff*, (the lessors of the plaintiff,) and the defendant *Wm. Goff*, her surviving: and the defendant thereupon possessed himself of the entirety of the premises. If the lessors of the plaintiff were adjudged entitled to recover, the verdict was to stand: otherwise, a nonsuit was to be entered.

Abbott, argued the case for the plaintiff on a former day of this term; and contended upon the intention of the testator, as collected from the will, that

Mary Goff took only an estate for life, and that all her children under the description of *heirs of her body*, took equal shares as purchasers, in remainder, by reason principally of the limitation to them *as tenants in common*: and he cited *Doe v. Luming*, 2 Burr. 1100; *Bagshaw v. Spencer*, 1 Ves. 142, and *Lisle v. Gray*, T. Jones, 119, and also *Robinson v. Grey*, 9 East, 1, and *Doe d. Wright v. Cundall*, ib. 400; where all the cases bearing upon the construction of this will were collected.

Preston for the defendant argued for the necessity of giving *Mary Goff* an estate tail, as well upon the legal effect of the subsequent limitation to the *heirs of her body*, as to effectuate what he said was the general intent of the testator, that no part of the estate devised to *Mary Goff* and the heirs of her body should go over to her brother, so long as any of her issue were in being: to which the particular intent, that her children should take as tenants in common, must give way. And he relied principally upon *Doe d. Candler v. Smith*, 7 Term Rep. 531; confirmed by *Doe d. Cock v. Cooper*, 1 East, 229; *Pierson v. Vickers*, 5 East, 548, and *Poole v. Poole*, 3 Bos. & Pull. 620. The principal arguments, as to the intention of the testator, were afterwards noticed in the judgment of the Court; which, after consideration, was now delivered by

Lord ELLENBOROUGH, C. J. This was an ejectment for premises in the county of *Oxford*; and the question arose upon the will of *Wm. Matthews*. The testator, as appears by his will; had a wife, a son, and a daughter; and he demised the premises in question to his wife for life, and immediately after her decease to his daughter "*Mary Goff*, and to the *heirs of her body* "lawfully begotten, or to be begotten, *as tenants in common*, and not as joint "tenants; but if *such issue* should depart this life before he, she, or they should "*respectively attain their age or ages of 21 years*, then he devised those "premises to his son in fee." By another part of his will he devised certain other premises to his wife for life; and, after her decease, to his son and to the heirs of his body lawfully begotten, or to be begotten: but if his said son should happen to depart this life without issue, or such issue should all die before he or they should attain their age of 21 years, then he devised those premises also to his said daughter *Mary Goff*, and to the heirs of her body lawfully begotten, or to be begotten; *such issue, if more than one, to take as tenants in common, and not as joint tenants*. The testator died; his widow entered and died: *Mary Goff*, his daughter, entered and died; and the lessors of the plaintiff are the four daughters of *Mary Goff*, and the defendant is her son. The lessors of the plaintiff, therefore, contend, that *Mary Goff* took an estate for life only in the premises in question, and that each of her children took a fifth by purchase. The defendant contends, that *Mary Goff* took an estate tail; and that upon her death the whole vested in him, as heir in tail by descent. This will is certainly a singular one, and it is very probable the testator might not know the exact meaning of all the terms he used; but upon attending to all the provisions of the will, we think his intention must be taken to have been, that *Mary Goff* should take for life only, and that her children should take as tenants in common by purchase. The words "*heirs of the body*" are undoubtedly *prima facie* words of limitation, but they may be construed to be words of purchase where it is clearly so intended; and we think that in this case such intention is clear. The provision, that they should take *as tenants in common, and not as joint tenants*, shews very distinctly that the testator was contemplating something very different from an estate tail: because an estate tail, if there were sons, would vest wholly in the eldest son, to the exclusion of all the rest: and upon an estate tail, there would be neither joint-tenancy nor tenancy in common. And the words which follow put it past all doubt that the testator used the words "*heirs of the body*," not as words of limitation, to give *Mary Goff* an estate tail, but as equivalent to *children or issue of her body*, to give such children a distinct and independant interest. The words are, "but if such issue should depart this life before he, she, or

they should respectively attain 21, then he devised to his son in fee." Whom does he mean then by "*such issue*" but the persons to whom he had before referred, by the description of the "*heirs of his daughter's body*?" And when he is contemplating the possibility that he, she, or they, may depart this life before 21, to whom can he be referring but the immediate children of his daughter? The obvious intention, therefore, of this part of the will clearly is to give *Mary Goff* an estate for life, and her children a distinct independant interest as tenants in common. In the devise to the son of the estate given to him, the words "*heirs of the body*" are perhaps used in a different sense; at least there are no new words importing that they are to take as tenants in common: but it is observable, that in the limitation over to the daughter, upon failure of issue of the son, the testator again uses the terms, "*heirs of her body*" when he is clearly speaking of her children; and again provides that they shall take as tenants in common, and not as joint tenants. There is a particular intent, therefore, fully and distinctly expressed upon the will, that the persons designated by the terms, "*heirs of the body*" of *Mary Goff*, should take as tenants in common: which they could not do, if she took an estate tail. But however strongly this intent is expressed, it would not be permitted to prevail, if it were inconsistent with any other paramount general intent of the testator; and it has been urged, that in case there is such paramount intent: not indeed, that any such paramount intent is expressed, or that it is inconsistent with any express devise in the will, that this particular intent should prevail; but it is assumed that the testator never could have intended, that any part of the estate in question should go over to the son, so long as there was any descendant of the daughter; and that to prevent this effect, and thereby to effectuate what he must have intended, the daughter must be held to take in tail; and that every word in the will, importing that her children were to take as purchasers and as tenants in common, ought to be rejected. But how can the Court say what was the testator's intention upon a point upon which he has expressed no intention at all, and which point perhaps never entered into his contemplation. Had the question been proposed to him, whether, upon the death of any of his daughter's children under 21, that child's share should go over to *Joseph*, or be divided among the daughter's other children, it is perhaps most probable the latter would have been his choice: but it is a probability only, not a certainty: and where one intention is plainly expressed upon the will, it must not be defeated by a mere conjecture that the testator might have another paramount intention inconsistent therewith. Admitting, however, that it ought to be inferred, that the testator could not have intended that any part should go over to his son, so long as there was any issue of his daughter in being, does it follow that the daughter must be held to have taken an estate tail? It might perhaps afford a reason for implying cross remainders between her children; (though it is not necessary to decide whether cross remainders are to be implied upon this will;) but it affords none for introducing so important a difference, as converting into an estate tail in the mother what would otherwise be separate and distinct interests in her children. It would be a singular conclusion, where each child was equally an object of the testator's bounty, and was to have an equal share, to hold that every child's share should be given up in the first instance to the eldest son, and that he and his issue, so long as he had any, should hold it to the exclusion of all the rest, lest the single share of a child dying under 21 should go over to the testator's son, before all the other issue of the testator's daughter were extinct! The argument would stand thus: *Mary Goff* may have 10 children; one may die under 21; the testator could not have intended that child's 10th part to go over to his son *Joseph*; ergo, to prevent that consequence, though the testator has said, that all his daughter's children shall take *equally*, that part of his intention must be wholly sacrificed, and the estate shall go intire to the daughter's eldest son; and no one of the eight other children shall have any thing, unless such eldest son

dies without suffering a recovery and without issue! Fortunately for the intention of the testator, and for the objects of his bounty, we are not bound down by any case to adopt such a decision. We have looked through the cases which have been cited, and do not feel that we shall break in upon any of them, by holding that the children of *Mary Goff* took estates in common by purchase: this is distinctly and unequivocally expressed by the testator to be his intention: no contrary intention is expressed in any part of his will; nor is there any provision contained in the will inconsistent with this intention, nor from which a contrary intention can fairly be implied. We are of opinion, therefore, that we are bound to give effect to this intention of the testator, so plainly expressed in his will; and that we do, by holding that the plaintiff is entitled to recover.⁽¹⁾

Judgment for the Plaintiff.

Gildart v. Gladstone and Gladstone, in Error.

11 East, 676. Nov. 27, 1809.

By the *Liverpool* dock acts of 8 Ann. and 2 Geo. 3, certain tonnage duties are payable to the dock company on all vessels sailing with cargoes outwards or inwards, so as no ship shall be liable to pay more than once for the same voyage out and home. This is one entire duty imposed upon one entire voyage out and home, if there be either an outward or an inward cargo in such voyage, but without making any advance if there should be both. Thus, a *Liverpool* ship carrying a cargo out to the *West Indies*, and bringing another home to *Liverpool*, is only liable to pay one duty, namely, the duty outwards; and a foreign ship bringing a cargo to *Liverpool*, and carrying another cargo out, is only liable to pay the duty inwards. But where a ship was built in another port, on account of the owner residing at *Liverpool*, where she was registered, and sailed to the *West Indies*, without first coming to *Liverpool*, but brought her return cargo there as to her home; this was held to be one entire and distinct voyage within the meaning of the acts, for which the duty inwards was payable, and did not privilege the ship from payment of the duties again when next she sailed with another cargo upon her outward voyage to the *West Indies*, though in fact she only used the dock inwards on her first voyage: for the privilege of using the docks with an outward and inward cargo, upon one payment of duty, is confined to the same voyage out and home.

THE *Gladstones* brought *assumpsit* in *C. B.* against *Gildart*, for money had and received by him to their use, and on other common money counts; to which the general issue was pleaded; and at the trial a special verdict was found, stating in substance, that a ship called the *Kelton* was built in the county of *Devon*, in 1800, for *Gladstone* and others, then and still residing at *Liverpool*, and on the 7th of *November* in that year was registered in their names at the port of *Liverpool*, and soon afterwards was cleared out by them from *Bristol* to *Saint Vincent's* in the *West Indies*, and arrived from thence at the port of *Liverpool* in *August* 1801, being her first arrival in that port; and on her arrival, her owners paid to the collectors of the dock duty the duty inwards then payable; and the ship afterwards sailed from *Liverpool* without paying any dock duty outwards. The ship afterwards performed several other voyages from and to *Liverpool*, and always paid the dock duty inwards, and not outwards, until the 7th of *January* 1807. On the 16th of *December* 1802, by the transfer of other shares to the *Gladstones*, they became the sole owners of the ship, and registered her in the port of *Liverpool* in their names. In *May* 1806, the ship cleared out from *Liverpool* with a cargo of goods to *Demerara*, and no duty outwards was then demanded or paid. In *November* 1806, the ship arrived at *Liverpool* from *Demerara* with a cargo of goods, when the *Gladstones*, as owners of her paid to *Gildart* as collector of the dock duties 33*l.* 15*s.* 3*d.*, being at the rate of 3*s.* per ton for the dock duty payable for the ship on her said arrival inwards at *Liverpool*. The ship having discharged

(1) Vide *Lasses of Findlay & al. v. Riddle*, 3 Binn. 139.

her then cargo, was afterwards, on the 7th of *January* 1807, by her said owners, cleared outwards from *Liverpool* with a cargo of goods for *Madeira* and *Jamaica*, and sailed accordingly; and upon such clearing out *Gildart*, as collector, demanded from the *Gladstones*, as owners, payment of the further sum of 33*l.* 15*s.* 3*d.* for the dock duty, and refused to permit the ship to sail until it should be paid: whereupon the owners paid the same, in order to enable the ship to clear out, having first protested against the validity of the demand. In *September* 1807, the ship arrived with a cargo of goods at *Liverpool* from *Jamaica*, and no dock duty was demanded from or paid by the owners upon such arrival inwards: and having discharged her cargo, she again cleared out and sailed in *September* 1807, from the port of *Liverpool* aforesaid with another cargo of goods to *Halifax*, when a further dock duty of 33*l.* 15*s.* 3*d.* was demanded by and paid to the collector by the owners. Since the passing of the act of the 2 Geo. 3. c. 86, until the beginning of 1807, the *Liverpool* dock duties payable upon all ships using that port have been demanded and paid upon their respective arrivals inwards, and not otherwise. But whether, upon the whole matter, the *Gladstones* ought to recover the said sum of 33*l.* 15*s.* 3*d.* from *Gildart*, the jurors prayed the advice of the Court.

This case was argued in the last term by *Js. Clarke* for the plaintiff in error, and *Richardson* for the defendants. The argument turned upon the construction of two acts of parliament for granting and regulating the dock duties in the port of *Liverpool*; of the 8 Ann. c. 12, and the other of the 2 Geo. 3. c. 86. By the first of these certain duties were given to the corporation of *Liverpool*, which are directed to be "paid for every ship," &c. (those in the service of the crown excepted) "trading or coming into or out of the said port with any goods or merchandize," by the master or owners, "viz. for every vessel so trading between the said port and *St. David's Head* or *Carlisle*, 2*d.* per ton: and for every vessel trading between *St. David's Head* and the *Land's End*, or beyond *Carlisle* to any part in or on this side the *Shetlands*, or to and from the *Isle of Man*, 3*d.* per ton: and for every vessel trading to any port of *Ireland*, 4*d.* per ton: and for every vessel trading to and from *Norway*, &c. 8*d.* per ton: and for every vessel trading to and from *Newfoundland*, &c. 12*d.* per ton; and for every vessel trading to and from the *West Indies*, &c. 1*s.* 6*d.* per ton." "Such duties to be paid at the time of such ship's discharge either inwards or outwards at the custom-house in the said port: so as no ship shall be subject or liable to pay the duty but once for the same voyage both out and home, notwithstanding such ship may go out and return back with a lading of any goods or merchandize." This act was continued by various other acts, amongst others, by the 2 Geo. 3. c. 86, which enacts, (s. 7,) "that all and every the said tonnage duties to be hereafter paid or made payable by any of the said former acts or this act, upon every ship, &c. coming into or arriving in the said port of *Liverpool*, shall be made due, payable, and be paid at the dock office in *Liverpool* to the collector, &c. upon the arrival of every such ship, &c. or other vessel inwards at *Liverpool*, and before such ship or other vessel shall be discharged or cleared inwards at the custom-house, &c. any thing in the said acts or this act, or any of them, to the contrary notwithstanding." And by another section, "to the intent that the said duties may be truly paid, the collector of the customs, &c. within the port of *Liverpool*, shall not receive any entry or cocquet, or other discharge or clearance, or take any report inwards for any vessel, &c. liable to the payment of the said duties, until the same duties shall be paid to the said collector or receiver, and until such master, owner, &c. of such vessel, subject and liable to the payment thereof, shall shew to such officer a receipt under the hand of such collector for the same, under the penalty of 20*l.*"

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court.

This case came before the Court upon a writ of error from the Common

Pleas; and as it depends upon the construction of two acts of parliament, the provisions of which have appeared to that Court in a different point of view than what they have appeared to us, we have taken time to consider of it to the present term. It was an action brought there for money had and received; and the question in it was, whether the collector of the *Liverpool* dock duties were warranted in insisting upon payment of dock duties on the clearing outwards of the ship *Kelton* on the 7th of *January* 1807. A special verdict was found, and the substance of it was this; that the ship *Kelton* was built for the plaintiffs and certain other persons residing in *Liverpool* in the year 1800. That she was built in *Devonshire*, and registered at *Liverpool* on the 7th of *November* 1800. That she was afterwards cleared out from *Bristol* to *St. Vincent's*, and arrived from thence in the port of *Liverpool* in *August* 1801. That this was her first arrival at that port: that she then paid the *Liverpool* dock duties upon her arrival *inwards*. That she sailed again, without paying any dock duties outwards. That she performed several other voyages from and to *Liverpool*, and always paid the dock duty *inwards* and not outwards, till the 7th of *January* 1807. That in *December* 1802, the other part owners transferred their shares to the plaintiffs in the cause below; and that they registered the ship at *Liverpool* in their own names. That in *May* 1806, the ship cleared outwards with a cargo for *Demerara*, but paid no duty outwards; and that she returned, in *November* 1806, with another cargo, and paid the duty on her arrival *inwards*. That on the 7th of *January* 1807, she cleared outwards with a cargo for *Madeira* and *Jamaica*, and the defendant below, as collector of the dock duties, insisted upon payment of duty on her so clearing, and refused to permit her sailing till it was paid; and that the plaintiffs below paid it accordingly, under protest. That the ship returned with a cargo in *September*, when no duty was demanded, and sailed again for *Halifax* with another cargo, when duty was again demanded and paid. That until the beginning of 1807, the dock duties payable on ships using that port were demanded and paid on their arrivals *inwards*, and not otherwise. The action was brought to recover back this money: the Court of Common Pleas thought the collector not warranted in demanding it, and gave judgment for the plaintiffs below.

The statutes affecting the case are the *Liverpool* dock acts of the 8 Ann. and 2 G. 3. c. 86. By 8 Ann. s. 3, a duty is to be paid for every ship trading or coming into or out of the port of *Liverpool* with any goods or merchandize, and the rate of duty varies according to the different ports between which the vessel trades. If she trade between *Liverpool* and certain neighbouring ports in this kingdom, the duty is 2*d.* or 3*d.* a ton: if she trade to *Ireland* and certain other specified places, 4*d.*: if she trade to and from *Norway*, *Denmark*, and certain other places; in some cases it is 8*d.*, in some 1*s.*, and in some 1*s.* 6*d.* By s. 4, the duties are to be paid at the time of the ships' discharge either *inwards* or *outwards*, so as no ship shall be subject or liable to pay the duty but once for the same voyage, both out and home, notwithstanding such ship may go out and return back with a lading of any goods or merchandize. By s. 8, no officer shall give any cocquet or other discharge, or take any report *outwards* for any ship as aforesaid, or in the said dock or limits, until the duties are paid, and a receipt for them produced. By stat. 2 G. 3. c. 86. s. 6, one third part of the former duties are to be paid, and they are to be collected and levied in the manner, &c. prescribed by the former acts. B. s. 7, the tonnage duties payable upon any ship coming into or arriving in the port shall be payable upon the arrival of such ship *inwards* at *Liverpool*, and before such ship shall be cleared *inwards* at the custom-house: and by s. 8, the officer shall receive no entry or cocquet or other discharge or clearance, or take any report *inwards* for any ship, &c. *British* or foreign, subject to the duties, until the duties are paid and a receipt for them produced.

These are the provisions which bear upon this case, and the questions raised

upon them are two; 1st, Whether the duty be payable in any case, except upon ships coming inwards? And 2dly, Whether the voyage out, upon which the ship sailed on the 7th of *January* 1807, were not under the stat. 8 Ann. s. 4, to be united with her last preceding voyage inwards; and whether the two did not constitute, within the meaning of that clause, *the same voyage*? The first question originates from the 7th and 8th sections of the stat. 2 G. 3; and because those clauses introduce provisions for enforcing payment *inwards*, it is contended that payment can never be demanded upon an outward bound vessel. When it is considered, however, how the case stood under the stat. 8 Ann. when those provisions were made, it will be found that the collecting *outwards* in cases which would admit of it was intended to be left as before; and the only alteration meant to be introduced was to give an additional security for collecting *inwards* in cases which admitted of an inward collection. The previous provision for collecting on *outward-bound* vessels was considered sufficient; that for collecting on *inward-bound* vessels, defective: the former were therefore to be left as they were, and the latter to be remedied. By stat. 8 Ann. s. 3, the duty was to be paid upon every ship bringing a cargo into the port of *Liverpool*, or taking a cargo out of it; and by s. 4, it was to be payable at the time of the ship's discharge either *inwards or outwards*, so as the ship paid only once for the same voyage. The company, therefore, had a clear right upon ships *taking out* a cargo, though they had never brought one *in*, and had a right to demand it upon the ship's sailing *outwards*. By s. 8, a provision was made to secure the payment upon ships sailing *outwards*, by forbidding the officer from giving her a discharge, till she had paid the duties, and produced a receipt for it; but no similar provision was made in respect of ships sailing *inwards*. The stat. 2 G. 3, remedied this defect, by introducing a similar provision as to ships liable to pay the duty on sailing *inwards*, with that which had before been made with respect to ships sailing *outwards*, and so made the system complete. If the duty were payable on her sailing *outwards*, the officer could not let her clear *outwards* (under stat. 8 Ann.) unless she produced a receipt for the duty: and, if the duty were payable on her sailing *inwards*, the officer would not let her clear *inwards* (under the stat. 2 G. 3,) without similar proof that the duty was paid. It was to remedy this defect, therefore, in the system alone, that the provision alluded to in the stat. 2 G. 3, was made; to extend the rights of the company, not to narrow them: to give them additional aid in collecting the duties, not to take away any previous powers. To hold that the duty could never be collected but upon an inward cargo might subject the port to great losses. If a ship sailed *in* ballast, nothing would be payable for her sailing *in*: if she sailed out with a cargo, she might be lost, or might wilfully avoid returning to that port. It may be true, that in the latter case, the company might have a remedy for their duties; but it would be a less immediate and operative remedy than the legislature meant to give them. We are therefore of opinion, that the duty is payable upon ships which sail with cargoes *outwards*, except in cases in which they paid the duty on sailing *inwards*, and where such sailing *outwards* can be connected with the previous sailing *inwards*, so as to constitute under the stat. 8 Ann. s. 4, *the same voyage*.

And this brings us to the second question, Whether the sailing out on the 7th of *January* 1807, could be connected with the previous inward voyage? The words of the proviso, which raise the point, are these: "so as no ship shall be subject or liable to pay the duty but once *for the same voyage out and home*." What then is meant by "the same voyage out and home?" It may mean that upon each voyage from the port to which the ship belongs and back, there shall be only one payment; that a *Liverpool* ship may carry a cargo out and bring another home, and that other ships may bring a cargo in and take a cargo out; and this seems the natural meaning of the words. The whole of this constitutes part of the same voyage, out and home.

But can the words fairly be carried to such an extent as to unite the voyages in question? This ship belonged to *Liverpool*; she was registered there, and that was her home. Upon her first voyage she sailed, not from *Liverpool*, but from *Bristol*; but when she came back, she came to *Liverpool* as her home; and there ended what would be considered in common parlance as her first voyage out and home. When she sailed again, she sailed upon what, in the common understanding of mankind, would be called a new voyage: with new stores, and probably with a different crew; her contract with her former crew would of course have ceased, and so would her charter-party, and the insurances upon her, if made in the ordinary way, for the voyage out and home. And if this were a new voyage, each of her voyages out and home ended at *Liverpool*; and when she sailed on the 7th of *January* 1807, she commenced a new voyage. It is true, that by this computation she pays whole duties upon one voyage, though she only used the dock on that voyage *inwards*; whereas if she had used it both outwards and inwards, no larger duties would have been payable. This, however, arises from the wording of the act. The act does not impose distinct duties upon an inward and outward cargo, but *one entire duty* upon each voyage, if there be either an inward cargo or an outward one in such voyage; but without making any advance if there should be both: and if the ship, instead of having both, has only one, the whole duty is still payable. It may be singular, indeed, to be paying as much for once using the dock, as would be payable if twice used; but if the ship owner have the option of using it twice, and use it once only, and be apprized by the act that if the ship do not use it the second time, the full duty will still be payable, he has no right to complain. Suppose a ship comes to *Liverpool* in ballast, carries out an outward cargo, and makes several other voyages without touching at *Liverpool*, and then comes into *Liverpool* with a cargo inwards; would there be an exemption from payment for the latter cargo, because the whole duty had been paid for the former? The ship owner would say, that he had in fact had no greater use of the docks than he would have been entitled to have had upon one payment; that is, that one payment would have entitled him to land an inward cargo, and carry back an outward one: or, *vice versa*, to carry out an outward one, and bring another home. But would not the answer have been, that you have no right under these acts of parliament for both an outward and an inward cargo, unless they be upon the same voyage? And is not that the answer here, that the two cargoes must be upon the same voyage, out and home? The act of Ann. has said in direct terms, that they must. Was then the voyage out, when the ship sailed on the 7th of *January* 1807, part of the *same voyage out and home* upon which the ship had returned in the preceding *November* 1806? The special verdict has not found that it was, as matter of fact; and can we say it was, as matter of law? If it were, it was a voyage out from *Demerara*, and home to *Madeira* and *Jamaica*; and her next voyage was a voyage out from *Jamaica*, and home to *Halifax*! To call these parts of the same voyage out and home does not fall in with what has hitherto been understood by "a voyage out and home;" and must we not suppose that the legislature intended to use these words in the sense in which they are commonly understood; that is, as descriptive of a voyage commencing from and terminating in the country to which the ship belongs, or (as here) in some particular port of such country. If the words would fairly admit of different meanings, it would be right to adopt that which would be most favourable to the interest of the public, and most against that of the company; because the company in bargaining with the public ought to take care to express distinctly what payments they were to receive; and because the public ought not to be charged, unless it be clear that it was so intended; but when plain words are used, their ordinary sense must be given to them: and we think the words here used are plain. Upon these grounds it appears to us, that the collector, the defendant below, was warranted in demanding, and having received it, is

entitled to retain, the money in question, and of course that the judgment of the Common Pleas in favour of the Plaintiffs in the original action, and against the Defendant below, now the Plaintiff in error, must be reversed.(1)

Judgment of reversal accordingly.

(1) See another case between the same parties, arising upon the same acts of parliament, and resting upon similar facts, in 12 East, 439.

J U D G E S
OF THE
COURT OF KING'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

EDWARD, Lord ELLENBOROUGH, Chief Justice.
Sir NASH GROSE, Knight.
Sir SIMON LE BLANC, Knight.
Sir JOHN BAYLEY, Knight.

ATTORNEY—GENERAL.

Sir VICARY GIBBS, Knight.

SOLICITOR—GENERAL.

Sir THOMAS PLUMER, Knight.



CASES

IN

HILARY TERM,

IN THE FIFTIETH YEAR OF THE REIGN OF GEORGE III.

Leeds v. Burrows.

12 East, 1. Jan. 24, 1810.

Where an agreement between an outgoing and an incoming tenant was, that the latter should buy the hay, &c. of the former upon the farm, and that the former should allow to the latter the expence of repairing the gates and fences of the farm; and that the value of the hay, &c. and of the repairs should be settled by third persons; held, that the balance settled to be due to the outgoing tenant for his hay, &c. after deducting the value of the repairs, might be recovered by him in a count upon a general indebitatus assumpsit for goods sold and delivered; having failed upon his count on the special agreement, for want of including in it that part of the agreement which related to the valuation of the repairs. And nothing being referred to the appraisers except the mere value of the goods and of the repairs, an appraisement stamp upon the written valuation is sufficient under the statute 46 G. 3. c. 43, and an award stamp is not necessary.

THIS was an action on the case on promises. The first count of the declaration was framed upon a special agreement, and stated, that the plaintiff, being possessed of a certain farm, as tenant to *T. W. C.*, on which farm he had 70 tons of hay and a spike-roll, on the 11th of *October* 1808, in consideration of the premises, and that the plaintiff, at the defendant's request, would relinquish to him the hay and spike-roll, and leave the same on the farm for his use, the defendant promised to pay the plaintiff so much money as certain referees should appraise and value the goods at. And then the plaintiff averred, that he did relinquish the hay and spike-roll to the defendant, and left them on the farm for his use; and that the referees valued and appraised the goods, and determined that the defendant should therefore pay to the plaintiff for the same, and for and in consideration of the premises, 184*l.* 4*s.* The second count was upon a general indebitatus assumpsit for a certain sum for hay and farming utensils sold and delivered by the plaintiff to the defendant. The third count was upon a quantum valebant; and there was also one upon an account stated, together with other common money counts.

It appeared at the trial before Lord C. J. *Mansfield* in *Norfolk*, that the plaintiff was the outgoing and the defendant the incoming tenant of a farm, and that it had been agreed between them, that the referees should value the hay and the spike-roll, for which the defendant was to pay, and should also estimate the value of repairs for gates and fences on the farm, which the plaintiff was to make good. That by a memorandum in writing, on an appraisement stamp, that the plaintiff was the outgoing and the defendant the incom-

ing tenant, and that the plaintiff, at the time of his quitting, had a stack of hay and a spike-roll on the farm, which he *sold and agreed to leave* to the defendant, and the defendant did *purchase and agree to take* at such sum of money, as they (the referees) should *value and appraise* the same; stated that they (the referees) having met and examined the hay and spike-roll, and considered their value, did appraise and value the same at 184*l.* 4*s.* This was signed by the referees, and dated 7th *March*, 1809; and on the other side of the same paper, was written, "7th *March* 1809.

" The hay and roll valued at - - - -	184 <i>l.</i>	4 <i>s.</i>	0
" To deduct therefrom for repairs of gates and fences - -	6	16	0

Due to Mr. *Leeds*

177 8 0

and this was also signed by the referees. It was thereupon objected, that it was part of the agreement that the appraisers should value the repairs of the gates and fences, and that there was a variance between the agreement laid and that provided. This objection was admitted by the Chief Justice; and though the plaintiff's counsel insisted, that he was entitled to recover either on the special or the general count, the plaintiff was nonsuited.

Sellon, Serjt., (with *Frere*, Serjt.) moved in the last term to set aside the nonsuit, 1st, upon the ground that the plaintiff was not obliged to set out more of the agreement in the special count than was necessary to entitle him to recover the value of the goods sold by him to the defendant, as ascertained by the appraisers. [But on this ground *The Court* were of opinion, that the plaintiff had failed in proving the special count. They said, it might have been part of the consideration which moved the defendant to agree to take the hay and spike-roll at the valuation of the referees, that they should allow him so much for the repairs of the gates and fences, to be paid by the plaintiff; and therefore the plaintiff had stated the consideration for the agreement on the part of the defendant too shortly.(1)] He then contended, that as the contract was executed, and the defendant had gotten the hay and spike-roll, the plaintiff was entitled to recover on the general count for goods sold and delivered. And on this ground the Court granted a rule *nisi*.

Peckwell, Serjt. now shewed cause, and urged a preliminary objection, which he had taken at the trial to the evidence given of the valuation of the plaintiff's goods by the instrument in writing, which had a 10*s.* appraisement stamp(a) instead of an award stamp, which is of a higher denomination, as he contended it ought to have had; the reference including a right of action for damages done to the estate. [*Le Blanc*, J. observed, that it was only left to the persons to whom the matter was referred, to put a value upon the articles which the parties had already agreed should be paid for; and therefore it seemed more properly to be a valuation or appraisement than an award, within the meaning of the stamp acts. But waiving this point, which was not referred to in the Chief Justice's report, the defendant's counsel was asked what objection he had to urge against the plaintiff's right to recover the value of those goods on the count on the general indebitatus assumpsit? To this he answered, that, if resort could be had to it in this case, it would equally avail in every case, however special the contract as to the mode of payment, after the time arrived when the payment was agreed to be made. But he contended, there was a

v. *Sheward*, 8 East, 7, particularly the opinion of *Le Blanc*, J. In *Clark* East, 569, 570, the Court distinctly recognized the principle, that in defect consisting of several distinct parts, it is necessary to state the entire act, and the entire act which is to be done in virtue of such contract. *King v. Robinson*, Cro. Eliz. 79. *Churchill v. Wilkins*, 1 Term Plead. 295, 6.

G. 3. c. 43, lays an ad valorem stamp on every piece of paper, &c. "upon tion or appraisement, or the amount of any valuation or appraisement operty, or effects, real or personal, or of any interest in possession, 1cy in any estate, &c. shall be written or set down in figures."

distinction in cases of this description where the payment was to be made not altogether in money, but partly in doing or receiving other things; as here the goods were in part to be paid for by the allowance to be assessed for the repair of the gates and fences. As it is said in *Hard's* case, 1 Salk. 23, that a general indebitatus assumpsit will not lie upon a mutual assumpsit; and the same principle was admitted in *Barbe v. Parker*, 1 H. Blac. 287, where several other cases are cited to the same effect.

GROSE, J.(a) said that he saw no reason why the plaintiff might not recover on the general count the value of his goods, which had been sold to the defendant and taken possession of by him,(1) deducting the value of the repairs which were to be allowed.(2)

LE BLANC, J. The fallacy consists in not considering the plaintiff's claim as arising for goods sold and delivered to the defendant, as the fact really is, but in assuming that the claim of the one party was in consideration of what was to be done on the part of the other. The plaintiff's claim is founded upon the sale and delivery of hay, and a spike-roll to the defendant; and the agreement between them in effect is no more than this, that as the plaintiff was indebted to the defendant for something else, as soon as the amount of the defendant's claim was ascertained, it should be taken in part payment of what was to be paid to the plaintiff for the hay and spike-roll. If it had not been so agreed to be deducted, it would have been a subject of set-off; but being agreed to be taken as part payment, it still leaves a sum due to the plaintiff for goods sold and delivered.

BAYLEY, J. The whole of the plaintiff's demand was for goods sold and delivered; though he is not entitled to recover the full value of his goods, because that would be contrary to his agreement to allow for the value of the repairs in part payment: the balance, therefore, is the only debt; but that is altogether for goods sold and delivered.

Rule absolute.(b)

(a) Lord Ellenborough, C. J. was absent.

(1) The rule laid down by Sir James Mansfield in *Cooke v. Munstone*, 1 New Rep. 355, is this: Where a party declares on a special contract, seeking to recover thereon, but fails in his right to do so altogether, he may recover on a general count, if the case be such, that, supposing there had been no special contract, he might have recovered on such a count. This rule his Lordship illustrates by the case of a plaintiff suing a defendant as having built a house for him according to agreement; there, if he fail to prove that he has built it according to any agreement, he may still recover for his work and labour done. In the late case of *Tuttle v. Mayo*, 7 Johns. 132, the Supreme Court of New-York, after adverting to some contrariety in the books on this subject, adopt the rule above stated as the most correct. See the opinion of Lord Mansfield, supported by that of Mr. Justice Wilmet, in *Harris v. Oke*, Bul. N. P. 139, 140. *Keck's* case cited in Bul. N. P. 139, is to the same effect.

(2) Though the plaintiff fail to prove the special agreement in such a manner as to recover on the count in which it is stated, yet the defendant may avail himself of any circumstances that appear in evidence connected with such agreement, which go to lessen the quantum of damages on the general count. *Keck's* case, Bul. N. P. 139. *Kist & al. v. Atkinson & al.* 2 Campb. 63. As to what negligence or fault in the plaintiff on a quantum meruit, or defect in the commodity on a quantum valebat, may be taken advantage of by the defendant, and how far the same shall operate as a defence, or in reduction of damages, see note (1) to *Templar v. M' Lachlan*, 2 New Rep. 141, Day's edit.

(b) The Plaintiff having recovered a verdict for the balance on the second trial before Grose, J. Peckwell, Serjt. moved, in Easter term following, to enter a nonsuit, upon the same objection as to the stamp taken at the trial; that the agreement included a reference of a right of action for damages done to the estate; which, he urged, was not within any of the words of the appraisement stamp act descriptive of the property to be valued. But Lord Ellenborough, C. J. said, that it was only appointing persons' count of what was due between the parties for the value of the differer parties had no contemplation of submitting any differences to the aw; and no such terms ought to be imposed upon them against their own meaning of the stamp acts. The Court therefore refused a rule.

entitled to retain, the money in question, and of course that the judgment of the Common Pleas in favour of the Plaintiffs in the original action, and against the Defendant below, now the Plaintiff in error, must be reversed.(1)

Judgment of reversal accordingly.

(1) See another case between the same parties, arising upon the same acts of parliament, and resting upon similar facts, in 12 East, 439.

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EDWARD, Lord ELLENBOROUGH, Chief Justice.
Sir NASH GROSE, Knight.
Sir SIMON LE BLANC, Knight.
Sir JOHN BAYLEY, Knight.

ATTORNEY-GENERAL.

Sir VICARY GIBBS, Knight.

SOLICITOR-GENERAL.

Sir THOMAS PLUMER, Knight.



CASES

IN

HILARY TERM,

IN THE FIFTIETH YEAR OF THE REIGN OF GEORGE III.

Leeds v. Burrows.

12 East, 1. Jan. 24, 1810.

Where an agreement between an outgoing and an incoming tenant was, that the latter should buy the hay, &c. of the former upon the farm, and that the former should allow to the latter the expence of repairing the gates and fences of the farm; and that the value of the hay, &c. and of the repairs should be settled by third persons; held, that the balance settled to be due to the outgoing tenant for his hay, &c. after deducting the value of the repairs, might be recovered by him in a count upon a general indebitatus assumpsit for goods sold and delivered; having failed upon his count on the special agreement, for want of including in it that part of the agreement which related to the valuation of the repairs. And nothing being referred to the appraisers except the mere value of the goods and of the repairs, an appraisement stamp upon the written valuation is sufficient under the statute 46 G. 3. c. 43, and an award stamp is not necessary.

THIS was an action on the case on promises. The first count of the declaration was framed upon a special agreement, and stated, that the plaintiff, being possessed of a certain farm, as tenant to *T. W. C.*, on which farm he had 70 tons of hay and a spike-roll, on the 11th of *October* 1808, in consideration of the premises, and that the plaintiff, at the defendant's request, would relinquish to him the hay and spike-roll, and leave the same on the farm for his use, the defendant promised to pay the plaintiff so much money as certain referees should appraise and value the goods at. And then the plaintiff averred, that he did relinquish the hay and spike-roll to the defendant, and left them on the farm for his use; and that the referees valued and appraised the goods, and determined that the defendant should therefore pay to the plaintiff for the same, and for and in consideration of the premises, 184*l.* 4*s.* The second count was upon a general indebitatus assumpsit for a certain sum for hay and farming utensils sold and delivered by the plaintiff to the defendant. The third count was upon a quantum valebant; and there was also one upon an account stated, together with other common money counts.

It appeared at the trial before Lord *C. J. Mansfield* in *Norfolk*, that the plaintiff was the outgoing and the defendant the incoming tenant of a farm, and that it had been agreed between them, that the referees should value the hay and the spike-roll, for which the defendant was to pay, and should also estimate the value of repairs for gates and fences on the farm, which the plaintiff was to make good. That by a memorandum in writing, on an appraisement stamp, that the plaintiff was the outgoing and the defendant the incom-

to the queen's (*Elizabeth's*) grant should be by law null. And whereas an action hath lately, as is alleged, been commenced in his majesty's said court of K. B. against the Rev. G. C. R. (the defendant) fellow of *S. S. college*, &c. M. A. &c. at the suit of *T. B.* (the plaintiff) D. D., and the said *G. C. R.* hath been served with a writ of latitat issued out of the said court, at the suit of the said *T. B.* and therein returnable, &c. against the form of the privilege aforesaid; we certify and signify to you, that the said *G. C. R.* before, and at the time of suing, summoning and impleading aforesaid, was fellow of *S. S. college* aforesaid, and resident within the same, and registered within the book of matriculation of the said university, and still is a resident member of the university. Therefore we pray you, that by virtue of the privileges to us in this behalf granted, confirmed, and enacted, as soon as you shall have inspected these our letters signifiatory and claim, you will be pleased to suspend all further process and execution thereof against the said *G. C. R.* and him from your court freely to dismiss without any expence; and that you will be pleased to remit the conusance and final decision of the said action, &c. to us, according to the form and effect of the privileges aforesaid; by virtue of which said privileges him the said *G. C. R.* for a person privileged, and of the jurisdiction of the university aforesaid, and the conusance and final determination of the action aforesaid, we challenge and claim by these presents. Dated under the seal of the office of the chancellor of the university of *Cambridge*, the 28th of *Nov.*, 50 G. 3. (Signed *Isaac Milner*, vice-chancellor., (*L. S.*))

The affidavit also verified the signing and the sealing on the 27th of *Nov.* 1809, of a power of attorney, (which was entered on the roll) from *Dr. Milner*, as V. C. locum tenens and deputy of the chancellor, masters and scholars of the university, appointing *W. W. Atkinson* and *C. Pemberton*, and either of them, their attorneys, and attorney, to claim and defend the liberties and privileges of the university in the said action.

The roll on which this proceeding was entered was among the pleas of Mich. 50 G. 3, and first set out the said letter of attorney, dated the 27th of *Nov.*; and next the latitat, returnable on the 15th of *Nov.*; and then it proceeds—On which day, i. e. on the 15th of *Nov.* in this same term, before our lord the king at *W.* comes the said *T. B.* by *E. R.* his attorney, and offers himself against the said *G. C. R.* in the plea aforesaid, and the said *G. C. R.* also comes by *W. W. A.* his attorney. And thereupon also cometh into court the Rev. *I. Milner*, D. D. vice-chancellor of the university of *Cambridge*, and locum tenens, or deputy of the Most Noble *A. H. Fitzroy*, Duke of *Grafton*, the now chancellor of the said university, and the masters and scholars of the said university, by *W. W. A.* his attorney above-named, to ask and claim, prosecute and defend all and singular the liberties and privileges of him the said V. C. and locum tenens or deputy; and thereupon the said V. C. and locum tenens or deputy prays his liberty, i. e. to have conusance of the plea aforesaid before the said chancellor, masters, and scholars, or their locum tenens for the time being, to be held at *Cambridge*, because he says, &c. And so he proceeds to set out the letters patent of the 3d of Queen *Elizabeth*, as stated in substance in the letter signifiatory of the V. C. confirmed by the stat. 13 Eliz. c. 29, and further stating, as before, the matriculation and residence of the defendant in the university before and at the time of the writ sued out against him, and that the causes of action, if any, arose within the liberties of the university, i. e. within the town and suburbs of *Cambridge*, concluding with claiming conusance of the cause as in the said letter; and proffering to the Court the letters patent of Queen *Elizabeth*, and the exemplification of the act of confirmation.

The rule, calling upon the plaintiff to shew cause why this claim of conusance should not be allowed, was drawn up on reading the said claim of conusance and the several affidavits and documents above-mentioned, together

with the letters patent of Queen *Elizabeth*, and the exemplification of the act confirming them.

Marryat and *Abbott* now opposed the rule, and objected, that this claim of consuance was neither made in due form, nor in due time. (a) 1st, The power of attorney to claim the consuance, which is necessarily entered on the record, is executed by the V. C. as deputy, and in the name of the chancellor, masters, and scholars of the university in their corporate character; but the claim of consuance is made by the attorney of the vice-chancellor only; for it is said,—“and thereupon also cometh into court *the Rev. I. M. &c V. C. &c.* by *W. W. A. his attorney*,” &c. It might have been different if the V. C. had come into court in person, for then he might have been said to come in his representative character as deputy of the chancellor, masters, and scholars. The claim of consuance, therefore, and the authority on which it is made, are not consistent with each other.

As to this objection, it was stated *e contra*, that this was the common form in which the claim of consuance had always been made. That the seal affixed to the instruments was that used by the V. C., and not the university seal. And the court were satisfied, that the V. C. must be considered as acting throughout *ex officio* on the part of the university, whose officer he is.

2dly, It was objected, that the claim of consuance was entered on the record on the return-day of the writ, which was the 15th of *November*; whereas the power of attorney, by virtue of which it was made, was not executed till 12 days afterwards, namely, on the 27th of the same month. [Lord *Ellenborough*, C. J. The claim is in fact made on the 28th of *November* as appears by the letter addressed to us by the V. C. bearing that date. Then, because in making up the roll it is entered by our officer under the date of the 15th by relation to the last return-day of the writ; can we take advantage of that, to reject the claim?] Then supposing it not entered till the 28th, it would come too late: for all claims of consuance, being analogous to pleas to the jurisdiction of the court, the party must come on the first day given by the court; and supposing the claim was properly made in this case, before the cause of action appears by the declaration, (which raises another objection to the claim) the claim ought to have been made on the 8th day after the return of the writ, which is the day of appearance for the defendant. [Lord *Ellenborough*, C. J. What intermediate step has been taken in the cause between the return-day of the writ, and the day when the claim was in fact made? Is there any continuance entered on the record?] No step appears by the record to have been taken in the mean time, because the day of appearance is not entered on the record; but the court will take notice of its own rules of practice, by which the defendant must appear within eight days after the return of the writ in this case. The rule laid down in *Rex v. Agar*, 5 Burr. 2823, is, that consuance must be claimed in the first instance: what shall be considered as the first instance must be regulated by the nature of the case. [Lord *Ellenborough*, Ch. J. Is not the declaration the next step which the plaintiff takes by his own act after the return of the writ? Here then the university, having come before the declaration filed, may be said to have come in the first instance.] Lord *Mansfield* in that case said, “the return of the original writ in trespass, where place is named, or on a *præcipe quod reddat* where land is demanded, may be the *first instance*; because in those cases the writ tells where the cause of action arises: but in debt or detinue it is otherwise; for it is not known where the contract or obligation was made; and therefore till the plaintiff has counted, the claims need not be made.” “But if a replevin were sued against the lord of the franchise himself, there the lord’s claim would come too late after the count; because he must know where the taking was made; and by not demanding his privilege on the writ, he gives the court seisin of the cause;

(a) Vide *Leasingly v. Smith*, 2 Wils. 406.

for the lord must use no delay." Now, here the university of *Cambridge*, not having consuance, as the university of *Oxford* has, of all personal actions throughout *England* in which any of its members are sued; but their jurisdiction being confined to personal actions arising *within the town of Cambridge and its suburbs*; until the plaintiff in the action has declared, it cannot be told whether or not the cause of action has arisen within the jurisdiction of the university. The objection, therefore, is two-fold; either the university might have come in and claimed consuance upon the writ, in which case they were too late; or they ought (which appears to be the weightier objection) to have waited till the plaintiff declared, before which time it cannot be ascertained that they are entitled to claim consuance at all. As with respect to pleas in abatement, it is laid down in 1 Com. Dig. Abatement, H. 24. "In a real or personal writ where no certainty is contained, it is no plea, that there is another action for the same cause, until a plaint or declaration made upon record, which reduces the generality of the writ to a certainty, from whence it may appear to the court to be the same cause," &c. All the cases but one have been where the claim of consuance was made after declaration or indictment; and *Woodcock v. Brooke*, Cases Temp. Hardw. 241, where the claim was made upon the writ, was a claim made by the university of *Oxford*. And in *Wild v. Villers*, Comb. 319, where an action had been brought in the court of the Bishop of *Ely*, and after declaration there, the cause was removed into *B. R.*; on which there was an immediate claim of consuance; Lord *Holt* said, that before such claim could be made, there must be a new declaration in this court. [Lord *Ellenborough*, Ch. J. It would still come to be ascertained upon affidavit even after the declaration filed; and therefore the plaintiff ought to be prepared to deny that now by affidavit which the V. C. avers in his claim of consuance, and which the defendant verifies by affidavit, that the cause of action arose within the jurisdiction. *Bayley*, J. It is more advantageous to the parties to have the claim made as early as possible, because if well founded, it saves expence to have it so.] The claim of consuance actually made is contained in the letter addressed by the V. C. to the judges of this court; who afterwards direct their officer to record that claim, and the warrant of attorney of the person making it. It is the same as if the V. C. himself had pleaded the claim in the nature of a plea to the jurisdiction upon the record. If therefore the claim itself be informal, it cannot be supplied by affidavit that the cause of action arose within the town and suburbs of *Cambridge*. And though the claim, as entered on the roll by the officer of the court, states, in conformity with the fact sworn in the affidavits, that the cause of action arose within the jurisdiction, yet that made no part of the claim itself; and if that had been entered as made, the plaintiff might have demurred to it.

The Attorney-General, *Lens*, *Serjt.* and *Dampier*, with respect to the latter objection (the only one which seemed in the first instance to press upon the Court,) observed, that this was brought forward, as claims of consuance usually are, upon affidavit, as well as by the statement on the record, and therefore it was competent to the plaintiff to have denied any of the facts stated in those affidavits which were necessary to substantiate the claim. The letter significant, addressed by the V. C. to the judges, is not the formal claim of consuance set out on the record, but, as in actions the original writ states the nature of that claim generally which is afterwards detailed in the declaration, so the letter significant is merely introductory of the claim of consuance which is afterwards stated on the record more formally and in detail from that document, together with the affidavits verifying the material facts of the case in judgment. The record here states the coming into court of the V. C. as deputy of the chancellor, masters, and scholars of the university, by his attorney, to claim and defend the privileges, &c., and then it restates the substance of the letter significant, together with the proper facts necessary to found the claim

of comusance; and amongst others, that the cause of action, if any, arose within the liberties of the university.

The Court expressed themselves entirely satisfied upon this, as well as upon the other points, to which answers had already been given by the Lord Chief Justice. And his Lordship further observed, with respect to the objection, that the claim was not preferred in the first instance; that the return of the writ is the first step upon the record, and the interval from that time till some other step be taken on the record may all be deemed a continuing first instance: so that the claim of comusance having been in fact made before any other step after the return-day of the writ was taken upon the record, may be said to have been preferred in the first instance upon the return of the writ: therefore let the claim be allowed.

The King v. Ashwell.

12 East, 22. Jan. 25, 1810.

A charter giving the right of electing an alderman to the mayor and burgesses at large from themselves, a by-law stated to be made in 1577 by the then mayor and burgesses, but *not now extant in writing*, whereby the right of electing was restrained to "the mayor and certain of the burgesses of the town, viz. aldermen, coroners, common council-men, and such of the burgesses of the said town as had served, or did serve the office of chamberlain or sheriff of the said town, and called the *livery or clothing burgesses* for the time being, or so many of them as should be duly assembled together for that purpose, whereof the mayor to be one, or the major part of them, was held to be a reasonable and valid by-law. But every by-law may be repealed by the same body which made it. And the office of *chamberlain of the town*, as stated in such by-law, was taken to be a corporate office as well as the other offices, the serving of which was made the qualification of the electing burgesses.

THIS was an information in nature of quo warranto, calling on the defendant to shew by what authority he used and exercised the office of one of the aldermen of the town of *Nottingham*. To this he pleaded, that the town of *Nottingham* was from time immemorial an ancient town, and that the burgesses thereof, at the time of granting the charter of Hen. 6, after mentioned, were immemorially a body corporate, and that during all that time there had been, and now were, an indefinite number of burgesses of the town. That Hen. 6, by his charter of the 27th year of his reign, confirmed to the burgesses to be a corporation, by the name of *The Mayor and Burgesses of the town of Nottingham*; and that the then burgesses of the town and their successors should for ever after have, in the place of two bailiffs of the town, two sheriffs, to be chosen *from themselves*, in the form therein mentioned. He further granted to the said burgesses and their successors, that the same *burgesses* and their heirs might from time to time elect *from themselves* seven aldermen, for life, of whom one to be mayor; and that on the death, departure, or amotion of any alderman, the *mayor and burgesses* for the time being should elect one other burgess *from themselves* into the office of alderman; and that the aldermen should be justices of the peace within the same town, &c. It then stated the acceptance of that charter, and that after such acceptance, viz. on the 1st of May 1577, the then mayor and burgesses duly made a certain reasonable *by-law, not now extant in writing*, for the avoiding popular confusion and tumult in the election of aldermen, whereby it was ordained, that upon the death, departure, or amotion of any of the aldermen, "the mayor and certain of the burgesses of the said town, viz. the recorder, aldermen, coroners, common councilmen, and such of the burgesses of the said town as had served or did serve the office of chamberlain or sheriff of the said town, and called the *livery or clothing burgesses* for the time being, or so many of them as should be duly assembled together for that purpose, whereof the mayor for

the time being to be one, or the major part of them, by themselves, and without the concurrence and assistance of the rest of the burgesses, should forever thereafter elect one other burgess from the other burgesses of the said town to be one of the aldermen, in the place of the alderman so dying, &c. as to them from time to time seemed fit and convenient :” to which said by-law the mayor and burgesses for the time being, from the time of the making thereof hitherto, have consented and conformed themselves, and the same is now in full force and unrepealed. That since the making of the said by-law, the mayor, recorder, aldermen, the coroner, common councilmen, and such other of the burgesses as had served, or did serve, the office of chamberlain or sheriff of the said town, and called *the livery or clothing burgesses* for the time being, or so many of them as were duly assembled together for that purpose, whereof the mayor to be one, or the major part of them, have been used and accustomed to elect, and still of right ought to elect an alderman, in the stead of any who hath died, &c.; *without the concurrence or consent of the rest of the burgesses.* The plea then stated, that after the making of that by-law, viz. on the 16th of *Sept.* 1802, the then mayor, certain of the then aldermen, common councilmen, and certain other then burgesses of the town, who had served, or did then serve, the office of sheriff or chamberlain of the said town, and called the livery or clothing burgesses of the said town of *N.*, were in due manner assembled together at the common hall to nominate and elect an alderman of the said town, in the place of *T. C.* an alderman deceased ; and so the plea proceeded to state an election of the defendant, being one of the burgesses, by the major part of the persons so assembled, to fill the vacant place of alderman.

The replication took several issues : 1. That the mayor and burgesses of the town did not make such by-law. 2. That the mayor and the other persons named in the defendant’s plea were not in due manner assembled in order to elect an alderman in manner and form as in the plea alleged. 3. That the major part of the said mayor, &c. did not elect the defendant. And a suggestion having been entered on the roll, that an impartial trial could not be had by a jury of the town and county, or of the county of *Nottingham*, the venire was awarded into the county of *Leicester*, as next adjoining to the county of *Nottingham* ; and a verdict having been found for the defendant on these issues, before *Le Blanc, J.* at *Leicester*, a rule was obtained, calling on the defendant to shew cause why judgment of ouster should not be entered against him, notwithstanding such verdict ; founded upon an objection that the by-law stated in the defendant’s plea was an unreasonable and therefore an invalid by-law, as taking the right of election of aldermen from the burgesses at large, and confining it to a select body, which did not even require the attendance of the majority of the integral parts of the corporation to constitute the elective assembly.

Lens, Serjt., Balguy, Reader, Holroyd, Scarlet, and Balguy, jun. opposed the rule, and maintained the validity of the by-law. The election of an alderman was given by the charter to the mayor and burgesses generally, which is their name of incorporation, without pointing out any specific mode of election ; in which case it was long ago settled, in the case of corporations, 4 Rep. 77, b. followed by other cases, (a) that the body at large might make a by-law, restraining the number of electors, though not of the eligible ; such a by-law being calculated to avoid popular disorder and confusion. The general principle was recognized in *The King v. Spencer*, ib. 1827 ; though there the restraining by-law was held bad, as not having been made by the body at large, but by a select body, which thereby attempted to restrain the rights of the body at large. This by-law, however, is argued to be unreasonable, and there-

(a) Vide Jen. Cent. 273. *Rez v. Tomlyn*, Rep. temp. Hardw. 316, and other cases cited in the margin of 3 Burr. 1833, *Rez v. Spencer*.

fore bad, because by possibility, it is said, an election of an alderman may be made by the mayor and one burgess; but that consequence might also happen if the right of election were in the body at large; therefore, the objection proves too much. And such an extreme case of inconvenience, admitting the greater probability of it, in proportion as the number of electors is reduced, would be felt less than if a large definite number were required to attend, when some by staying away might defeat the election, at least for a time. In all cases, however, it must be presumed, that the electors will do their duty by giving their attendance; and in case of default, they may be compelled to do so by mandamus. The same thing in effect takes place in most large bodies, by their own regulations. In the House of Lords three, and in the House of Commons forty members are sufficient to constitute a House for the high function of legislation. It is the same in most other bodies. And the practical convenience of the thing is found to outweigh any theoretical disadvantage. There cannot, therefore, be any thing intrinsically unreasonable in a by-law made by the body at large, to whom the power of election was originally given, restraining that power to a certain description of themselves; when the same thing may in effect be done in each instance by the voluntary absence of members. In *Rez v. Hoyte*, which was the case of a prescriptive corporation, evidence of an ancient usage for the election of a capital burgess by the major part existing of a definite body, though less than the majority of the whole number when complete, was held to be evidence of a charter empowering such an election; which could not have been presumed, if such a provision were in itself unreasonable. But if a charter require an election to be made by a definite body, then according to *R. v. Bellringer*, 4 Term Rep. 810; *R. v. Miller*, 6 Term Rep. 268, and *R. v. Morris*, 4 East, 17, a majority of the entire number must meet, in order to constitute an elective assembly; and it is upon a misapplication of the principle of those cases, that the objection to the by-law in question is founded, which only narrows the right of election given originally to an indefinite popular body.

The Attorney General, Clarke, Dayrell, Dampier and Copley, contra. It does not follow that a by-law restraining the right of electors, as given to them by one charter, may not be unreasonable and therefore void, because the same provision may be found in other charters, or may be presumed to have been originally granted by evidence of ancient usage in the case of a prescriptive corporation; because the grantees must accept or reject the grant in the terms in which the crown chooses to make it. Here the body at large, by the terms of the charter, had the power of electing their own magistrates, and they exercised it: then a by-law, which may have been passed by a small majority of the existing body, abrogating the rights of the rest, and of their successors, and transferring the power of election to a select number, is in the very nature of it unreasonable, as being destructive of the general right granted by the charter. And though the most popular rights of election may come to be exercised in fact by comparatively small numbers: yet there is a wide difference, whether that happen by the choice of the individuals not attending, or by involuntary exclusion. The unreasonableness of the by-law, therefore, consists in the disfranchisement, as it may be deemed, of all those who are thus excluded, against or without their individual consent, from the exercise of that elective franchise which the charter gives them: and this is not compensated by transferring the privilege from the body at large to a select body, however reasonable such a confined privilege might have been deemed in the charter itself. Then, if this restriction were not legal in its commencement, no antiquity can give it strength. In *Ginever's case*, 6 Term Rep. 735, Lord Kenyon reserved giving any opinion as to the legality of a by-law to restrain the number of electors; and there, as well as in *Spencer's case*, all the court agreed, that a corporation could not make a by-law contrary to their constitution.

They also objected, that, as in *Spencer's* case, 3 Burr. 1627—8, it was held, that a by-law could not impose another qualification, such as that of having served parish officers, upon the character of corporator, as given generally by the charter, for the purpose of exercising the elective franchise; so here, the by-law was bad by requiring as one of the qualifications for the select body, the having served or serving the office of *chamberlain*; when it did not appear, that that was a corporate office, nor did it appear what was meant by "*clothing burgesses*," or how they were appointed.

LORD ELLENBOROUGH, C. J. We are called upon to pronounce this by-law to be void, as unreasonable, because it restrains the right of electing aldermen to a select body, which before was possessed and exercised by the body at large; and therefore it is argued, that it affords a greater chance than before of the entire non-attendance of the electors, or at least that there needs only the attendance of the mayor and one other, or perhaps two other burgesses, in order to constitute a good election under it, and that the chance of so small an attendance is greater under the restricted power of election given by the by-law, than under the extended right conferred by the charter. But in order to avoid a by-law upon the ground of its being unreasonable because of some inconvenience that may result from it, it should appear to be a *probable* inconvenience; for one can hardly predicate of any law, that some *possible* inconvenience may not result from it: but is it likely to happen? Now, this by-law has existed for above 230 years; and during all this time, if any inconvenience had resulted from it, it was competent to the corporation, by the same authority which enacted, to have repealed it. But the long continuance of a by-law, though it would not legalize it, if it were in itself illegal, is fair evidence to shew that there is no intrinsic inconvenience in it: at least, the acquiescence of the corporation in it for above two centuries is a fair answer to any theoretical argument of inconvenience; especially when it is considered, that they might have relieved themselves from the inconvenience, if it existed at all, at any hour of that long period, by repealing the by-law. Then consider what the by-law is: It is a delegation of the right of election by the indefinite body of the corporation at large to a select part of themselves, consisting of such of the burgesses as had served or were serving certain offices, and were called the livery or clothing burgesses. Such a by-law has the convenience, according to the opinion of the Judges in the case of corporations, of preventing popular tumults, and therefore it was approved of by them. It is not open to the objection which prevailed in *The King v. Spencer*, that of imposing upon the corporate character of the electors another qualification foreign to it: for though it be said, that the office of chamberlain (one of those named in the by-law) does not appear to be a corporate office; yet being described to be an office of *the town*, the burgesses of which were incorporated, and classed with the office of sheriff, as an office in the appointment of the corporation, and the chamberlain being one of those called "*the livery or clothing burgesses*," it must be understood to be a corporate office. I therefore see no ground for impeaching this by-law, either as unreasonable on account of any probable inconvenience likely to result from it, or as imposing any foreign qualification on the corporate character. At the same time, I do not say that any thing which may be done by charter, may be done by a by-law: but with respect to elective functions to be performed by the body at large, they may in this manner delegate them to a select part of themselves; and I cannot say, that it is an unreasonable by-law, because an inconvenience may, by bare possibility, result from it.

GROSE, J. This is in effect a motion in arrest of judgment, founded upon the supposed illegality of the by-law under which the defendant claims title to his office. It is plain, that the prosecutor did not in the first instance consider the by-law to be illegal, otherwise he would have demurred to it: but now he insists, that it is unreasonable on account of the greater chance that only two

or three of the electors may attend an election. But if any inconvenience were likely to arise from this, it is strange that the by-law should have existed so long without objection; and I can see nothing more unreasonable in this by-law than would exist in every other case where the number of electors is narrowed: but it has been settled since the case of corporations, that a by-law made for that purpose is valid; the reason assigned for which, is, in order to prevent popular confusion and tumults in elections, and an excellent reason it is. Finding, therefore, nothing unreasonable in this by-law, I agree that this rule ought to be discharged.

LE BLANC, J. This rule for entering judgment of ouster against the defendant, notwithstanding the verdict found for him on the issues taken in his plea, was moved for on an alleged defect of his title as set forth in the plea: and two objections have been taken to it; first, that he ought to have shewn the manner in which certain officers, and particularly the chamberlain mentioned in the by-law, were appointed, that they might all appear to be corporate officers; and secondly, that the by-law itself is essentially unreasonable, and therefore illegal. As to the first objection, it appears that all the officers named in the by-law were known officers of the corporation at the time; they are mentioned as officers of the town, who were called "*the livery or clothing burgesses*;" which sufficiently shews them to be *burgesses*, who are incorporated by the charter. Then, as to the second objection, as to the unreasonableness of such a by-law; it has been settled since the case of corporations, confirmed by other cases, that it is competent for the body at large, to whom the power of making by-laws is given, to narrow the number of the body who are to elect, and to delegate the power of election to a certain number of the corporation; as here, to a certain description of known officers of the corporation, and such other burgesses as have filled the same offices. But it is said to be unreasonable, for inasmuch as a majority of the persons so designated are not required to attend in order to make an elective assembly, it may happen, it is said, that one or two burgesses, with the mayor, may elect an alderman. But in order to be *duly* assembled, as the by-law requires them to be, the persons who are to make the election must have notice of the meeting; and if, after notice, they do not choose to attend, it is only the same inconvenience which might happen in case of an election to be made by the body at large. And their choosing to absent themselves no more shews the by-law to be unreasonable, than if, attending at the place of election, they did not choose to vote. It is not necessary to maintain, that the same provision must be reasonable and valid in a by-law, which would be good by charter or prescription; but it is sufficient to say, that it is no more unreasonable to provide that a particular number of the whole body should, on being duly assembled for the purpose, make the election, than that the whole number should elect. Therefore, I consider this to be a reasonable and valid by-law.

BAYLEY, J. The crown by its charter may impose what term it pleases, and if the parties accept the charter, no objection can be made on the ground that those terms are unreasonable: but where the question is upon a by-law, it is open to object to whatever is unreasonable in it. But I see nothing unreasonable in this by-law: it does not give the right of election to those who had no right before: it does not dispense with the attendance of any persons whom the charter expressly requires to attend: but merely to avoid popular confusion, the corporation made a by-law that the election of aldermen should be made by a certain description of their own body. And this by-law only operates upon the body at large so long as they think fit to continue it: it is liable to be re-considered by them at all times: it only binds their successors so long as the successors choose to be bound by it: for the same body that made the by-law may repeal it. Then the circumstance that for nearly 240 years no inconvenience has been found to result from it, is a strong argument to shew that no inconvenience is likely to result from it, and therefore to shew

that it is not unreasonable. Next, as to the objection that the chamberlain is not shewn to be a corporate officer; the whole town being incorporated, how can there be such an officer of the town, unless he be a corporate officer? It does not appear, therefore, that any person is named in the by-law who is not a corporate officer.

Rule discharged.

Roberts v. Williams, Clerk, and Another.

12 East, 33. Jan. 26, 1810.

Prohibition denied to the spiritual court upon its rejection of a modus set up there of 1d. for every turkey laying eggs, or of every tenth egg, &c. in lieu of tithe of turkeys, at the option of the vicar; such modus not ascertaining any certain time when the money payment in lieu of the eggs was to be made, in case the option were made to take it in money.

W. WILLIAMS, clerk, vicar of the parish church of *Pendoylon* in the county of *Glamorgan*, and his lessee of the tithe, libelled **R. Roberts**, an occupier in that parish, in the consistory court of the diocese of *Landaff*, for subtraction or non-payment of vicarial tithes; amongst others, the tithe of 40 turkeys bred and reared on *Robert's* farm in 1808, which sold at the rate of 7s. 6d. a couple, the tithe whereof amounted in value to 15s. To which *Roberts* pleaded, that by an ancient custom or modus decimandi, used from time immemorial within the parish of *Pendoylon*, the vicar was never entitled to the tithe of turkeys in kind from any of the inhabitants, but to 1d. for every turkey laying eggs, or to every tenth egg laid by such turkey, at the option of the vicar, in lieu thereof. This plea, with the proof offered in support of it, having been rejected by the spiritual court, an application was made in the last term, on behalf of *Roberts*, and a rule obtained, calling on *Mr. Williams* and his lessee to shew cause why a writ of prohibition should not issue to prohibit the consistory court of *Landaff* from holding further plea of the matters there depending between these parties.

Bevan shewed cause against the prohibition, and made three objections to the modus; 1st, that attending to the relative value of money in the time of *Rich.* 1st, at which time the modus must have existed, if at all, 1d. for every turkey laying eggs was a rank modus. [But *The Court* said, they could not now go into that objection.] (a) 2dly, That there could be no modus of the tithe of turkeys, per se, because turkeys were only introduced into this country since the time of legal memory. [Lord *Ellenborough*, C. J. How are we to know that?] The Court has taken notice that hops were introduced within time of memory; as, it was said, about the time of Queen *Elizabeth*. *Crouch v. Risden*, 1 Ventr. 61. 1 Sid. 443, and 2 Keb. 612. Turkeys were first noticed in this island in 1555, Dugd. Orig. 135; and the first mention of them in our books is in *Hughton v. Prince*, Moor, 599, in the 37 & 38 of *Eliz.*, where they are said not to be titheable in themselves or their eggs, because they were seræ naturæ. And in *Brinklowl v. Edmunds*, Bunb. 308, anno 1731, where a modus of three eggs for every cock and drake, and for every hen and duck respectively, payable on *Wednesday* before *Easter*, in lieu of tithe eggs and of chickens and ducks hatched in the parish, was established,

(a) By Lord *Eldon*, C. in *O'Conner v. Cock*, 6 Ves. jun. 671, "the magnitude of the payment is but evidence of the improbability that it was immemorially paid." It is therefore properly a question of fact, involving the relative value of money and of the particular species of property to which the modus is applied, as they might by possibility have existed before time of memory. But where the rankness, as it is called, is so gross and palpable as to exceed all moral possibility, courts of equity have in many instances decreed against them without sending the question to a jury. Vide instances of rank moduses collected in *Toller on Tithes*, 207.

the reporter, who was a person of great experience on those subjects, adds in a marginal note—"not to extend to turkeys, because brought into *England* "lately." But in *Carleton v. Brightwell*, 2 P. Wms. 402, anno 1728, the Master of the Rolls said he could not see but that turkeys were as tame as other poultry, and must therefore pay tithes: but that if tithes were once paid of the eggs, there could be no second demand for the chickens hatched. 3dly, the modus is bad, inasmuch as there is no time certain mentioned when it is to be paid. *Goddard v. Keeble*,^(a) *Phillips v. Symes*,^(b) and *Blacket v. Finney*,^(c) are in point: and the Court will not send a case to trial in vain. In *Hill v. Vaux*, Ld. Ray. 58, and Sal. 656, where the modus set-up was bad on the face of it, the court refused a prohibition.

Peake, in support of the prohibition, as to the second objection, said, that it was founded on an assumption of fact, which the Court would require proof of, before they decided against the validity of the modus. [Lord *Ellenborough*, C. J. said, that there might be a good modus, to include turkeys, though the bird might have been introduced into this country within the time of legal memory, as if there were a modus for all domestic fowls; but here, he observed, the modus was distinctly and eo nomine for turkeys.] If there were a general modus for all domestic fowls, including turkeys, the party might insist on it as a modus for turkeys nominatim: but even as a particular modus, the court would grant the prohibition, in order to try the fact on which the modus is objected to. For it is strange, that the court should have taken notice, as it is supposed, that hops were first introduced in the time of Queen *Elizabeth*, when there was a petition to parliament in the 6 H. 6, against the use of them. It is disputed between naturalists whether the turkey first came from *Asia* or *America*, but that does not decide the time of its introduction into *England*; but being found here in a domestic state, it may be presumed, in the absence of all proof to the contrary, that it was here before time of memory: and the opinion of Sir *Jos. Jekyll* in *Carleton v. Brightwell*, is an answer to the case in *Moor*, and the note in *Bunbury*. As to the 3d objection (which came upon him by surprise), he suggested, that the cases in *Bunbury* requiring a certain time for the payment of a modus had been over-ruled in some later case; but at any rate, he contended, that the time of payment of this modus was certain enough, namely, as soon as the tenth egg was laid; and then the parson had his option either to take that, if he had not thought proper to take the 1d. before for every turkey laying eggs. And *Wats. Clerg. L.* 563, 3d edit. says, that of the tithe of fowls (including turkeys) either the tenth egg, or the tenth young, is to be paid, but not both; and the custom regulates which: and the only difference in this modus is, that it gives the option to the parson either of the egg or of money.

Lord *ELLENBOROUGH*, C. J. This modus, it is said, gives the vicar an option either to take the tithe in the egg, or in money, in lieu thereof; but though, if the tithe be taken in the egg, it would belong to the vicar at the time the tenth egg was laid, yet no certain time is given if the option be made to take it in money; and therefore, if there were a change of vicars in the year, it would be uncertain to which of them it would belong; it is most material, therefore, for the vicar to have the time ascertained when the money payment is due, if the option be made to take it in money; and the defect in not ascertaining that time seems to be the vice of this modus.

The rest of the court agreed with his Lordship on this ground to discharge the rule for the prohibition.

On the same day, *Peake*, having looked into the cases on the last point, referred to *Richard v. Evans*, 1 Ves. 39, where Lord *Hardwicke*, C. said, that as to the general question, whether it were necessary to lay and prove a par-

(a) Bunb. 105, and vide other cases cited in the note to the 2d edit.

(b) Ib. 171.

(c) Ib. 198.

ticular day of payment, the case in the Exchequer^(a) was certainly so determined; but he remembered, that it gave general dissatisfaction in *Westminster-hall* and abroad, as too nice to require the proof of a particular day: that it had been since adjudged to the contrary, that *on or about* was sufficient: so that they had left off taking that exception in the Exchequer. But

Lord ELLENBOROUGH, C. J. observed, that Lord *Hardwicke* himself assumed in that case, that it was necessary there should be some fixed time of payment, though in pleading it was not necessary to lay the precise day; but that laying it to be *on or about* such a day was sufficient. But that without some fixed time, it could not be known to which of two vicars, in case of a change, the money payment would belong.

Per Curiam,

Rule discharged.

Stevens v. Lynch.

12 East, 38. Jan. 26, 1810.

The drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but apprehending that he was still liable upon the bill in default of the acceptor, three months after it was due, said that *he knew he was liable, and if the acceptor did not pay it, he would*: Held that he was bound by such promise.

THIS was an action by an indorser of a bill of exchange against the drawer. The defendant drew the bill upon *Jones* in favour of *Cleveland*, who indorsed it to the plaintiff. *Jones* accepted the bill. The defence set up at the trial before Lord *Ellenborough*, C. J. in *London*, was, that the plaintiff had twice given time to the acceptor, after his dishonour of the bill, by which the drawer was discharged. The answer given to this was, that three months after the bill was due, and after the indulgence, which was in fact known to the defendant (he having before told *Jones* that he was glad time had been given to him), the defendant promised to pay the bill; saying to the plaintiff, "I know I am liable, and if *Jones* does not pay it, I will." On this subsequent promise, his Lordship held that the plaintiff was entitled to recover; and accordingly he took a verdict for the amount of the bill.

The *Attorney-General* moved for a new trial, on the ground that the defendant had made the promise under a mistaken belief that he was still liable, and therefore ought not to be bound by it. He referred to *Chatfield v. Paxton*^(b) in which case he had contended on the part of the defendant, that the money having been paid with a general knowledge of the facts, the party paying it under a false impression of the law could not avail himself of that ignorance to avoid his payment and recover back the money: the plaintiff, however, recovered and maintained his verdict in that case. And he also referred to *Bize v. Dickason and Another*, 1 Term Rep. 285, 7, where the plaintiff recovered back money which he had paid to the defendants, the assignees of a bankrupt, under a mistake, without deducting money which he was entitled to set off against the debt due to the bankrupt's estate.

The Court, however, considered those cases to have proceeded on the mistake of the person paying the money, under an ignorance or misconception of the facts of the case; but here the defendant had made the promise, with a full knowledge of the circumstances, three months after the bill had been dis-

(a) This was before cited in the book as a case in Tr. 5 Geo. 1, and vide what was said by Lord *Hardwicke* to the same effect in *Cart v. Ball*, 1 Ves. 3.

(b) M. 39 Geo. 3, B. R. Vide Chitty on Bills of Exchange, 102. [187. Story's edit.] and the note referred to in *Bilby v. Lumley*, 2 East, 471, where money paid by one with full knowledge, or the means of such knowledge in his power at the time, of all the circumstances, cannot be recovered back, on account of such payment having been made under an ignorance of the law.

honoured, and could not now defend himself upon the ground of his ignorance of the law when he made the promise.(1)

Rule refused.

Roe, on the Demise of Raper, v. Lonsdale.

12 East, 39. Jan. 26, 1810.

Copyhold descending by custom to all the children equally of the tenant last seised, one of the parceners may maintain ejectment on his single demise for his own share.

THIS ejectment was brought, on the single demise of the heir at common law, to recover a copyhold estate in the county of *York*; but, it appearing at the trial before *Chambre, J.*, that the custom was for the land to descend, on the death of the tenant last seised, to all the sons and daughters equally, of whom there were several in the present instance, the plaintiff was nonsuited for want of a joint demise.

Hullock (with whom was *Walton*) moved in the last term to set aside the nonsuit, and for a new trial; contending that the lessor's demise was a severance of the joint tenancy; and that he might recover his part; as one of several parceners might recover her part in ejectment, without the others joining. And he cited *Doe d. Gill and his Wife v. Pearson*, 6 East, 173, where that was recognized.

Topping, for the defendant, now admitted that he could not sustain the objection; the learned judge who tried the cause being himself satisfied, that the lessor of the plaintiff was entitled to recover his customary share. And the rule was accordingly made absolute.(a)

The King v. The Churchwardens and overseers of the Poor of the parish of Sculcoates, in the East Riding of the County of York.

12 East, 40. Jan. 27, 1810.

Commissioners under the *Beverley* and *Barmston* drainage act, who purchased land and erected buildings in the parish of *Sculcoates* for the outlet of the drainage, but who received no benefit from such property in *Sculcoates*, but the whole benefit was derived to the owners of lands in other parishes, drained by means of such outlet, are not rateable in *Sculcoates* for such benefit.

THE parish officers of *Sculcoates*, in the rate made for the relief of their poor, charged the commissioners of the *Beverley* and *Barmston* drainage in a certain sum in respect of certain lands and buildings in that parish, purchased by them and converted into a drain, under the act of parliament after mentioned, which land was cut for the purpose of the drainage, and is now covered with water, containing 6 acres. The commissioners appealed to the sessions against the rate on the grounds, 1st, That they were not the proprietors of any rateable property within the parish of *Sculcoates*; and 2dly, That they derived no beneficial interest from the lands for which they were rated: and the Sessions quashed the rate, subject to the opinion of this Court upon the following case.

By an act of the 38 G. 3. c. 63, intituled "An act for draining, preserving,

(1) Vide *Haddock v. Bury*, cited 7 East, 236, n. (a). *Blesard v. Hirst & al.* 5 Burr. 2670. *Goodall & al. v. Dolley*, 1 Term Rep. 712. *Lundie v. Robertson*, 7 East, 231. *Donaldson v. Means*, 4 Dal. 109. *Crain v. Colwell*, 8 Johns. 384. [See 2 Swanst. 186, 192. *Mayhew v. Crickett*.—W.]

(a) Vide *Denne v. Judge*, 11 East, 268, and *Doe d. Marsack v. Read*, post, 57.

and improving, the low grounds and carrs, lying in the several parishes, lordships, townships, hamlets, precincts and territories, of *Beverley Saint John of Beverley, Grevehill, Sandholme, &c.* (naming nearly 40 other districts, amongst which *Sculcoates* is not one,) all in the East Riding of the county of *York*," certain commissioners are appointed for putting the act into execution. These commissioners, for the purposes of the act, purchased the lands and buildings then rated in *Sculcoates*, which lands and buildings have been converted by virtue of the act into part of a drain extending from *Beverley* through part of *Sculcoates*, a distance of 10 miles; but no part of the lands adjoining thereto are benefitted thereby; the drain having been made for the passage of waters coming from certain low grounds intended by the act to be drained into an outfall clough into the river *Hull*. The lands and buildings so purchased by the commissioners to be applied as aforesaid were, previous to such purchase, assessed to the relief of the poor and other parochial rates and assessments in common with other lands in the parish of *Sculcoates*, but since the making of the drain the lands so cut or excavated have not been rated. The drainage is in every respect completed, and the proprietors of the low grounds situate within the several parishes mentioned in the act have received the benefit thereof.

Park contended, that the commissioners, having a mere naked trust, without any beneficial interest, were not rateable in respect of this property: and for this he relied on the case of the *Salter's Load Sluice Navigation*, 4 Term Rep. 730, which was distinguished from all the prior cases where tolls levied for the benefit of the proprietors had been held to be rateable. He then referred to several clauses of the act in question. By s. 2, the lands to be drained are to be taken out of the jurisdiction of the general commissioners of sewers and placed under these commissioners. By s. 4, persons are to be chosen commissioners who have no interest in the lands to be drained; and by s. 8, they are to receive two guineas a day for their trouble, journeys and expences in the execution of the act; and they have no other benefit whatever from the drainage; but all the money raised by them is by s. 51, to be applied to the purposes of the act: and by s. 60, they are to raise a rate on the owners of the lands benefitted by the drainage for the support of the same.

Topping and *Holroyd*, contra, insisted that the commissioners were rateable. They are in the actual occupation of the property. By s. 38, the estates are to be conveyed to them and their heirs; and s. 39, says, that they and their heirs "shall be deemed in law to be in the actual seisin and possession thereof to all intents and purposes whatsoever," &c. S. 44, directs every lessee or tenant, in possession of lands purchased by them for the purposes of the act, to deliver up the possession thereof to the commissioners; and by s. 98, they are to bring actions of trespass and ejectment. There is nothing in the act to exempt the property, which was before rated, from being still rated in their hands. The property itself is beneficial to the owners of the lands which are drained, and they would certainly be rateable, like proprietors of canals and other beneficial undertakings of the like description, if they occupied it by themselves or their servants; and an occupation by their trustees is the same in effect. The commissioners of the *Salter's Load Sluice Navigation* were held not to be rateable, because they were trustees merely for public purposes. [Lord *Ellenborough*, C. J. I have been looking, without success, into the act, to see if these commissioners are either in the receipt of any fund for their own benefit, or are trustees of any divisible fund in their hands in this parish for the benefit of others. They certainly are not so for their own benefit. Then can you point out any benefit to be received by any persons, except by the owners of the lands benefitted by the drainings in other parishes, and who are liable to be rated in their respective parishes for the improved value of their lands there? *Bayley*, J. Is there any beneficial interest derived in this parish from these works? for this is a parish rate.] It is not material from

whence the benefit or profit is derived, whether in or out of the parish, if it be received in the parish : and here the benefit to the land owners in the parishes above is derived to them from the property and works situated in *Sculcoates* parish : the commissioners, therefore, who represent those land-owners ought to be rated there for the benefit which they derive from the appropriation of the property in *Sculcoates* to their use : and no injustice will be done to those owners ; for this will form an item of charge against the increased annual profits of the lands, which they will be entitled to deduct from those increased profits in the respective parochial rates. In *Rez v. Gardner*, Cowp. 79, a collegiate body was held liable to be rated for property occupied by them for their own benefit. Lord *Mansfield* there said, that all real property was rateable to the poor, and must have (except in certain cases there mentioned, *i. e.* of lands held in trust for the poor, or for public purposes,) occupiers and inhabitants in consideration of tax. So the corporation of *Aberuon*, 5 East, 453, who were seised in fee of uninclosed land stocked with the cattle of the resident burgesses and others ; and the dock company of *Hull*, 1 Term Rep. 219, who purchased land and erected docks, under an act of parliament for the improvement of the port, yielding profit to the individuals whose capital was subscribed, were held liable to be rated for the real property so applied.

Lord ELLENBOROUGH, C. J. In all these cases the property rated yielded pecuniary benefit, or that which was capable of being estimated and converted into pecuniary benefit, within the parish, to the parties interested ; but here the benefit results to the lands drained which lie in other parishes, where the owners are liable to be rated in proportion to their improved value : and the property would be liable to a double rate, if it were also rateable in the hands of the commissioners. Or supposing that the objection of double taxation were obviated by the argument that the amount of the rate on these commissioners should be deducted, *pro tanto*, from the several parochial assessments on the increased value of the lands in the hands of the owners, still the difficulty remains of shewing that there is any benefits received by these commissioners for themselves or others within this parish, which is capable of being rated. The benefit is all derived in other parishes. The dock-company of *Hull* were in the receipt of tolls for the benefit of the share-holders in respect of the use of the docks within the parish in which they were rated ; but these commissioners gather no profits either for themselves or others in this parish, but are the mere instruments of benefit to land-owners elsewhere. I know of no instance where a canal company has been held rateable for the mere space occupied by the canal in a particular parish, if no tolls were received or become due there ; and I cannot distinguish between land converted into a drainage and into a canal. However, that our decision may not clash with other cases, we will look into them before we deliver our final opinion.

The case of the proprietors of the *Staffordshire* and *Worcestershire* canal navigation, 1 Term Rep. 348-9, was referred to by *Park*, as having decided that the company were only rateable for their tolls in the several parishes where they became due, and not in those through which the canal merely passed ; the canal not being productive property in the latter. And after the discussion and decision of the *Tynemouth* case, which stood next in the paper, on this day.

Lord ELLENBOROUGH, C. J. said, that the Court having no doubt in this case, they would dispose of it at once, by stating that they were clearly of opinion, that the commissioners, having no beneficial occupation of the property in this parish, either for themselves or others, were not liable to be rated. That if they were to hold otherwise, it would be opening a question of beneficial occupation in every case where a canal or a turnpike road passes through a parish, though the tolls were not due there ; which had never been considered as liable to be rated in such parishes, but only where the benefit accrued. In conformity, therefore, with all the decisions on the subject, the

commissioners having no beneficial occupation within the parish, were not liable to be rated there.

Order of Sessions, quashing the Rate, confirmed.

The King v. The Inhabitants of Tynemouth.

12 East, 46. Jan. 27, 1810.

The tolls of a lighthouse situated in the township of Tynemouth, which tolls were collected out of the township in the several ports at which the vessels passing by the coast afterwards arrived, are not rateable qua tolls in the township. And the residence in such lighthouse by one as servant to the owner, at an annual salary, to take care of the light, is the occupation of the master, who alone can be rated in respect of such occupation of the toll house.

UPON an appeal of *Wm. Fowke*, Esq. to the Quarter Sessions of the county of Northumberland against a certain rate for the relief of the poor of the township of *Tynemouth* in that county, the sessions ordered the rate to be amended by striking out *Mr. Fowke's* name, and that of *R. Wisencroft* (his servant); subject to the opinion of this Court upon the questions: 1st, Whether *R. Wisencroft* be rateable for two rooms in *Tynemouth* lighthouse; and 2d, Whether *Mr. Fowke* be rateable for the tolls in respect of the lighthouse? The facts were these. *Mr. Fowke* is entitled to *Tynemouth* lighthouse, and to certain tolls payable in respect thereof, by virtue of letters patent under the great seal in the 17 Car. 2, viz. 12*d.* for every ship belonging to any of the king's subjects passing by the lighthouse, and belonging or trading to the ports of *Newcastle* and *Sunderland*, or either of them, or the creeks or the members of the same: and 3*s.* for every ship belonging to any foreigner or stranger coming or passing by the lighthouse. *Mr. Fowke* is also entitled to additional light duties under an act of the 42 Geo. 3, entitled, "an act for improving the *Tynemouth-castle* lighthouse, and for authorising additional light duties in respect of such improvement." The alterations in the lighthouse have been made in conformity to the act. The lighthouse is in the township of *Tynemouth*; and the tolls and duties arising to *Mr. Fowke* are payable upon ships sailing in the *German* ocean, and receiving the benefit thereof: and the ships from which the tolls or duties arise never come within the township of *Tynemouth*, but proceed directly from the main sea into the river *Tyne*, the whole of which as far as *Newcastle* is in the port of *Newcastle-upon-Tyne*, and the parish of *St. Nicholas* within the town and county of the town of *Newcastle-upon-Tyne*, and neither *Mr. Fowke*, nor any of the receivers of the tolls or duties reside in the township of *Tynemouth*. The tolls or duties paid in respect of ships arriving at and sailing from the port of *Newcastle-upon-Tyne* are collected at the custom-house in the parish of *All Saints* in the town and county of *Newcastle-upon-Tyne*, by *Mr. Thomas Beck*, a person appointed by *Mr. Fowke* for that purpose: and the tolls or duties paid in respect of ships sailing from other coasting ports are collected at the ports from whence they sail, if they clear at the custom-house there to a port beyond *Tynemouth-castle* light; if to a port short of *Tynemouth*, no toll or duty is payable by them in the first instance; but if they afterwards extend their voyage or passage to *Newcastle*, or beyond the lighthouse, then the toll or duty is paid at the port of their arrival. Some of the tolls collected at the coasting ports are remitted to *Mr. Beck* at *Newcastle*, and others accounted for in the first instance to *Mr. Fowke*. The township of *Tynemouth* is within the parish of *Tynemouth*, and maintains its own poor. *Wisencroft* is a servant of *Mr. Fowke*, at an annual salary, and resides in two rooms within the walls of the lighthouse, to take care of the light: and he is rated for those two rooms as occupier, at 6*l.*; and *Mr. Fowke*

is rated for the tolls, in respect of the lighthouse, at 750*l*. The property-tax in respect of the tolls has been paid to the collectors of that tax in the township of *Tynemouth*.

Topping and *Hullock*, on the part of Mr. *Fowke* and his servant, maintained that at any rate the servant could not be rated; his occupation being in law the occupation of his master; and they referred to a late case of the *White-haven* bank, argued in the Exchequer-Chamber before all the judges. They also resisted the liability of Mr. *Fowke* himself to be rated for this property within the township of *Tynemouth*, inasmuch as the ships from which the tolls were collected never came within the township, nor were the tolls received there: for which they cited *The King v. Reboue*, M. 12 G. 3. 1 Const. 115, 3d edit. as directly in point.

Holroyd and *Bigge*, contra, admitted that the case was not distinguishable from *The King v. Reboue*; but they said, that that case was decided before the rateability of tolls in general had been settled. In the argument of *Atkins v. Davis*, Cald. 351, it is said to have been so decided, upon the principle that the profits were uncertain, and depended upon the expenditures: but that question having been since put at rest, the authority of that case is much impeached. Considering the case then upon principle, the lighthouse in respect of which the tolls arise is in the township: it confers a great benefit to the ships navigating along that coast, and the tolls are payable for that benefit; the tolls therefore are properly due there where the benefit arises, though for convenience sake they may be collected in the different ports where the ships arrive. Supposing a towing post were necessary to be placed at the mouth of a river to warp in the ships; though the body of the river where the ships lay were in another parish, yet the tolls would be payable in the parish where the post was fixed. [*Bayley*, J. observed, that the rate in such a case would be upon the post.]

LORD ELLENBOROUGH, C. J. It is no question now whether this property could be rated in some other way; as if the lighthouse, whose light is the meritorious cause of earning the tolls, were in consequence let at a larger rent: but this is a rate specially upon the tolls, and therefore the case is not distinguishable from *The King v. Reboue*, which is so immediately in specie, and in all its circumstances, the same, and has been so long considered and acted upon as law, that it concludes the question. What local property is there within the township on which this rate on the tolls can be levied? The tolls are not received there; nor do the ships from which they are collected come within the township; the subject matter of the rate has no locality within this township. As to the other point, it is equally clear, that it is the occupation of the master by his servant, and not the occupation of the servant himself: and therefore the rate on the servant is bad on that ground.

Per Curiam,

Order of Sessions, amending the
Rate, confirmed.(a)

The King v. Knill.

12 East, 50. Jan. 27, 1810.

Upon an appeal to the Sessions against an order of filiation, the respondents are to begin, by supporting their order, as in all other cases.

THE defendant appealed to the sessions in the county of *Hereford* against an order of filiation of a bastard child, and gave due notice of such his appeal to the parish officers of *Holm Lacey*, on whose application the order had been

(a) Vide post, *Rez v. Eyre*, p. 416.

obtained. The Sessions confirmed the order, subject to the opinion of this Court upon a case, which stated, that when the appeal came on to be tried, the appellant was called upon to begin, and to allege and prove what he could against the order; which he refused to do; insisting that by the rules of law the respondents were bound in the first place to begin and support the order. The respondents refused to do so; insisting that according to the practice of that sessions it was incumbent upon the appellant to begin, by alleging and proving a sufficient case for quashing the order. The sessions found this latter to be their practice in the like cases; and therefore required the appellant to begin by shewing cause against the order complained of, and proving what he could to invalidate it. And no cause being shewn, nor any thing alleged or proved on either side, as to the merits, for or against the original order of filiation, the Sessions confirmed the same. And now the original order, and order of confirmation, being removed into this Court by certiorari, and a rule obtained calling on the prosecutors to shew cause why they should not be quashed for insufficiency;

Gaselee, who was to have shewn cause, admitted that he could not support them; the case of *The King v. Newbury*, 4 Term Rep. 475, having settled the point; and it being the general practice of Sessions throughout the kingdom for the respondents to begin by supporting their order.

And *The Court* being of this opinion, remitted the cause to the Sessions to proceed upon and hear the appeal in the regular and general course.

Const and *Puller* were for the appellant.

The King v. The Inhabitants of Hardhorn with Newton.

12 East, 51. Jan. 27, 1810.

Where the master died 3 weeks after hiring the pauper for a year, the latter abiding in the service with the widow and sons to the end of the year, gains a settlement in the parish where she served. And it is no less an abiding in the service for a year, because one of the sons, on the frivolous pretence that the servant threw more sand on the floor than he deemed necessary, turned her out of doors three weeks before the end of the year, she being willing and offering to stay to the end of the year, but carrying away her clothes the next day, and taking what the son insisted was her full wages for the year according to the agreement, though she demanded a larger sum as her full wages.

MARGARET Lingard, a pauper, was removed by an order of two justices from the township of *Newton* with *Scales* to the township of *Hardhorn* with *Newton*, in the county of *Lancaster*. Upon appeal to the Sessions against this order, the question was, Whether a settlement had been gained by hiring and service in *Hardhorn* with *Newton*. The pauper was hired by *R. Gratrix* in *Hardhorn*, for a year: three weeks after the beginning of the year, *Gratrix*, the pauper's master, died, and the farm was continued on by his widow and two sons, *George* and *William*. About three weeks before the end of the year, the pauper fell out with *George*, one of the sons, about her work, because she threw more sand upon the floor than he deemed necessary, and was by him turned out of doors, though she was willing to stay. The next day, she came again for her clothes, when *George* paid her 4*l.* 10*s.* as for her full wages. There was a dispute about the amount of her wages; *George* insisting that the pauper was hired for 4*l.* 10*s.*, and she demanding 5*l.* 15*s.* The pauper, however, accepted 4*l.* 10*s.*, and never got any thing more, though she employed an attorney for that purpose. The pauper, when she came the next day for her clothes, offered to stay to the end of the year, but *George* would not let her. The Sessions, being of opinion that a settlement was gained under the hiring and service above stated, confirmed the order.

Scarlett, in support of the order, said that he did not know whether the death of the master within three weeks after the hiring were meant to be urged as a dissolution of the contract, notwithstanding the continuance of the service under the original hiring with the widow and sons on the farm. [But *Le Blanc*, J. said there could be no question made as to that; and the counsel for the appellants said, that he did not mean to raise any objection on that ground, but upon the subsequent dissolution of the contract, by the acts of the parties.] *Scarlett* then observed, that the cases which turned on the question of dispensation of the service, or of dissolution of the contract, ran very near to each other; but that which came nearest to the present *Rez v. St. Philip* in *Birmingham*, 2 Term Rep. 624, classed this with the cases of dispensation. The pauper was unjustly discharged before the end of the year; and though she took her wages, yet they were the wages for the whole year, and she offered to stay and serve out her time. And that offer distinguished the case from *Rez v. Clayhydon*, 4 Term Rep. 100, where it was only stated that the servant wished to stay out the year; such wish not having been communicated to the master. [Lord *Ellenborough*, C. J. having observed that the question here really was, whether kicking the pauper out of doors was a dissolution of the contract, the respondents' counsel said it was unnecessary to argue the case any further].

J. Williams, contra, admitted that the contract could only be dissolved by the consent of both parties; but contended, that the acceptance of the wages by the pauper before the end of the year shewed such consent on her part, though she would have preferred staying out the whole year. The act of parliament, 8 & 9 W. 3. c. 30. s. 4, requires "a continuing and abiding in the service during the space of one whole year," in order to confer a settlement, and every case of dispensation is against the plain sense and letter of the act; the court therefore will not be inclined to go an iota farther than the express adjudications compel them to go: and where there are conflicting authorities will rather abide by the letter of the statute. He then referred to *Rez v. Grantham*, 3 Term Rep. 754; *Rez v. Thistleton*, 6 Term Rep. 183; *Rez v. King's Pyon*, 4 East, 353; *Rez v. Sudbrooke*, ib. 356; *Rez v. Rushall*, 7 East, 471, and *Rez v. Leigh*, ib. 539, as cases of dissolution which materially trench upon the other decisions, and shewed that though the master urged the dissolution of the contract, without or against the desire of the servant; yet if the latter acquiesced by accepting the wages and departing from the service before the end of the term, that put an end to the contract. Now, here the pauper did at last accept that which the master insisted to be her full wages, and which would conclude her from any other demand; which made an end of the contract on her part, as the turning her out of doors by the master concluded him, on the other hand, from any further claim to her service; and there was no longer any mutual remedy upon the contract.

Lord *ELLENBOROUGH*, C. J. If indeed there were a conflict of cases upon this point, that would bring us back to the words of the act, the true import of which we should have to consider: but there is no material conflict of the cases, nor any thing in the construction contended for by the respondent's counsel which will clash with the words of the act. There must be an abiding in the service for a whole year in order to confer a settlement: and as far as lay in the power of the pauper, there was an abiding in it for a year: but she was wrongfully and forcibly turned out of doors by her master against her will; and when she returned the next day for her clothes, he gave her 4l. 10s., which he said was the whole of her wages; but she did not assent to that, and demanded more, though she took what he was willing to give her in part, and offered to stay to the end of the year, maintaining her right to her full wages. She therefore did all she could to abide in the service according to her contract, and did so, except so far as she was prevented by an act of force. The case of *The King v. Grantham*, which is principally relied on to shew the

dissolution of the contract, is very distinguishable. The servant there having been improperly turned out of doors by his master in the first instance, took him at his word, and refused to return to the service, though invited by his master to do so : and when the master at last agreed to pay him his full wages, he left the service contrary to the express request of the master to stay.

GROSE, J. In the case of *The King v. Grantham* there was an agreement by both parties to dissolve the contract before the end of the year : and the same answer may be given to all the other cases which have been held to be dissolutions of the contract. But here there is nothing like consent on the part of the servant. The master turned her out of doors against her consent, and she wished to come back and perform her service to the end of the year : but he would not permit her. Therefore, though the service was not performed, yet she tendered herself to perform it, which is equivalent to the performance of it in law : and the contract could not be dissolved by the wrongful act of the master in turning her away.

LE BLANC, J. The first point which was suggested has been very properly abandoned now ; for there is no doubt that the death of the master after the pauper was hired for a year, she continuing to serve the widow and son on the farm, was a continuation of the same service. Then with respect to the other point, it is now too late to recur back to the strict words of the act of parliament, upon questions of dispensation or dissolution of the contract : a long current of cases has established the distinction : and where the dissolution of the contract has not been assented to by both parties, the Court has inquired into the cause of the master's dismissal of his servant. Now, here was a frivolous cause assigned by the master, which would not warrant him in turning the servant out of doors against her consent ; and she offered to stay, but he refused to permit her. It was necessary, however, that she should have her clothes and something to maintain her ; therefore, her taking her clothes and what money he was willing to pay her does not shew her consent to abandon the contract, which she expressly offered to fulfil to the end of the year. Then after her departure, she did not hire herself into another service before the end of the year, as occurred in one, *Rez v. Leigh*, 7 East, 539, of the cases, which was held to be a dissolution of the contract. Here, then, the pauper did every thing she could to continue in the service, from which she was wrongfully discharged : the Sessions have decided that it was not a dissolution of the contract ; and I cannot say, that they have decided wrongly.

BAYLEY, J. It would be much better if the Sessions would decide the fact, (a) whether of the dissolution of the contract, or of the dispensation of the service, and abide by their decision, without sending up a case with the evidence on which they formed their conclusion. In *The King v. Grantham* there was the consent of both parties at one time to put an end to the contract, and the master wishing the next day to retract his consent could not alter the case. But the question here is, whether a wrongful act of the master can dissolve the contract without the consent of the servant. It would operate very unjustly, if it could ; for then masters would often be induced to discharge their servants on frivolous pretexts towards the end of the year to prevent them from acquiring settlements.

Order of Sessions confirmed.

(a) In *Rez v. St. Peter of Mancroft*, in *Norwich*, 8 Term Rep. 477, the Court recommended to the Sessions to find the fact, whether the contract was dissolved by mutual consent, or the performance of the service dispensed with by the master.

Doe, on the several Demises of Marsack and Others, v. Read.

12 East, 57. Jan. 20, 1810.

The plaintiff in ejectment, under the several demises of two, may, after notice to quit, recover the possession of premises held by the defendant as tenant from year to year, upon evidence that the common agent of the two had received rent from the tenant which was stated in the receipts to be due to the two lessors; even assuming such receipts to be evidence of a joint tenancy; for a several demise severs a joint tenancy; and supposing the contract with the tenant to have been entire, no objection lies on that account to the plaintiff's recovery in this case, as he had the whole title in him. It seems that a receiver appointed by the Court of Chancery, with a general authority to let the lands to tenants from year to year, has also authority to determine such tenancies by a regular notice to quit.

THIS was an ejectment for messuages and lands in the parish of *Hinderwell* in the county of *York*, which was brought on the four several demises of, 1. *C. Marsack*, 2. *R. Davison*, 3. *J. G. Parkhurst* and wife, and 4. of *W. Boyd*; all of which were laid on the 8th of *April* 1809. At the trial before *Chambre, J.* at *York*, the following notice to quit was proved to have been served on the defendant on the 1st of *October* 1808: "I hereby give you notice to quit, and deliver up to me, or my successor, on the 6th of *April* next, the possession of all those several closes, &c. (describing the premises in question,) of which I am the receiver duly appointed by the court of chancery, or at such time or times as your current year of occupancy may expire." Dated 1st of *October* 1808, and signed "*R. Davison*." The appointment of *Davison* by the court of chancery in the suit after mentioned to the office of receiver for the estates, of which the premises were part, with a power to let the estates, was also proved to have been made on the 9th of *April* 1806: Also copies of a bill and answer in chancery. The plaintiffs in the bill, which was filed in *June* 1804, were several creditors of the said *J. G. Parkhurst* and his wife: the defendants were the said *C. Marsack*, as a trustee of estates which had been allotted in chancery to *Mrs. Parkhurst*, as the widow of *Sir G. Boynton*, on behalf of the creditors of *Mr. and Mrs. Parkhurst*, himself being one of those creditors; *J. B. Smith*, (since dead, on whose death *Davison* was appointed receiver,) as receiver of the rents of the estates appointed by the said *Marsack*, and several other defendants. One object of the bill was to have an account of the rents and profits from *Smith* as well as from *Marsack*: and *Smith* having received the rents of the premises in question from the defendant, his answer, wherein he charged himself with the receipt of those rents, was produced to shew that the defendant by those payments acknowledged *Marsack* as his landlord. In that answer, *Smith* stated that he was appointed receiver by *Marsack*, with the consent of *Parkhurst* and his wife, by deed dated 30th of *March*, 1803, and had received the rents down to the 9th of *May* 1805, when his answer was sworn. The answer also referred to a schedule annexed, containing a recital of the estates of *Mrs. Parkhurst*, occupied by the defendant and others, as tenants from year to year, in which were entered acknowledgments of receipt of rent from the defendant by *Smith* half-yearly at *May-day* and *Martinmas*. There were also proved receipts of rent given by *Davison*, after his appointment in Chancery as receiver, stating the rent to be due half-yearly at *Lady-day* and *Michaelmas* to *C. Marsack*, *J. G. Parkhurst*, and *Mary his wife*. And no other evidence of title in any of the lessors was given.

On the part of the defendant, it was objected, 1st, That *Davison*, as receiver with authority to let, was not authorised to determine the tenancy from year to year by his notice to quit. The learned Judge however inclined to think that he was so authorised. 2dly, It was objected, that the evidence did not support any of the counts, which were all laid upon separate demises; whereas

all the receipts given by *Davison*, the receiver, imported that *Parkhurst* and his wife were jointly interested in the estate with *Marsack*. But the learned Judge thought, that the form of those receipts, without any other evidence of a re-letting, was insufficient to destroy the effect of the payment of rent to *Marsack's* agent acting under his sole appointment; and that the introduction of the names of Mr. and Mrs. *Parkhurst* probably arose from the receiver's ignorance of the state of the legal title, and from their being parties to the suit in equity, and beneficial owners of the property subject to the trust. The plaintiff, therefore, took a verdict at the trial: but leave was given to move the Court on both points, and to enter a nonsuit if either of them were available. This motion was accordingly made in the last term, and a rule nisi granted; against which

Park and *Holroyd* now shewed cause. And, as to the first objection, they said, that it was in frequent practice for receivers appointed by the Court of Chancery to determine tenancies from year to year by notice to quit; and that this had often been acted upon and recognized in actions at nisi prius; and they referred to *Wilkinson v. Colley*, Burr. 2697-8, where a notice to quit given by such a receiver was held sufficient to entitle the trustees of the legal estate to maintain an action of debt on the stat. 4 G. 2. c. 28, against a tenant who held over. Upon this point the Court said they had no doubt. To the 2d objection they answered, that it sufficiently appeared upon the whole of the evidence that the legal title was in *Marsack*, who was the trustee for the family. There was clear evidence of the defendant's acknowledgment that he held under him, by the payments of rent to *Smith*, as receiver for *Marsack*: and the subsequent receipts given to *Davison* were not inconsistent with the others, as it appeared that *Parkhurst* and his wife had the beneficial interest. But however this might be, there could be no objection to the plaintiff's recovery of the entire premises in this ejectment; for even if *Marsack* and Mr. and Mrs. *Parkhurst* were to be considered as joint tenants, each might recover their own share; and here was a demise from each, which would cover the whole interest. And though joint-tenants who are seised *per mie et per tout* may join; yet no doubt they may also sever; (a) and if one recovered his share in ejectment, he would be tenant in common with the tenant of the other two joint-tenants.

Cockell, Serjt. and *Lambe*, abandoning the first objection, after the intimation of the opinion of the Court against it, contended, that the last receipts of rent by the receiver, upon account of *Marsack* and of Mr. and Mrs. *Parkhurst*, were as decisive, in the absence of all evidence of the legal title by the production of deeds, to shew that the defendant at the time he received the notice to quit held under a joint demise from the two, as the prior receipts would have proved a holding under *Marsack* alone at the time they were given. There is no question here as to the legal title: but the question arises only upon the evidence of a contract, whereby it appears that two parties have jointly contracted with the defendant to let the premises to him: it cannot therefore be competent to either of those persons to determine the contract which is entire: but if the plaintiff could recover the whole upon the separate demises of each, which can only be on the ground of each having a distinct title, and a separate right to determine the tenancy as to his share, it would entirely alter the nature of the contract entered into with them by the defendant. [The Court having called their attention to the demise by *Davison*, the receiver, the common agent of all the parties interested, and who, having a general authority to let by the Court of Chancery, must be taken to have a power of determining the letting, as he must determine for how long he will let;] they expressed a doubt whether by the practice of that Court the receiver had a power to determine a subsisting lease, without the leave and direction of the

(a) The case of *Roe v. Lonsdale*, decided a few days ago, ante, 39, was adverted to.

Court: and said, that at all events *Davison* admitted by his receipts that he received the rents on account of the two parties therein named, with whom the entire contract must be taken to have been made.

Lord ELLENBOROUGH, C. J. said, that whatever difficulty there might have been in the way of the plaintiff's recovery, on the ground of the entirety of the contract, if there had not been a demise from each of the parties interested; yet here the plaintiff having by the several demises of each the entire interest in the whole subject matter, and the several letting to the plaintiff having severed the joint tenancy; there was therefore no incongruity in his recovering.

The Attorney General, as *amicus curiæ*, said, that the rule was formerly considered to be, though he had never heard any reason assigned for it, that laying demises in ejectment, tenants in common must sever, joint-tenants must join, and parceners might either join or sever. But if joint-tenants might sever, it seemed difficult to say why tenants in common might not join, as each might still be taken to have demised according to his legal interest.

Per Curiam,

Rule discharged.

Doe, on the joint and several Demises of Allason Foster and Wm. Allason Jamieson v. Sisson.

12 East, 62. Jan. 29, 1810.

Evidence of reputation of the custom of a manor, that in default of sons, the *eldest daughter*, and, in default also of daughters, the *eldest sister*, and, in case of the death of all, the *descendants* of the eldest daughter or sister respectively of the person last seised should take, is proper to be left to the jury of the existence of such a custom, as applied to a *great nephew* (the grandson of an eldest sister) of the person last seised; although the instances in which it was proved to have been put in use extended no farther than those of the eldest daughter and eldest sister, and the *son* of an eldest sister. The existence of such extended custom in adjacent manors seems to be no evidence of the custom in the particular manor.

THIS was an ejectment for a customary tenement, holden of the manor of *Castlerigg and Derwent-water*,^(a) and situate in the parish of *Crosthwaite* in the county of *Cumberland*. The person last seised was *Abraham Allason*, who died without issue, having had three sisters who died before him, leaving issue; and the question was, whether, upon his death, the tenement descended to the heirs of his three sisters, according to the course of descent at common law: or to the heir of the eldest sister only, by the custom of the manor. The eldest sister *Ann*, married *William Sisson*, and died leaving issue *Thomas S.*, who also died before *Abraham Allason*, leaving issue *Wm. Sisson*, the defendant, who claimed the whole as customary heir of the said *Abraham Allason*. The second sister, *Sarah*, married *J. Foster*, and died before her brother, leaving issue *Allason Foster*, one of the lessors of the plaintiff, and other younger children. The third sister, *Martha*, married *W. Jamieson*, and died before her brother, leaving issue *Wm. Allason Jamieson*, the other lessor of the plaintiff.—At the trial before *Wood, B.* at *Appleby*, the lessors of the plaintiff, who claimed two thirds as heirs respectively of the two younger sisters of the person last seised, rested their case on the proof of the pedigree and the common law course of descent. The defendant insisted upon a custom in favour of the descent to the heir of the eldest sister, in exclusion of the others; and first proposed to prove, that in other adjacent manors, where these tenant right customary estates existed, the course of descent was to the eldest sister and her heirs exclusively. This evidence was objected to on the part of the plaintiff; and the learned Judge, without deciding upon the admissibility

(a) The Commissioners of *Greenwich Hospital* are the lords of the manor.

of it, required the defendant to enter into his evidence of the custom as applicable to the particular manor in which the tenement in question lay. The steward of the manor accordingly produced the court books and rolls from the year 1739, and proved one instance, in 1785, of the presentment by the jury of *C. A.* having died seised of several messuages, &c., "and that *Elizabeth A.* his sister was heiress at law, and ought to be inrolled;" and there was an assessment of a fine upon her, and she was inrolled tenant, and enjoyed the estate. It further appeared, that she had at the same time several younger sisters living. There was another instance of a presentment in 1806, that *T. L.* died seised of a customary tenant: and that his nephew and heir at law *J. W.* ought to be admitted tenant; and he was accordingly enrolled tenant; it being also proved, that *T. L.* had five sisters, the eldest of whom was the mother of *J. W.* and other younger children; and the other sisters, who all died before *T. L.*, also left issue. Another instance was of *J. F.* a customary tenant, who died leaving two daughters, *Ann*, who had married *J. F.*, and *Elizabeth*, who had married *D. C.* In 1793, the jury presented, that *J. F.* died seised as mortgagee of several parcels of land, &c., and that *Ann G.* is heir and ought to be admitted; and *Ann G.* paid a fine for a descent as mortgagee on the death of *J. F.* her father. It was also proved by an aged witness, who had himself been possessed of property in the manor since 1774, that the reputation of the custom was, that in case of a person dying seised, leaving only daughters, the eldest daughter takes; leaving only sisters, the eldest sister takes; and in case all are dead, the descendants of the eldest take. The steward also, who had been in office 15 years, spoke to the reputation of the custom, that the estate descends to the eldest sister when a brother dies seised, leaving more sisters than one. The learned Judge being of opinion, that these facts were *prima facie* evidence of a custom in this particular manor to entitle the defendant to the whole, as heir of the eldest sister, would have left the case to the jury upon that evidence; but the plaintiff's counsel chose to be nonsuited, intending to take the opinion of the Court, whether, as no instance was in fact proved of a customary descent to a collateral representative, so far removed as a *great nephew* from the person last seised, but only of a descent to a sister's son, the custom could be extended so far by the general evidence given in this case. Accordingly,

Park, in the last term, obtained a rule *nisi* for setting aside the nonsuit, which was now supported by him and *Littledale*; and in support of their objection to the evidence they relied on the case of *Denn d. Goodwin and others v. Spray*, 1 Term Rep. 466, where proof of customary descents to the eldest daughters and *eldest sisters*, in exclusion of younger daughters and sisters, was held not to extend to an *eldest niece*: and yet it appeared in that case from an ancient customary of the manor, found amongst the court rolls, and therefore stronger than evidence of mere oral reputation, that "*nulla tenementa manerii erunt partipilia, nec inter haeredes masculos nec famellas.*" But the Court, relying upon the doctrine of Lord Coke, in *Ratcliff v. Chapman*, 4 Leon. 242, that to prove a custom it must be shewn by precedents to have been *put in use*, and that reputation only was not sufficient, held, that where the custom was silent, or in other words was not proved by precise precedent, the common law must regulate the course of descent. In support of the same doctrine, they also referred to 1 Roll. Abr. 624, pl. 2, and Godb. 166; and argued that the *jus representationis* only applied to the right of succession and descent at common law; and unless the customary heir is entitled to seisin, the custom does not attach: for no right attached in the eldest sister during the life of her brother.

Topping and *Holroyd*, on opposing the rule, in answer to a question from the Court, waived any reliance upon the evidence of the custom of other manors offered at the trial; which it seemed to be agreed now was not evidence

for the present purpose.(a) And as to the principal point, they denied any necessity to shew a particular instance of an immediate descent to a great nephew of the person last seised. The customary right of descent to an eldest sister was not disputed; and then the common law attached upon the custom to carry the estate, in case of her death, to her male heir, *jure representationis*. The younger sisters, taking nothing by the custom, could not transmit any estate to their descendants.

LORD ELLENBOROUGH, C. J. The objection made is to the want of evidence of any instance where the grandson of an eldest sister of the person last seised has taken immediately by the custom; but there was evidence of *reputation*, as to the custom of the manor, that in case all the daughters or sisters of the person last seised were dead at the time of his death, the descendants of the eldest of those should take. And though this reputation in its generality went beyond the particular instances proved in which the custom had been put in use, (which, however, was established not only in the case of the eldest sister's taking, but also of the eldest sister's son's taking, upon the death of the tenant last seised; yet how can we say that it was not evidence to go to the jury (which is the question we are now to decide) of the larger custom, of which the particular instances proved were only so many branches derived from the same root. We do not take upon us to decide, that the existence of the reputation proved that the custom existed in this extended degree; we only say, that it was evidence to go to the jury. If the judge had decided improperly, in stating that he should leave that evidence to the jury, we would have taken care that the plaintiff should not be prejudiced by voluntarily submitting to a nonsuit in deference to that opinion: but we see no reason to disapprove of it. If the lessors of the plaintiff have evidence to contradict the reputation, they are not concluded by this nonsuit.

The other judges accorded with this opinion; and by

LE BLANC, J. The question as to the custom stands more favourably for the lessors of the plaintiff upon the nonsuit, than if the question of fact had gone to the jury, and they had found, as they probably would have done, that the custom did exist to the extent contended for by the defendant: for then the existence of the custom would have stood upon the verdict of a jury finding the fact. But it is still open to the lessors, if upon further search they should discover any instance in which the grandson of an eldest sister did not take under similar circumstances, to bring the question forward again in another ejectment.

Rule discharged.

Massey v. Johnson.

12 East, 67. June 14, 1809.

The stat. 43 G. 3. c. 141, does in no instance extend to protect justices of peace in the execution of their office against actions for acts of trespass or imprisonment, unless done on account of some *conviction* made by them of the plaintiffs in such actions by virtue of any statute, &c. But whether certain proceedings alleged by the plaintiff to have been set on foot against him by the defendant, a justice of the peace, *ex mero motu*, without any information laid on oath before him, (though falsely alleged to be on the information on oath of J. S.) on which the plaintiff was taken and imprisoned, were a *conviction* within the meaning of the act; so that the plaintiff was thereby confined to seek redress by an action on *the case* framed as the act directs; the Court would not inquire of on affidavit, but sent the case to a new trial to have the fact of such conviction ascertained. And it appearing on a second trial, that an information on the oath of T. O. on a charge of vagrancy against the plaintiff was laid before the magistrate on a certain day, when the plaintiff was examined and heard upon that charge, and that the magistrate then made out a warrant of commitment until the next Ses-

(a) Vide S. P. by Lord Kenyon, C. J. in *Roe v. Parker*, 5 Term Rep. 30.

sions, in which warrant it was wrongly stated, that the plaintiff had been charged on the oath of T. S. (who negatived having made such oath :) but which allegation it was held might be rejected as surplusage ; and afterwards drew up a conviction dated on the same day, but not exhibited till a month afterwards at the Sessions : held, that this was sufficient evidence of a conviction connected with the imprisonment, however informally such conviction or warrant of commitment operating as a conviction were drawn up ; and, therefore, at all events the magistrate was protected against the action of trespass.

The magistrate is liable to answer in an action for such part of an imprisonment suffered under his warrant as was within six calendar months before the action commenced against him.

THIS was an action of trespass and false imprisonment, which was brought against a magistrate of the county of *Chester*, in consequence of a commitment by him of the plaintiff to the house of correction, under a proceeding which was contended by the magistrate to be a conviction of the plaintiff as a vagrant. At the first trial before the Chief Justice of *Chester*, it was opened by the plaintiff's counsel, and proposed to be proved, that no information had been taken by the defendant which could warrant any conviction or commitment, but that the magistrate had proceeded *ex mero motu* ; and they began by proving the notice of the action, served above a month before the action brought, directed to the defendant "*one of his majesty's justices of the peace for the county of Chester ;*" and stating in substance, that the defendant having on the 27th of *March 1808*, as *one of his majesty's justices of the peace for that county*, caused the defendant to be *apprehended and unlawfully committed* to the house of correction, and there *imprisoned* for 4 months then next following, the plaintiff, according to the form of the statute, gave him notice that after the expiration of one calendar month he should sue out a writ of *latitat* against the defendant in *B. R.* for the said imprisonment, and proceed against him thereupon according to law. Upon this it was immediately objected for the defendant, that the case was within the late act of the 43 Geo. 3. c. 141, and that the action of *trespass* was not maintainable ; and thereupon, without entering further into the case, the plaintiff was nonsuited.

That statute, reciting that justices of the peace, who are authorised and required by divers acts to convict persons of offences in a summary way, should be rendered more safe in the execution of their duty, enacts, "that in all actions whatsoever brought against a justice of the peace on account of any conviction by him made by virtue of any statute, &c., or by reason of any act, matter or thing whatsoever, done or commanded to be done by such justice for the levying of any penalty, apprehending any party, or for carrying any such conviction into effect, *in case such conviction shall have been quashed*, the plaintiff in such action (besides the penalty, if levied, &c.) shall not be entitled to recover any more damages than 2*d.* nor any costs, unless it shall be expressly alleged in the declaration in the action in which the recovery shall be had, *and which shall be in an action upon the case only*, that such acts were done maliciously, and without any reasonable and probable cause."

Topping (with whom were *Yates* and *Richardson*) moved in the last term to set aside the nonsuit, (a) contending, upon the authority of *Morgan v. Hughes*, 2 Term Rep. 225, that *trespass*; and not *case*, was the proper remedy in this instance : and that the act of parliament must be confined to cases where the magistrate had a jurisdiction, and a conviction had been made, regular at least in the form and manner of proceeding, and not where he had pro-

(a) At the same time *Topping* stated, by way of objection, that the cause had gone down to trial at *Chester* by mittimus, without an order for a special jury ; and after it was entered, application was made to the Court there, by the defendant, for a special jury ; which the plaintiff opposed ; but the Court at *Chester* granted it ; saying that it was their practice so to do. *Le Blanc, J.* asked how advantage could be taken of this upon the motion to set aside the nonsuit then before the Court. And Lord *Ellenborough, C. J.* afterwards said that the objection, if any, was cured by the plaintiff's appearance.

ceeded without any information on oath laid before him, and therefore without any semblance of authority. A rule nisi being granted,

The Attorney-General and *J. Williams* now shewed cause against it, and relied upon the positive words of the statute, that a magistrate should not be liable for any act, matter, or thing done or commanded by him, for carrying any conviction into effect, in case such conviction shall have been quashed, (which of course assumes that it was illegal) except in an action upon the case only; and even then the plaintiff shall not be entitled to recover more than 2*d.* damages (over and above the penalty, if levied,) unless the declaration alleges that the act was done maliciously, and without any reasonable and probable cause. If an action of trespass, therefore, may be brought, to which that injunction does not apply, the magistrate will be deprived of the benefit of the statute. It is only magistrates who happen to have acted illegally who are liable to be sued with effect at all, and the statute meant to protect them against damages in every case but where they had acted from malice and without probable cause.

The Court having asked the *Attorney-General*, whether he meant to contend that the statute extended further than to protect magistrates in cases where there had been a conviction in form: and being answered in the negative; after some consultation

Lord ELLENBOROUGH, C. J. said, that such being their consideration of the meaning of the statute, that it was confined to cases where there had been a conviction by the magistrate; it seemed to them, that the progress of the cause had been stopped too soon, before it had appeared whether there had been a conviction or not; and therefore it was necessary that the cause should go to trial again in order to have that fact ascertained.

On this *J. Williams* said, that they had now an affidavit of the fact of a conviction having been made by the magistrate; which might save the expence of taking the cause to trial again. But *The Court* said, that they could not take notice of that affidavit; for if they received it, they must let in affidavits on the part of the plaintiff denying the conviction, and so they should have to try the fact upon affidavits. And afterwards

Lord ELLENBOROUGH, C. J. said: It appears to me that the true construction of the act is, to confine the protection given by it to magistrates to cases where there has been in fact a conviction; and if there were a conviction in fact in this case, it would answer no purpose to the plaintiff to carry the cause to trial again: but as that matter was not ascertained at the former trial, we must send it to another.

All the other Judges concurred in this; and *Le Blanc*, J. added, that if the construction of the act were otherwise, it would go the length of saying that in no case would trespass lie against a magistrate for any act done by him in his official character, whether there had been any conviction or not; which could not have been the meaning of the legislature. The court however in making the rule absolute said, that they would open it again if any thing occurred to themselves before the end of the term, or upon the suggestion of the defendant's counsel, to render the construction of the act more doubtful than it at present appeared to them. But a few days afterwards, the *Attorney-General* expressing his acquiescence in the opinion before delivered by the Court, that the act was confined to the case of convictions, the rule stood absolute as it had been before ordered.

At the second trial, it appeared, that the plaintiff, who had previously resided at *Wilmslow* in the parish of *Bollenfee* in *Cheshire*, where he had property in houses estimated at 7 or 800*l.*, had been imprisoned under civil process from some time in 1806 till the 27th of Feb. 1808, when he was discharged: and that on the 15th of March, he came to a friend's house near *Wilmslow*, and removed from thence on the 21st to another place in the neighbourhood. That during the greater part of the time the plaintiff was absent from home,

he left his wife and children without any provision, and the latter were maintained by the parish of *Bollenfee* in their poor house. That *Thomas Smith*, an overseer of the poor of *Bollenfee*, had complained on this subject both to the defendant and to others, and the defendant had ordered the parish officers to relieve the plaintiff's family: but *Smith* himself expressly negatived that any information or complaint upon oath was ever made by him to the defendant against the plaintiff for any supposed act of vagrancy. That on the 26th of *March* 1808, the defendant delivered to the constable of *Stockport* a warrant to apprehend the plaintiff, dated the 19th of that month; which, reciting that *Thomas Smith*, present overseer of the poor of *Bollenfee*, &c. had made information and complaint upon oath before the defendant, one of his majesty's justices of the peace, &c., that *J. Massey*, late of *Bollenfee* aforesaid, check manufacturer, had run away and left his wife and children chargeable(a) to the township of *B.* aforesaid; commanded the constable forthwith to apprehend the plaintiff, and bring him before the defendant, &c. to answer the said information and complaint. Upon this warrant the plaintiff was apprehended on the next day, which being *Sunday*, he was brought before the defendant on *Monday* the 28th, in the custody of *Thomas Occlestone*, constable of *Bollenfee*, when the plaintiff, on being examined, refused to part with his property in order to provide for his family, or to give security to the parish; and having previously declared his intention to go away, the defendant took the examination on the oath of *Thomas Occlestone* then present, in which he deposed that the plaintiff had left *Wilmslow*, his place of residence in *Bollenfee*, in *Oct.* 1806, and that his family consisting of a wife and two children had been chargeable to the township of *B.* since *March* 1807. Whereupon the defendant, on the same 28th of *March*, made out the following warrant of commitment of that date: "County of *Chester*.—To the keeper of the common goal, &c. Receive into your custody the body of *J. Massey* herewith sent you, brought before me (the defendant) one of his majesty's justices, &c. by *T. Occlestone*, constable of the townships of *Bollenfer*, &c. being charged on the oath of *Thomas Smith*, overseer of the poor of the said township, &c. with running away and leaving his wife and two children, whereby they have been chargeable to the said township of *B.* since the 1st of *March* 1807; and him safely keep in your custody until the next General Quarter Sessions, and until he shall be discharged by due course of law, &c." The defendant afterwards, at the next Quarter Sessions on the 26th of *April*, put in the following conviction: "County of *Chester*, to wit.—Be it remembered, that *John Massey*, late of *Bollenfee* in the county of *Chester*, chapman, is this day convicted before me, one of his majesty's justices of the peace in and for the said county, of being a rogue and vagabond; for that he the said *J. M.* between the 1st of *Jan.* 1808, and the 1st of *Feb.* 1808, did run away and leave his wife and family chargeable to the township of *B.* aforesaid." (Dated 28th of *March* 1808, and signed and sealed by the defendant.) This conviction was proved and relied upon at the trial by the defendant as an answer to the action;(b) the rest of the evidence having been adduced by the plaintiff, or obtained on cross examination of his witnesses. And in order to shew that the action was brought in time, the plaintiff further proved the notice of action before stated,(c) and the latitat issued in this suit indorsed with the name of the agent of the plaintiff's attorney, and with the date of the 8th *October* 1808, when it was sued out.

The objections were taken on the part of the defendant to the action: 1st,

(a) This is an act of vagrancy by stat. 17 G. 2. c. 5.

(b) At the Quarter Sessions held at *Chester* on the 26th of *April* 1808, the plaintiff, by an order of that Court, reciting his commitment by the defendant for the cause stated in the warrant of commitment, was remanded to the same custody until the next Sessions, or until he should be otherwise discharged by due course of law.

(c) Ante 68.

That it was brought too late; the writ having been sued out on the 8th of *October*, more than six months after the cause of action, (a) which accrued on the 28th of *March*. 2dly, That the conviction, while it remained in force, conclusively protected the defendant from being questioned in this form; according to the case of *Strickland v. Ward*. (b) But in order to save further expense to the parties the whole case was left to the jury, in order to assess the damages, in case the plaintiff should ultimately be considered as entitled to recover: reserving the question of law for the consideration of this Court. The jury accordingly found a verdict for the plaintiff for 20*l.* damages: and leave was reserved to the defendant to move to set aside that verdict, and enter a nonsuit, if the Court were of opinion that either of the objections to the action was well founded. A rule *nisi* was accordingly obtained for that purpose in the last term, which now came on to be argued.

Upon the first point it was observed by *Le Blanc, J.* that the plaintiff was estopped by the lapse of more than six months before the action brought from insisting upon the illegality of the caption under the warrant of apprehension, grounded, as the plaintiff's counsel insisted, upon a false allegation that *Thomas Smith*, the overseer of the poor of *Bollenfee*, had made information and complaint upon oath before the defendant that the plaintiff had committed an act of vagrancy. But it being observed by the plaintiff's counsel, that the plaintiff continued in gaol under the defendant's commitment of the 28th of *March* down to the 26th of *April* (after which his farther imprisonment was under the order of the Quarter Sessions), which was within the six months before the suing out of the writ on the 8th of *October*, this objection finally took another shape; upon which the question was, Whether the imprisonment under the commitment of the 28th of *March* could be covered by the conviction, which was not exhibited, and, for ought that appeared, was not

(a) Vide stat. 24 G. 2. c. 44. s. 8.

(b) *Winchester Summer Assizes 1767*, coram *Yates, J.*, cited in *Lovelace v. Curry*, 7 Term Rep. 633, 4. Vide *Hill v. Bateman and Another*, 1 Stra. 710, where in an action of trespass and false imprisonment against a justice of peace and a constable, the case was, that the magistrate had convicted the plaintiff for destroying game; (the stat. 5 Ann. c. 14. s. 4, giving a penalty for this offence to be levied by distress, and only enabling the magistrate to commit the offender to the house of correction for want of such distress;) and though it was proved, that the plaintiff had effects which might have been distrained sufficient to answer the penalty, yet the defendant sent him immediately to *Bridewell*, without endeavouring to levy the penalty—*Ld. C. J. Raymond* held, that the action lay against the justice. And as the report states, it was agreed that justices of peace, in such cases, were obliged to shew the regularity of their conviction; and that the information, &c. laid before them, upon which their convictions were grounded, must be produced and proved in court. This opinion must have been given upon the supposition that it was necessary to shew such information laid before the magistrate in order to give him jurisdiction, in the particular case, for the purpose of protecting himself; for with respect to the constable who had executed the warrant of commitment, it was clearly agreed that the warrant was a sufficient justification; it being a matter within the general jurisdiction of the justice. But in the case of *Strickland v. Ward*, it does not appear that Mr. Justice *Yates* required any other evidence to be produced in justification of the magistrate than the conviction itself, and the warrant of commitment granted thereupon; on which, says Mr. Justice *Yates*, in his own M. S. "I give my opinion that this conviction "could not be controverted in evidence; that the justice, having a competent jurisdiction "of the matter, his judgment was conclusive till reversed or quashed; and that it could "not be set aside at *nisi prius*." The jurisdiction of the magistrate being granted, the conclusiveness of the conviction in a collateral preceeding, that is, the propriety of the conclusion drawn by him from the whole matter before him, seems clear upon principle and all the authorities; the only question upon these cases would be, Whether, as against the magistrate himself, the conviction alone would be conclusive evidence of his jurisdiction in the particular case; or, if not conclusive, at least presumptive evidence of it; or, whether it were necessary for him to shew the information on oath laid before him; or competent for the plaintiff in the action to negative by evidence the fact of any such information, as stated by the magistrate in his conviction, having been laid before him, in order to shew that he had no jurisdiction in the particular case. Vide *Crepps v. Durdon*, Cowp. 640. *Davidson v. Gill*, 1 East, 64, and *Welch v. Nash*, 8 East, 394.

drawn up and executed by the defendant, till the 26th of *April*; and there being no proof of any minutes of a conviction made on the 26th of *March*, which was contended to be necessary to warrant the antedating of a more formal conviction. But the *Court* had no doubt, that supposing the magistrate to have had jurisdiction to convict, and that upon information laid before him upon oath he had in fact convicted the plaintiff on the 28th of *March*, it was competent to him to draw up the conviction at a future time in regular form, and to protect himself by it. And here, they observed, that the conviction purported on the face of it to have been made on the 28th of *March*, and there was no evidence to shew that it was in fact made at any other time. But the difficulty felt by the *Court*, as expressed by the Lord Chief Justice, was this; supposing the conviction drawn up in this general form to be sufficient for this purpose (which was denied by the plaintiff's counsel, and admitted by the defendant's counsel to be informally drawn up), how the imprisonment under the warrant of commitment could be connected with it; there being no internal reference to connect the two papers: and then the warrant of commitment expressing upon the face of it to have been made upon the information on oath of *Thomas Smith*; an allegation which was shewn by evidence to be false; it was difficult to refer that to a legal and valid conviction, which must be presumed to have proceeded upon a true fact.

Topping, Yates and Richardson for the plaintiff, adopted this suggestion, and further contended, that whether the record of conviction, on which the defendant rested his justification at the trial, were or were not connected with the warrant of commitment, the defence equally failed. If not connected, the conviction appeared to have been made without any information on oath, or any hearing of the party accused, and was therefore illegal and void, both in form and substance. For though a magistrate may proceed in such cases upon his own view; yet if he allege his conviction to be founded upon the information of another, and such allegation be proved to be false, the foundation fails. And a magistrate cannot protect himself against an action for false imprisonment by drawing up a paper in the name of a conviction without any facts to warrant it. But if the instruments were connected, then the conviction partook of the original vice of the commitment, which was founded upon the allegation of a false fact. Considering them as unconnected, there was no conviction either in fact or in law to justify the imprisonment. The warrant of commitment was not of itself a conviction: it did not profess to be so: and in *Rez v. Rhodes*,^(a) confirmed in *Rez v. Cooper*, 6 Term Rep. 509, such a warrant was held to be illegal for want of a previous conviction. The warrant of commitment ought, as it was there said, to include a conviction. The magistrate ought to have stated that there was an information on oath laid before him of such and such facts (amounting to an act of vagrancy;) and that after hearing the evidence before the accused, and his defence, if any, he had found him guilty of the offence; and then he should proceed to his commitment. They further contended, that the stat. 43 Geo. 3. c. 141, only extended to cases where there had been a conviction, and that conviction had been *quashed*; for the legislature considered, that while the conviction remained in force, the magistrate having jurisdiction to convict in the particular instance would be protected by it in any collateral proceeding, as before the statute; and therefore only needed the protection of the statute where the conviction had been *quashed*, as it might be, for any irregularity in the form of the proceeding. It was therefore still competent for the plaintiff in this case to bring his action of trespass, the conviction not having been *quashed*, though insufficient to protect the defendant, by reason of the falsity of the allegation, as to

(a) 4 Term Rep. 210. In Hil. 37 Geo. 3, this *Court* *quashed* a similar instrument, drawn up in the same words as the warrant of commitment in *Rez v. Rhodes*, which was intended to have effect as a conviction and commitment in execution, and ordered the party *Richard Devereux Combe*, who was brought up on *habeas corpus* to be discharged.

the information on oath of *T. S.* which was the foundation of the defendant's jurisdiction in the particular case. And they also suggested, that the act was confined to cases where a defendant has been convicted in a penalty; for it says, that the plaintiff in the action, *besides* the amount of the *penalty* levied, in case any levy thereof shall have been made, shall not be entitled to recover more than 2*d.* damages, &c.

In answer, however, to this part of the argument, it was said, *e contra*, that the act was plainly not confined only to cases where penalties were or might be levied, but that it extended to every case, whether a penalty were leviable or not; providing only for the recovery of the penalty, if levied, in addition to the damages, where the conviction has been quashed. And of this opinion were the whole Court.

The Attorney-General, Crosse, and J. Williams, in support of the rule, observed with respect to the argument, that the stat. 43 G. 3, applied only to cases where the conviction had been *quashed*; that the legislature could never have intended to protect magistrates after their convictions had been adjudged to be bad, and were quashed, and yet to leave them unprotected while their convictions were still nominally in force, however vicious in the form of them. It certainly was their intention to protect the magistrates by this statute in every case where the conviction itself did not protect them. They then contended upon the principal question, that it was sufficient if the magistrate, on hearing the information or complaint, upon oath, and the defence of the party accused, came to the conclusion that he was guilty; for that was a conviction, and it was competent to him to draw up such conviction in formal language at any time afterwards, and this, whether he had made minutes of the proceeding at the time or not, however proper it might be, for the sake of certainty, to make such minutes. Then taking the whole of the facts together as proved in evidence, it appeared that the plaintiff had been legally convicted, although such conviction had not been drawn up and committed to writing in proper form. There was a regular information on oath, laid before him on the 28th of *March*, by *T. Occlestone*, of *Bollenfee*, charging the plaintiff with having deserted his family for some time previous, and that they had been chargeable to the township: and the plaintiff himself, when questioned, refused to provide for them, or to give security to the township, though he had property there sufficient for the purpose. The defendant must then have come to the conclusion that he was guilty; for the warrant of commitment dealt with the plaintiff as a person who stood convicted. This is the effect and substance of it; though not correctly expressed in the warrant; for it states the evidence of the act of vagrancy to be the vagrancy, when the magistrate ought regularly to have convicted the plaintiff of being a vagrant upon that evidence stated, and upon the result of the hearing of the whole matter of the charge and defence: and there is also a palpable mistake in stating the charge upon oath to have been made by *T. Smith*, instead of *T. Occlestone*, by whom it was in fact made. Then the conviction afterwards drawn up, with which the commitment is connected by the whole scope of the evidence, expressly states the plaintiff to have been, on the same 28th of *March*, convicted before the defendant of being a rogue and vagabond, upon the fact of deserting his family and leaving them chargeable to the township. But however irregularly the conviction or the warrant of commitment may be drawn up, it is not less a conviction *in fact*, and does not the less bring the convicting magistrate within the protection of the statute. Suppose an action on the case had been brought, and these facts had been proved, it could not have been objected by the defendant to such an action, that the conviction was irregular, or that the warrant of commitment was not issued for the purpose of carrying that conviction into execution; and therefore that the action ought to have been trespass. When the facts of a conviction and of the warrant of commitment were given in evidence, it was competent to the plaintiff to contradict the fact, stated in the

warrant, of the information not having been given on oath by *T. Smith*. But though the conviction and the warrant of commitment were not connected by the evidence, it would be sufficient for the purpose of defence against this action, to shew that the warrant of commitment was itself a conviction, though an irregular one, to entitle the defendant to the protection of the act. The magistrate heard the plaintiff upon a charge of vagrancy; and must either acquit or convict him: then, if he send him to gaol to be there kept till the next sessions, as a commitment under the vagrant act to the next sessions is a commitment in execution; this of itself operates as a conviction, however informally it may be drawn up. The commitment states the same facts as the conviction.

LORD ELLENBOROUGH, C. J. I will assume for this purpose, that there ought to be a regular ground-work for the conviction of the plaintiff on the 28th of *March*; but there was in fact a regular information on oath laid before the magistrate, and a hearing of the plaintiff upon the charge. Then the magistrate being warranted in taking cognizance of the charge, and in committing the party, if in fact he did convict him of that charge; after a conviction in fact, the magistrate was authorised to commit the plaintiff; and the conviction might be drawn up in form at a future time. Then having in fact convicted, and being warranted to commit, the plaintiff, though the defendant has misrepresented in the warrant of commitment that he acted upon the information on oath of *Thomas Smith*, when in truth it was upon the information of another person; yet that may be rejected as surplusage, and the rest of the commitment will stand good. This recital of a false fact in the warrant of commitment is the only thing which has kept my mind in suspense, on account of the difficulty of connecting the imprisonment under it with the conviction: but by rejecting from the warrant of commitment the words as to the person by whom the information was made, the warrant will stand good for this purpose: and then the conviction, which may be drawn up at any time afterwards, if in fact the party were convicted, and which was afterwards exhibited, shews that the plaintiff was convicted of the offence for which he was committed. This is sufficient at all events to protect the magistrate in this action.

The other Judges expressed themselves satisfied on this ground. And *Le Blanc*, J. added, That the objection would have assumed a very different shape, if there had been no information on oath of any person whereon to found the conviction: the information on oath of *T. Smith*, on which the conviction professed to be founded, having been negatived by the evidence: but there was in fact an information on oath laid before the magistrate by *T. Occleston*, which, at all events, authorised the proceedings.

Rule absolute.

Fell, Clerk, v. Wilson.

12 East, 83. Feb. 1, 1810.

Where a composition for tithes had been long paid by the farmer, and two years before the action of debt brought on the stat. 2 & 3 Ed. 6. c. 13, for not setting out the tithes, the vicar, in a conversation with the farmer, had demanded his tithes vicarial, on which the other tendered him 40s. (the annual composition,) which the vicar refused to take, but assigned no reason for his refusal; this was held to be no evidence of a notice to determine the composition, which notice ought to be unequivocal: and held also, that the farmer not having denied the vicar's right to tithe in kind before the action brought, was not precluded from taking the objection to the action at the trial, for want of a proper notice to determine the composition, analogous to a notice to quit land, by putting the vicar to the strict proof of his right to tithe in kind.

THE plaintiff, as vicar of the parish of *Warcop* in *Westmoreland*, brought debt upon the stat. 2 & 3 Ed. 6. c. 13, against the defendant for not setting out the tithes of potatoes and other vegetables. At the trial before *Chambre*, J. at

Appleby, much evidence was given on the part of the vicar, which satisfactorily established his right to the tithes in kind of the articles in question, and negatived the existence of any modus; expecting, as it seemed, that defence to be set up by the defendant. But it appeared, that the tithes of the defendant's estate had been always or generally retained by the occupiers under agreements and compositions from time to time made with the vicar for different periods, varying in the sums; and for some time back 40s. a year had been received by the vicar of the defendant. And no notice to determine the composition, analogous to a notice to quit, having been proved; it was objected, that the composition continued in force, and therefore that this action was not maintainable: but the learned judge, considering the contention between the parties to be, whether there existed a modus or not; and considering the defendant as thereby denying the composition, and any title in the plaintiff to take tithe in kind; and thinking the case analogous to that of a tenant from year to year disclaiming to hold of his landlord; overruled the objection, but saved the point; and the plaintiff took a verdict for 1s. as the single value.

Raine moved, in the last term, to set aside the verdict and enter a nonsuit, upon the authority of the case of *Hewitt and others v. Adams*, in the House of Lords, in 1782,^(a) where it was decided by the unanimous advice of all the judges, recognised in *Wyburt v. Tuck*, 1 Bos. & Pull. 458, and *Bishop v. Chichester*, 2 Bro. Ch. Rep. 162-3, that the like notice was required to determine a composition for tithes as to quit land tenanted from year to year.

LE BLANC, J. asked, whether the defendant had denied the vicar's right to the tithes before the action brought, or only in Court, by putting him upon the proof of his title; for that, he thought, made all the difference. And being answered, that the defendant had not denied before the action the composition payable to the vicar, which the latter had before received; the court granted a rule nisi. And now upon reading the report of the evidence given at the trial to the purport before stated, it appeared that the learned Judge before whom the cause was tried, upon further consideration of the evidence, and of the course which the trial took, was induced to think that the resistance by the defendant to the plaintiff's title at the trial lay principally in his putting the plaintiff to the proof of it, and not in producing evidence against it, or cross-examination to that point, except, that one of the witnesses was asked whether he had ever known the vicar collect tithe in kind of the articles in question; and that another witness said, that he saw the defendant offer 40s. which he called a *modus*, or *something of that sort*; not speaking with any certainty to the defendant having insisted upon it as a modus. And as there

(a) *Adams*, the lessee of the tithes, claiming under Dr. *Waller*, the vicar of *Kensington*, filed his bill against *Hewitt* and others, nurserymen in that parish, who had before made a composition with Dr. *Waller* at so much an acre for their nursery grounds; stating that he had served them with notices to determine their compositions, and requiring them to set out their tithes, which they had neglected to do, and praying an account for the value of all the tithes since the termination of the compositions. To which the defendants below put in their answers, insisting, 1st, That the composition was to inure during the incumbency of Dr. *Waller*; 2d, That if determinable, it was not properly determined by the notices that had been given: 3dly, That hothouse and greenhouse plants, exotics, &c. were not titheable. The court of Exchequer having decreed an account to be taken against the nurserymen, they appealed to the House of Lords; and that House, after hearing counsel upon the following preliminary point, Whether the notice given were sufficient notice to determine a composition for tithes; put this question to the Judges: "Whether the notice given on the 8th of September were a sufficient notice to determine a composition for tithes from year to year; such years commencing on the 39th of Sept.?" On the 19th April 1802, Mr. Justice *Gould* delivered the unanimous opinion of the judges present upon the said question, that such notice was not sufficient. Whereupon the judgment complained of (so far as it related to the cause above mentioned) was reversed. Appeal Papers in Dom. Proc. with MS. Judgments. And vide 7 Bro. Cas. in Parl. 64, (edited and continued by *Tomlins*) S. C. and also 3 Gwill. Tithe Cas. 1204. S. C. and 4 Gwill. 1323.

was no evidence to prove that the modus was actually insisted upon before the action; and this was a penal action; it now seemed to the learned Judge, that no denial of the plaintiff's title at the trial could affect the defence upon the want of notice, since the penalty could only be incurred at the time when the titheable subjects were removed, at which time the composition was in force, and the defendant had a right to do the act. Notwithstanding this report, however, the plaintiff's counsel still insisted, that, though there was no evidence given at the trial of a formal notice from the plaintiff to the defendant to determine the composition; yet that it was to be collected from other facts proved at the trial, that the defendant had notice of the determination of the composition long before 1808; for not setting out the tithe of which year this action was brought. It was therefore referred back to the learned Judge to report the evidence *in pleno*, which had not been at first considered to be necessary, for the purpose of raising the objection on which the rule had been moved for. And now, upon reading the further report, it appeared that there had been a demand by the plaintiff of his tithe vicarial from the defendant in 1806, when the defendant tendered 40s., which the plaintiff refused to take; and it was upon this occasion that the witness said the defendant called it a *modus, or something of that sort*. That the plaintiff afterwards went again to demand tithe in kind of the defendant in 1807, when only the defendant's wife was at home; but in fact no composition had been received for the last two years antecedent to bringing this action.

Park, Topping, and Holroyd, in shewing cause against the rule, insisted upon the facts last reported, as evidence that the vicar had determined the composition by a regular notice, (and a parol notice is at any rate sufficient,) supposing a six months notice to be necessary in order to determine a composition: but they intimated doubts whether that were the point in judgment in the case of *Hewitt v. Adams* in the House of Lords. The question there put was, whether the particular notice given on the 8th of *September* to determine a composition for tithes ending on the 28th of the same month were good; which the Judges held to be insufficient.

LORD ELLENBOROUGH, C. J. Both law and convenience require that *some* notice at least should be given to determine a composition of tithe; and if some notice be to be given (which is not denied) it ought to be an unequivocal notice, that the party may know upon what he is to depend. But the question here is, whether any notice at all has been given? Now, I cannot collect that, from the mere refusal to take the 40s. tendered by the defendant. Where there has been an habitual money payment, the mere demand of tithe by the vicar might mean of that which had been used for a series of years to be accepted by him for tithe. He ought to have explained himself further, if he meant to put an end to the composition. If he had demanded his tithe *in kind*, that would have been unequivocal. Then, when the plaintiff refused the 40s. tendered by the defendant, that might have been because there was more than one year due, or because they might have entered into another composition. The plaintiff should have explained what he meant: whether he meant to refuse to accept any composition at all: for it lay upon him to prove that the former composition was put an end to: and if a party will rest on a verbal expression of his meaning, when it is certainly more convenient that it should be reduced to writing, at least the verbal notice should be unequivocal, and not rest upon a conversation which will bear different meanings.

GROSE, J. said it would be very inconvenient if such loose evidence were admitted to determine a composition of so long standing.

LE BLANC, J. It is clear from the opinion delivered by the Judges in the case referred to in the House of Lords, of *Hewitt and others v. Adams*, that they thought *some* notice was necessary to determine a composition for tithe. The question put to them did not require their opinion as to the length of time of the notice: and therefore the answer given by them satisfied the ques-

tion put to them, that the particular notice which had been given was not sufficient. But Mr. Justice *Buller*, who was one of the Judges concurring in that answer, stated afterwards, in the case which has been mentioned of *Wyburd v. Tuck*, the grounds on which the Judges proceeded who had concurred in that opinion. Now here the evidence is, that in 1806 the plaintiff demanded of the defendant in person his tithes vicarial: that we must understand as a demand of the amount: and at the same time 40s. was tendered by the defendant: which was refused to be accepted by the plaintiff, but on what account was not explained by him. Then again, in 1807, there was another conversation, but nothing was said of taking tithes in kind. Can that then be considered as a notice to quit given at that time? If so, it must have operated on both parties. But if the vicar in the next year had demanded the composition, and the farmer had insisted, that he had determined the composition the year before, and that he would only give him his tithes in kind: it would have been no answer for the farmer to have said, that because the vicar had refused to receive the composition the preceding year, that operated as a notice to determine it. Therefore by analogy to other cases of notice to quit, we cannot construe a mere general demand of tithe, and a refusal to take the sum tendered, which had been before received by the vicar, to be a determination of a subsisting composition.

BAYLEY, J. There is no evidence that the composition was determined. The plaintiff demanded of the defendant his vicarial tithes: that rather seemed to be a demand of something *immediate*, and looked more to a money payment than to tithes in kind; and there was no demand of tithe in kind in future. Then the evidence is, that the defendant offered him 40s. shewing that in his (the defendant's) understanding it was a demand of money, and that 40s. was all that was due. The vicar, however, refused it; but that might be because he thought that more than one year's composition was due. He leaves this unexplained: and I do not think it can be inferred from thence, that it was a notice from the vicar that *in future* he should take his tithe in kind. I have said thus much, not as supposing that I have added any thing to the reasons assigned by the rest of the Court for their opinion, but lest it should be imagined that I do not fully accord with my Lord and my Brothers in what they have said. But I would wish it to be understood, that when I accede to the judgment of the Court, without assigning my own reasons, it is because I fully agree in those which have been before assigned by my Brothers.

Rule absolute.

Max v. Roberts and Others.

12 East, 89. Feb. 5, 1810.

A count in an action on the case stating that the defendants, being owners of a ship at *Liverpool* bound on a voyage from thence to *Waterford*, the plaintiff shipped goods on board to be carried upon the said voyage by the defendants and to be delivered at *W.* to the plaintiff's assigns; and thereupon the plaintiff insured the goods at and from *L.* to *W.*: and then averring, that it was the duty of the defendants as such owners to cause the ship to proceed on the voyage from *L.* to *W.* without deviation; and alleging a breach of such duty, by their causing the ship to deviate from the course of that voyage; after which she was lost with the goods; and the plaintiff by reason of such deviation, lost his goods and the benefit of his policy, &c.; cannot be sustained, for want of alleging that the goods were delivered to or received by the defendants for the purpose of carriage, or that they had notice of the shipment; from whence a promise of duty, founded upon an agreement to carry the goods, might be inferred: and also for want of an allegation, that the defendants undertook to carry the goods directly to *W.* from *L.*; for though the ship's ultimate destination might be *W.*, yet she might have been first destined to other places on a coasting voyage.

THE plaintiff brought his action on the case in the Court of Common Pleas

against the defendant *Roberts*, and eight other defendants, of whom *John Ames* and *Jane* his wife were two: and declared against them in his first count, that whereas they were the owners of a ship called the *Draper*, which ship, before the time of the grievance after mentioned, viz. on 25th of April 1805, was lying in the port of *Liverpool*, and bound upon a voyage from thence to *Waterford in Ireland*; and being so bound upon the said voyage, one *J. T.* shipped on account of the plaintiff in the said ship ten hogsheads of sugar, of the value of 375*l.* to be carried upon the said voyage by the defendants, and to be delivered at *Waterford aforesaid* (the dangers of the seas excepted) to the plaintiff or his assigns, he or they paying freight for the said goods 20*s.* per ton, &c.; and whereupon the said *J. T.* as the agent of the plaintiff, caused to be underwritten a policy of assurance of the said ten hogsheads of sugar valued at 375*l.* at and from *Liverpool to Waterford aforesaid*; by which policy the underwriters took upon them in that voyage the perils of the sea, &c. And then the plaintiff averred, that the said hogsheads of sugar, being so loaded on board the said ship for the voyage aforesaid, it became, and was the duty of the defendants, as such owners, as aforesaid, to cause the said ship to proceed upon the said voyage from *Liverpool to Waterford aforesaid*, without making any unnecessary deviation from the course of the said voyage: yet the defendants not regarding their said duty, as such owners of the said ship, but neglecting the same, did not cause the said ship to proceed upon the said voyage from *Liverpool to Waterford*, without making any unnecessary deviation from the course of the said voyage, but, on the contrary thereof, afterwards, and after the said ship had sailed on her said voyage, and before she completed the same, the defendants wrongfully suffered her to make an unnecessary deviation from the course of the said voyage from *L.* to *W.* with the said hogsheads of sugar on board as aforesaid, viz. from and out of the course of the said voyage into *Porto William Bay*. And that afterwards, and whilst the said ship remained in the said bay with the said hogsheads of sugar so on board, she was by the dangers of the seas, &c. sunk; by reason whereof the said hogsheads of sugar of the said plaintiff so on board were destroyed. Whereupon the plaintiff, but for such deviation of the said ship from and out of the course of the said voyage, might and would by law have recovered payment of his damages so by him sustained by such loss by virtue of the said policy of insurance: but by reason and means of such deviation in the said voyage as aforesaid, and on no other account whatsoever, the said insurance so as aforesaid made on the said hogsheads of sugar, became and was avoided and of no avail, and the said underwriters became and were exonerated and discharged from all sums that would otherwise have been due and payable from them under their said insurance, for and in respect of the said loss so sustained by the plaintiff as aforesaid; and in consequence thereof, the plaintiff failed in the recovery of the said sums of money in certain actions brought by the said *J. T.* as agent of the plaintiff as aforesaid, for and on account of the said plaintiff, against the said underwriters on insurances, viz. against one *D. M. &c.* without knowing or being apprised of such deviation as aforesaid, and became liable to pay and did in fact pay divers sums, to wit. 500*l.* for and in respect of the costs and charges as well as of the defence of the said *D. M. &c.* of such actions, as of the prosecution thereof by the said *J. T.* the agent of the plaintiff aforesaid. There was a second count stating the circumstances in a similar manner, and alleging that it was the duty of the defendants (in respect thereof,) as such owners of the said ship, to have made such voyage by and according to the direct, usual, and customary way and passage, without deviation and departure from, or delay or hindrance in, the same, without reasonable or sufficient cause for so doing, in order that the plaintiff, so being such proprietor of the said hogsheads of sugar, and having caused such assurance to be made thereon, might not lose the benefit of such assurance. And then it proceeded to allege as a breach, that the defendants did not make such voyage

with their said ship by and according to the direct, usual, and customary passage, without deviation, &c. but wrongfully deviated from the direct, usual, and customary passage, &c. ; and so concluded as the former count.

To this declaration three of the defendants pleaded *Not guilty*, and the rest (including *John Ames* and *Janet* his wife) suffered judgment by default. And the cause went down to be tried at Guildhall, in C. P., before the Chief Justice, upon the issue between the plaintiff and the three defendants who pleaded to issue, and to assess the plaintiff's damages against the six other defendants who suffered judgment by default. The jury found the three defendants who pleaded to issue, not guilty : and assessed damages and costs against the six defendants who suffered judgment by default. The plaintiff thereupon entered a *noli prosequi* as to the husband *John Ames*, and *Janet*, his wife, two of those six defendants, and prayed his judgment against the remaining four defendants. The judgment of the Court of Common Pleas thereupon was, that the plaintiff should take nothing by his writ, &c. ; upon which judgment the plaintiff *Max* brought a writ of error, and assigned for error, that judgment ought to have been given for him to have recovered against the four defendants his damages assessed by the jury against them. To which assignment of error all the original defendants (except *John Ames* and his wife, in respect to whom a *noli prosequi* had been entered) pleaded *in nullo est erratum*.

This writ of error was twice argued : the first time in this court, in Mich. 49 Geo. 3, by *Taddy* for the plaintiff, and *Paruther* for the defendants : and the second time in the Exchequer Chamber, before all the judges, by the *Attorney-General* for the plaintiff, and *Laves* for the defendants. The argument turned principally upon the question, whether in an action on the case, which is laid in tort against two or more, founded upon the alleged breach of a joint contract, one or more of the defendants may be found guilty and the others acquitted, according to the doctrine of this Court in *Govett v. Radnidge and Others* (3 East, 62) ; considering the tort or breach of the duty resulting from the contract to be the gist of the action, and not the contract itself out of which it arose : or whether, as the Court of C. B. decided in *Powell v. Layton* (2 New Rep. 365), the contract to be the gist of the action, as well when declared on in an action on the case for a tort in the breach of the duty resulting from it, as in *assumpsit* upon the promise and undertaking expressed or implied in the terms of the contract itself, in which view a defendant sued alone in an action on the case might plead in abatement that he had contracted jointly with others. The case was argued at much length, and a difference of opinion was understood to prevail amongst the judges upon the question ; but as the principal authorities are collected in the reports of the two conflicting cases, and the judgment now delivered turned upon a collateral point ; and as another case is now depending in this court, *Weall v. King and Another*, post 452, in which the same point is intended to be raised, it is unnecessary here to recapitulate the arguments. In this term,

Lord ELLENBOROUGH, C. J. after stating the record, as above set forth, proceeded—This writ of error after having been twice argued here, was adjourned into the Exchequer Chamber ; as it was supposed that a decision in this case might settle and put at rest a question upon which contrary judgments had lately been given in this court and in the Common Pleas. The judgment of this Court was in the case of *Govett v. Radnidge and Others*, 3 East, 62, and that of the Common Pleas in *Powell v. Layton*, 2 New Rep. 365. And it has since accordingly been argued by counsel before the twelve judges in the Exchequer Chamber, and then, and at a further meeting held for the same purpose, fully considered by them : and upon such consideration they were unanimously of opinion, that both the counts of this declaration are so defective in several material respects (perfectly collateral to the grounds of objection argued, and upon which the determination of the Judges was sought,) that no judgment could be given for the plaintiff upon either of them : the

main question, upon which the determination of the judges was sought, being (it will be recollected) whether a verdict could consistently with the rules of law be given, acquitting some defendants and finding others guilty, in such an action as the present. The first count of the declaration alleges a shipment by the plaintiff of goods on board a vessel, of which the defendants are stated to be owners; but it does not proceed to state that such goods were delivered to or received by the defendants, or that the defendants in any manner ever had notice of the fact of such shipment. So that in this count there is not only a want of any words importing a promise by the one party to the other, but there is also an entire absence of all circumstances or facts from which any promise or agreement could be implied, or duty inferred between them in respect to such goods. Neither is it alleged in either of the counts (which would have been further necessary, supposing a delivery of the goods in question to the defendants, and an acceptance by them for the purpose of carriage had been charged), that the defendants undertook to carry the goods *directly for Waterford*; because, independently of any restraint upon the ship-owner, arising from the agreement on the subject, the ship may make as many intermediate rests and stages in the course of its voyage, (and in the case of coasting voyages, or voyages to places near home, it usually does so) as the ordinary convenience of its employers and nature of its service may require. Upon a record, therefore, so essentially defective as this is in the particulars I have mentioned, it is enough to say, that we, together with all the other judges, were of opinion, that the judgment given below, which was that the plaintiff should take nothing by his writ, was properly given: and of course, that it is fit that the judgment there given for the defendants in error should be affirmed by us.

Judgment affirmed.

Doe, on the several Demises of J. Hayne, of his Majesty King George III., and of others v. Elizabeth Redfern, Widow.

12 East, 96. Feb. 5, 1810.

The stats. 8 H. 6. c. 16, and 18 H. 6. c. 6, prohibiting the granting to farm of lands seised into the king's hands, upon inquest before escheators, until such inquest be returned in the Chancery or Exchequer, and for a month afterwards, *if the king's title in the same be not found of record*, unless to the party grieved who shall have tendered his traverse to such inquest; and avoiding all grants made contrary thereto; extend to the case of an escheat upon the death of the tenant last seised; without heirs, where no immediate tenure of the crown was found by the inquest. And as the crown could not grant to a stranger in such a case without office, neither can the plaintiff in ejectment recover upon the demise of the crown.

And the 8th section of stat. 2 & 3 Ed. 6. c. 8, (which is in general terms, and not confined to the particular inquiries mentioned in other clauses of the act) extends to avoid any such inquisition or office before escheators, not finding of whom the lands are holden; in the same manner as if the jury had expressly found their ignorance of the tenure: and a *melius inquirendum* shall be awarded.

Quere, Whether at common law, upon the death of the tenant last seised of the land, without heirs, the right and possession must be presumed to be immediately in the crown, without office, as though the person last seised were the king's immediate tenant; the king's title not appearing by any matter of record, and the possession not having been vacant from the death of the tenant last seised.

THIS ejectment was brought on the several demises of *John Hayne*, deceased, the king in right of his crown. *Elizabeth Hayne*, widow, and *T. Bolton*, as executrix and executor of the said *John Hayne*, and the said *Eliz. Hayne*, as executrix of the said *John Hayne*, to recover a message and 33 acres of land in the possession of the defendant, situated at *Clifton* in the parish of *Ashborne*, in the county of *Derby*. At the trial before *Bayley, J.* at

Derby, a verdict was found for the plaintiff, subject to the opinion of the court on the following case.

By indentures of lease and release of the 1st and 2d of *April*, 1737, *Rd. Taylor* conveyed the premises in question to *Roger Johnson* and *Elizabeth* his wife, and to the heirs of the said *Roger Johnson*, to hold the same unto the said *Roger Johnson* and *Eliz.* his wife, and the heirs of *Roger Johnson* for ever, of the chief lord or lords of the fee, by the rents and services due and of right accustomed. By virtue of which *Roger Johnson* entered thereon, and died seised thereof without heirs, on the 28th of *August* 1740. *Eliz. Bradbury* (called in the said deed the wife of *Roger Johnson*, but not being in fact his wife,) died on the 23d of *Jan.* 1791. By a commission of escheat, dated 17th of *June* 1794, directed to certain commissioners therein named; reciting that it was understood, that the said *Roger Johnson* was born a bastard, and died without lawful issue, and that he was, at the time of his death, seised in fee simple, or otherwise, of certain lands in the county of *Derby*: the commissioners were authorized to inquire, as well by the oaths of good and lawful men of the said county, and the examination of witnesses upon oath, as otherwise, whether the said *Roger Johnson* was a bastard, or not, and whether he died without lawful issue, or not, and on what day and year, and where he died, and what lands and tenements, and of what annual value, he had in the said county at the time of his death, and of what person or persons the same were holden, and by what services, and what estate or interest he had therein, and in whose hands they then were, and who had taken and received the meane profits thereof since his death, and to what amount, and also of all other matters and circumstances which they should judge fit and necessary to be inquired of touching the matters, &c. An inquisition was taken under and by virtue of the above commission on the 25th of *July* 1794, before *Daniel Parker Coke*, *John Balguy* and *Nathaniel Goodwin Clarke*, Esqrs., three of the commissioners; when it was found by the jury, that *Roger Johnson* was not a bastard, and that, at the time of his death, he was seised of the remainder in fee expectant on the death of *Eliz. Bradbury* of and in the premises in question under the indentures of lease and release before mentioned; and that he died in *August* 1740, without any heir of his body, or any right heirs capable of enjoying the premises; and that the premises were at his death of about the yearly value of 28*l.*; and that the rents of part of the premises then in the possession of *Halksworth*, and of the yearly value of 20*l.*, had been received by *Elizabeth Bradbury* from the time of the death of *Roger Johnson* until her death on the 23d of *January* 1791, and since that time the same has been received by *John Redfern* of *Derby*; and that a close, the residue of the said premises, then in the occupation of *T. Bradbury*, had been possessed by him since the death of *Roger Johnson* without any rent paid for it to any person, and that the whole of the premises were then in the possession of *J. Halksworth* and *T. Bradbury*. But it was not found of what person or persons the premises were holden, nor by what services. The above inquisition was duly sealed and returned. The person who was in possession as tenant at the time the inquisition was taken attended as a witness by the desire of the defendant who is the widow of the said *John Redfern*; and *Mr. Simpson*, an attorney, (now deceased) also attended the inquisition on behalf of the defendant, and cross-examined witnesses. By indenture of lease under the Exchequer seal, dated the 17th of *April*, 1807, his majesty demised and granted to *John Hayne*, his executors, &c. the premises in question, to hold from the 5th of *April* 1797, for the term of 31 years, under the yearly rent therein mentioned. The said *John Hayne* died in *January* 1808, having by his will appointed his widow *Eliz. Hayne* and *Thomas Bolton* executrix and executor thereof; and the will was duly proved by *Eliz. Hayne*. If the plaintiff were entitled to recover, the verdict was to be entered accordingly: otherwise, a verdict was to be entered for the defendant. The case was argued in the last term.

Balguj jun. for the plaintiff. The first objection made to the inquisition, by the defendant, is, that the return does not find *of whom, and by what services, the lands were holden*, and is therefore avoided by the stat. 2 & 3 Ed. 6. c. 8: and another objection made is founded on the stats. 8 H. 6. c. 16, and 18 H. 6. c. 6, avoiding grants of lands seised into the king's hands before office found and returned, &c. for a month, &c. But the plaintiff's claim under the crown may be supported, independently of those facts, upon general principles. For, 1st, It is a maxim of law that all lands and tenements are holden mediately or immediately of the crown. Co. Lit. 1, and Wright's Tenures, 58, 9, 136. [This was not disputed.] 2dly, It follows of course, that in the absence of proof of any mesne tenure, the presumption of law is, that lands are holden immediately of the crown: and, 3dly, It also follows upon the principles of the common law, that where the king's tenant dies without heirs, the lands of which he died seised vest immediately in the crown, before office found, if there be no statutable provision to the contrary. [These positions being also admitted, Lord *Ellenborough*, C. J. said: Are we to take it for granted that in the absence of proof of any mesne tenure the presumption of law is, that the lands are holden immediately of the crown, so as to vest in the king, without office found, upon the death of the tenant last seised without heirs, when in this very case a commission has issued for the purpose of inquiry, amongst other things, *of what person or persons the lands were holden*; which commission issues, because the king is in doubt of the matter, and for the purpose of clearing that doubt?] The only objection made is upon the statutable provision of the 2 & 3 Ed. 6. c. 8, "an act for finding of offices before escheators," which enacts (s. 8.) "that where any inquisition or office shall be founden by these words, or like, *Quod de quo vel de quibus tenementa prædicta tenentur juratores prædicti ignorant*; or else founden holden of the king *per quæ servicia ignorant*, or such like; that in such case such tenure so uncertainly founden, *de quo vel quibus tenementa prædicta tenentur ignorant*, shall not be taken for any immediate tenure of the king: nor such tenure so founden of the king, *per quæ servicia ignorant*, shall not be taken any tenure in capite; but in such cases a *melius inquirendum* to be awarded, as hath been accustomed in old times; any usage of later time to the contrary notwithstanding." These words indeed are general, but they must be construed with reference to the whole scope of the act; and the inquisitions mentioned in that clause must be taken to relate and be confined to the inquisitions and offices mentioned in the other clauses, and not to extend to *all* inquisitions in general. The 2d and 3d clauses extend only to protect chattel and copyhold interests, and persons having interests in rent, common, or profit appendre, for term of years, life, or otherwise, out of any lands, &c. contained in any office or inquisition where the king is entitled to hold such lands. The 4th and 5th clauses protect the heirs of the king's tenants found to be of less age than they really are. The 6th section gives a traverse to the true heir or party grieved against untrue offices found in respect to the heirship, lunacy, ideocy, or death of parties interested. The 7th section gives a traverse, or monstrans de droit, to the party interested against untrue inquisitions of treason, felony, or præmunire, giving title by double matter of record to the king. It is to these several inquisitions only that the general provisions in the 8th clause must be taken to apply. But then it is objected, that by the stat. 8 H. 6. c. 16. "No lands seised into the king's hand upon such inquest taken before the escheators or commissioners shall be in any wise let or granted to ferm by the chancellor or treasurer of England, or any other the king's officer, until the same inquests and verdicts be fully returned in the Chancery or Exchequer; but all such lands shall entirely and continually remain in the king's hands until the said inquests and verdicts be returned, and by a month after the same return; if it be not so that the parties grieved by the same inquests or putting out of their lands come into the Chancery and proffer

"themselves to traverse the said inquests, and then offer to take the same lands to farm: and if they do so, that then the same lands be committed to them, if they shew good evidence proving their traverse to be true, after the form of the stat. 36 Ed. 3. st. 1. c. 13, to hold until the issue taken upon the same traverse be found for the king," &c. But this statute applies not to cases where the king is in possession before office found, as upon the death of his own tenants in capite without heirs; but only to cases where an inquest is necessary to perfect the king's title, as in cases of forfeiture, or entry for condition broken. The preamble of the 8 H. 6, speaks of the *disherison* of the subject by means of the irregular and wrongful inquests taken by escheators, by which the lands of persons had been seized into the king's hands and let to farm before such inquests returned: but that cannot apply to a case where there are no heirs of the tenant last seized; and where the king is so completely in possession before office found that he may maintain a writ of intrusion against any who disturb him. The stat. 18 H. 6. c. 6, does not carry the objection further; it recites the stat. 8 H. 6, giving to the party grieved his traverse, and the evasions of it; and then it avoids all grants of lands seized &c. before inquisition found and returned into Chancery or the Exchequer for a month, unless such grants be made to those who have tendered their traverses as provided for by the former act: but that must still be understood of such cases where the inquest of office is necessary to entitle the king to enter, and not merely to notify to him the locality and value of the lands, which, having been held by his own immediate tenant, vested upon his death, without heirs, in possession in the king, 16 Vin. Abr. 79, office, B. mentions two sorts of offices; one which vests the estate and possession of land in the king where he had only a right or title before; and which is called "office of instituting;" of which the instances put are of purchases in mortmain, or by an alien, villein of the king, or felon: the other, which is called the "office of instruction;" which is where the estate is lawfully in the king before, but the particularity of the land does not appear of record; as in case of attainder for high treason under the stat. 33 H. 8. c. 20; or if the king's own tenant commit felony, and be attainted and die: in these and other such cases, says the book, (which must include the death of the king's tenant without heirs) *the estate is in the king, without any office*. For this is cited *Page's case*, 5 Rep. 52, and a note is subjoined from Gilb. Hist. Exch. 132—4 in which it is stated, that the king's officers may not enter upon any *other man's* possession till the jury have found the king's title: but that where the king's title appears of record, his officers may enter without any office found; as *where the lands are held of the crown, and the tenant dies without heir*. And *Yonge v. Conway*, Salk. 7, is to the same purpose. [Lord *Ellenborough*, C. J. As all lands are held mediately or immediately of the crown, must not that passage in *Gilbert* be understood of lands which already appear by matter of record to be held immediately of the crown? In the case in *Savill* the party is stated to have held of the crown in capite. But here is another person in possession, not having paid rent to the crown, whose possession must therefore be presumed to be adverse, and may turn out to be a legal one: or there may be a mesne lord. The inquiry is directed to ascertain these matters.] There was sufficient evidence to warrant the jury in finding that the tenant last seized, who died without heirs, held immediately of the king, in the absence of all proof to the contrary. [*Le Blanc*, J. Then that fact ought to have been so found in the inquisition. If it be a presumption of law that the tenant last seized held immediately of the king, unless the contrary be shewn, then the jury would have been warranted in finding the fact; but they have not found it. *Bayley*, J. When there is a proper office found, that is notice to all persons who have claims to assert them, and the mesne lord, if any, may then come in and claim: it is an inquisition *in rem*: but an ejectment, which is only to recover a chattel interest, is no notice to the mesne lord, or to any

other persons.] He then adverted to the demise laid from the king : but *the Court* said, that the question was the same upon that demise as upon the demise of the king's grantee.

Copley, contra, admitted, that upon the death of the king's tenant, without heirs, the king is taken to be in the actual possession of the land before office found : and though the inquisition does not find that the tenant last seised who died was the king's immediate tenant, and therefore he was entitled to avail himself of that omission ; yet he was prepared, he said, to argue the case upon the supposition, that, in the absence of any proof to the contrary, the presumption of law was, that every person held immediately of the crown ; and still he contended, that till office found the king could not grant the estate to another by force of the statutes referred to. Staunford (*Prerogative*, fo. 54,) speaking of the king's seisin, possession, or title, says, that there may be a possession in law in the king as well as a possession in deed, which possession in law is ever without office or other matter of record ; as when possession is cast on the king by descent, reverter, remainder, or *escheat* : and the king, he adds, may make it a possession in deed *by entry or seizure* ; but *not* to make it a possession in deed *by his grant*, because of the stat. 18 H. 6. c. 6, which avoids *all* letters patent made of lands before office found and returned, or within one month after, but only to him that tendereth his traverse : and yet, he says, the seisin remains in the king as at common law, though not in deed, until such time as he had made a seisin or entry by his escheator, or a grant thereof, which waiveth both to a seizure and grant, in such cases where the grant may be good, and not restrained by statute. For an office that entitleth the king to the possession is sufficient by itself, without any seizure or entry of the escheator, to make a possession in deed in the king, *if the possession were vacant when the office was found. But if the possession were not vacant, but another than he in whose right the king seizeth was tenant thereof at the time of finding the office, then must the king enter or seize by his office before the possession in deed shall be judged in him.* And this is not inconsistent with the doctrine in *Willion v. Berkley*, Plow. 229, that if the king's tenant die without heir, the freehold and possession in law is presently in the king without office. But the same distinction is recognized in Bro. office devant Escheator, pl. 56, (which cites 29 H. 8,) that if the king grant land for life, and afterwards the grantee die ; yet the king cannot grant this over until the death be found by office ; and this by the stat. 18 H. 6. So also in the case of attainder for high treason, the actual possession and seisin of the land is by stat. 33 H. 8. c. 20. s. 2, in the king before office : yet until office found and returned, &c. or something equivalent, it was questioned in Dy. 145, b. whether a grant by the king of the forfeited lands were not within the prohibition of the stat. 18 H. 6. In Saville, 70, where the queen granted a lease, (a) with a proviso to be void if the rent reserved were in arrear for 10 days, *Manwood* held, that though the freehold were in the queen, yet she could not make a lease or grant thereof without office found and returned ; and that by the stat. 18 H. 6. c. 6 : *quod fuit concessum per totam Curiam*. And the Court further held, that an office found and returned afterwards would not make an intermediate lease good by relation. Other instances are stated in Bro. office devant Escheator, pl. 14, and Fitz. Abr. Graunt. pl. 91, where, though the possession shall be deemed in law to be in the King before office, yet he cannot grant till office found and returned by the 18 H. 6. c. 6. It is contended, however, that an office has in effect been found in this case for the king, because it is not found in the inquisition that the lands were holden of

(a) The report states the lease to have been for 20 years, and yet supposes the principal question made by the Court to have been, Whether the *freehold* were in the queen. The question more probably made, was, Whether, the freehold being in the queen, she could, by virtue of the proviso avoiding the lease, upon the mere non-payment of the rent for 10 days, re-grant or re-demise without office found.

any intermediate lord, the presumption of law is that they were holden immediately of the king. But such a presumption could not have been made even at common law from the mere silence of the inquisition, nor would it from thence have been taken to have been an immediate tenure of the king in chief, but a *melius inquirendum* would have issued: *a fortiori* since the statute. Dy. 155, b. 292, a. Co. Lit. 77, b. 2 Inst. 693. Register, 293, b. *Inche v. Roll*, Hob. 50, *Barham's case*, Ley. 23. *Milner's case*, ib. 26. There is nothing then in principle to limit the construction of the stat. 2 and 3 Ed. 6. c. 8. s. 8, to any particular kinds of office, and the words of that clause are general, extending to "any inquisition or office," and directing a *melius inquirendum* to be awarded if the jury return *ignorant* as to the person of whom, or the services by which, the tenement was holden: and expressly declaring that the tenure so uncertainly found shall not be taken for any immediate tenure of the king. Lord Coke, Co. Litt. 77, b. says, that this was but a declaration of the common law, and calls it a right profitable statute, and beneficial for the subject. And no limitation has been put on these words in any case, which would probably have occurred if they had not been always considered to be general. Then nothing having been found in this inquisition, of whom and by what services the lands were holden, it is the same as if the jury had found *ignoramus*, *House's case*, Cro. Jac. 41.

Then as to the demise from the crown; it has been doubted whether the king can maintain an ejectment; but at any rate the stats. of H. 6, preclude the king from letting or granting to farm, until, &c. The action of ejectment by the king supposes him to have been turned out of possession, which cannot be; for if he be entitled at all, he is presumed to be in possession: and though ejectment be a fictitious proceeding, yet it must be consistent throughout, and the lessor must not only have in himself, but be capable of conveying to the plaintiff, a legal interest. So an intruder is not supposed to put the king out of possession; and therefore if the king have judgment on an information of intrusion, no *habere facias seisinam* issues. Again, the judgment in ejectment is, that the tenant recover his term: but the king had no power to grant the term; and the writ of possession would operate to make the tenant an intruder upon the king's possession. Besides, the policy of the acts would be evaded, if *Hayne*, though the grant to him were void, could make use of the king's name to recover the possession in ejectment. And, lastly, it is not found that the person last seised was the tenant of the king.

Balguy, jun. in reply. The acts of Hen. 6, speak throughout of lands seised into the king's hands by *inquest* before escheators; and therefore cannot apply to a case where the king is not in by inquest. The case in *Saville* 70, was one of a condition broken and forfeiture; and as entry would have been necessary to have entitled a subject, so office was necessary to entitle the crown. The case of the king's ward was where the ward having lawful possession, office was necessary to give title to the king till the ward came of age. But the case of an escheat is very different from that of forfeiture: an escheat according to Mr. Justice Wright, Law of Tenures, 117, imports in its legal sense something happening or returning to the lord upon a determination of tenure only," and is properly feudal; and it is distinguished by him from forfeitures, which accrued to the king at common law upon the commission of treason, before the introduction of tenures. 2 Inst. 164, is to the same effect. And in this case of escheat, the king is in possession immediately on the death of his tenant without heirs, before office found. The acts of Hen. 6, apply only to cases of expulsion; and that of Ed. 6, is confined to the particular inquisitions there mentioned, of which this is not one. Then as to the plaintiff not being able to maintain ejectment upon the demise of the king, by reason of the statutes of Hen. 6, those statutes only extend to avoid the king's grant by letters patent in the cases to which they apply; but the Court will take notice, that the lease to *John Doe* is merely fictitious, for the

purpose of trying the title, and could not have been in the contemplation of the legislature. [*Bayley, J.* Can the king convey any interest in the land except by matter of record? and must we not presume upon this record that *John Doe* had a term granted to him?] The defendant, by entering into the rule to confess lease entry and ouster, admits that the king has demised. [*Le Blanc, J.* The defendant admits a demise in fact from the king, but he does not admit that the demise is good in law.]

LORD ELLENBOROUGH, C. J. The court will look into the acts which have been referred to before they deliver their final opinion upon a matter so seldom brought into judicial consideration. If the provision in the 8th section of the stat. of Ed. 6, be general, it decides the question, and there must be a writ of melius inquirendum awarded: and at present it does not appear to me that the words are susceptible of the restriction which has been argued for. But perhaps the admission which has been made by the defendant's counsel, that the right of possession must be presumed to have been in the crown immediately upon the death of the tenant last seised, without heir, without office found, nothing appearing to the contrary, may be found to have been rather too largely.

The case stood over for consideration till this term, when his Lordship now delivered the opinion of the Court. This was an ejectment on three demises, first, of *John Hayne*, deceased: secondly, of the king; and thirdly, of *Hayne's* executors: and the claim of the lessors of the plaintiff was under an escheat. [Then, after stating the facts of the case.] Upon these facts it was admitted, that the right and possession were in the king immediately upon *Eliz. Bradbury's* death. But it was contended, 1st, That under the stats. of 8 H. 6. c. 16, and 18 H. 6. c. 6, the king was restrained from granting *until after office found*. 2dly, That as the inquisition in this case did not state of *whom* the lands in question were holden, it was a bad inquisition, and could not support the grant to *Hayne*. And 3dly, that if that grant be bad, the count upon the king's demise cannot be supported; because the demise is to be considered as a grant. The position, that the right and possession were in the king immediately upon *Eliz. Bradbury's* death, is not perhaps quite so clear as has been supposed; and the admission to that effect would probably not have been made, had not the defendant's counsel felt confident upon the other points. There is nothing upon any record to shew any title in the crown: nor has the possession been vacant from the moment of *Eliz. Bradbury's* death: and whenever the king's right, without office, comes under discussion, those may be found important considerations. The cases of the king's tenants in *capite*, and his other known tenants, bear no analogy to this case; because there the tenure was of record, and upon the tenant's death, the king was entitled to take seisin of the land, and to receive the profits to his own use, till the heir appeared to claim the land and receive investiture: and if the heir were under age, the king was entitled to wardship: if of full age, to primer seisin or relief: and if there were no heir, the king's seisin was of course indefeasible. These cases, therefore, in which the tenure under the king was recorded, and in which the seisin devolved upon him on his tenant's death, conclude nothing in a case in which no tenure is recorded, and in which it is wholly uncertain under whom the tenure is. [His Lordship mentioned the *Sadler's Company's* case, 4 Rep. 58, a. *Willion v. Berkley*, Plowd. 229. *Nichols v. Nichols*, Plowd. 481. *Gilb. Exch.* 110. (133), and *Staunf. Prerog.* 53, b. 54, a. as authorities which might be referred to upon this point. Without proceeding further, however, upon this point, or intimating any thing like a decided opinion upon it, but merely protesting against giving an unqualified assent to the admission by the defendant's counsel, we will proceed to the other points. The first, that the king cannot grant before office, depends on the two statutes of Hen. 6. The stat. 8 Hen. 6. c. 16, states as a grievance (among others) that the lands and tenements of many of the king's liege people are seised into the

king's hands upon the inquests of escheators, or let to farm by the treasurer or chancellor, before such inquests are returned; and to remedy that grievance, it provides that no lauds nor tenements, seised into the king's hands upon inquest before escheators or commissioners, be in anywise let or granted to farm by the chancellor or treasurer of *England*, or any of the king's officers, until the same inquests and verdicts be fully returned into the Chancery or Exchequer; but all such lauds and tenements shall entirely and continually remain in the king's hands, until the said inquests and verdicts be returned, and by a month after the same return; unless the party grieved come into Chancery, [This was because, where an office was necessary to entitle the king, the commission must issue out of Chancery. 5 Rep. 52, a.] and proffer to traverse the inquest, and offer to take the same lands and tenements to farm; and if he do, then the lands shall be committed to him upon certain terms, till the traverse is decided: and if any letters patent of any lands and tenements be made to the contrary; or if they be let to farm within the said month; they shall be holden for none. The stat. 18 H. 6. c. 6, recites the above provisions, and states, that, to evade it, divers persons had sued to obtain gifts, grants, and farms by patent, before any inquisition or title found for the king; pretending such gifts or grants were not comprised or remedied by the former act, though they are within the same mischief; and therefore provides, that no letters patent shall be made to any person of any lands or tenements before inquisition of the king's title in the same be found in the Chancery, or in his Exchequer returned, if the king's title in the same be not found of record, nor within the month after the same return; if it be not to him or them which tender their traverses as before mentioned: and if any letters patent be made to the contrary, they shall be void and holden for none. The object of the legislature, therefore, plainly was, *according to the words of the act*, that in all cases in which the king's title did not appear upon record, ("if the king's title in the same be not found of record") the possession should be open to whoever could claim against the king till the final decision of the right; and that any grant to obstruct him should be void: and the authorities correspond with this object. *Staundford* in his *Prerogativa Regis* 54, a., though he states that the king has a possession in law upon a descent, reverter, remainder, or escheat; yet adds, that he cannot make it a possession in deed by his grant; because there is a statute 18 H. 6, to the let thereof. *Brooke*, Office de Escheator, pl. 56, says, If the king grant land to A. for life, and A. die, he cannot grant the land again till A.'s death be found by office: and that by 18 H. 6. In Sav. 70, it is said to have been granted by the whole Court, that under a lease for 20 years from the crown, with proviso, that if the rent should be in arrear 10 days, the lease should be void; if the rent were in arrear, though the freehold were in the crown before office, yet that the crown could make a lease or grant thereof, without an office thereof found and returned; and that by 18 H. 6. c. 6. But the Court cannot lay much on this authority: for it also describes *Shute*, second Baron, as having been of opinion that the freehold was in the queen, and therefore in her to demise without office found: and, there are other parts of the report which shew it is not deserving of attention. It states as the question, whether the freehold were in the queen before office found: it describes *Shute*, second Baron, as being of a clear opinion, that the freehold was in the queen; and *Manwood*, as agreeing that the freehold was in the queen, but not to grant without office found: and that if the lease had been, that upon non-payment we should re-enter, there must have been an office before she could have been entitled to the freehold; and yet, as the queen had only granted a lease for 20 years, how could there, in the correct sense of the word, be any question as to the freehold? Besides, if the rent in that case were made payable at the Exchequer, then, according to *Finch v. Throgmorton*, 2 Leon. 134, 139, Poph. 25, 53, the queen might have granted without office; because, as said by Popham (p. 28,) "If it had been paid, the payment would have been

"entered of record; and not being so, the default appeareth of record." And if the rent were not made payable at the exchequer, then, according to *Stephens v. Potter*, Cro. Car. 100, the queen not only could not grant without office, but an office would have been necessary to terminate the lease. The Court, therefore, does not rely upon the case in Sav. 70. The cases, however, which seem to sanction grants from the crown, where there has been no office, are at least consistent with the notion, that an office was essential to make the grant valid in this case, which is that of an escheat where no tenure of the crown is found, if they do not furnish ground for it. In *Finch v. Risely*, or *Finch v. Throgmorton*, Poph. 25. 53, 2 Leon. 134, Cro. Eliz. 221, and 1 Anderson, 303, where a lease was granted by the crown for 70 years, with a proviso that it should be void if the rent should be in arrear; and a grant in fee, without office, after the rent was in arrear, was held good; the rent was made payable at the exchequer; (as appears from Poph. and 2 Leon. 139, and from the pleadings in Co. Ent. 191; though that fact is not noticed in Cro. Eliz. or Anderson: so that the non-payment within the time appeared of record, by reference to the records of the exchequer; and that, therefore, was a case in which the king's title was found of record. In *Dyer*, 145, 6, where a grant of the lands of a person attainted of high treason was thought by some of the judges to be good, without an office; the ground was, that as the stat. 33 H. 8. c. 20, had in such cases vested the actual possession and seisin in the king, without office, it had taken them out of the operation of the stat. 18 H. 6. In *Knight's case*, Moor 199, where three judges against one were of opinion, that the stat. 18 H. 6, applied to those cases only where the land came to the king by new title, not to those where his title in fee already appeared of record; though there was no decision upon the point, the opinion of the three evidently was, that in such case as this the land would be considered as coming to the king by new title; and that a previous office would consequently be necessary to make a grant valid; for they put, as instances of new title, "wardship, attainder, mortmain, or the like:" and title by escheat is as much a new title, or title arising from circumstances not already appearing of record, as title by wardship or attainder. And they state this, as the mischief at common law, that they who had rights could not traverse the office, and have the lands to farm, but were prevented by grants before office returned: whereby the king had disabled himself from granting the land to farm to him who tendered the traverse: and the present cause is certainly within this mischief. Upon these grounds, therefore, that this case is within the words and spirit of the statutes of Hen. 6, and within the mischief intended to be redressed; and that the cases in which grants, without office, have been thought maintainable, are plainly distinguishable from this; we are of opinion that the grant to *Hayne* in this case is bad, unless the inquisition shall be deemed sufficient to support it. The objection to the inquisition is, that it does not state of whom the lands were holden; and by stat. 2 and 3 Edw. 6. c. 8. s. 8, it is expressly provided, that where any inquisition or office shall be found by these words or the like, "*quod de quo vel de quibus tenementa tenentur ignorant*," such tenure so uncertainly found shall not be taken for any immediate tenure of the king; but a melius inquirendum shall be awarded, as has been accustomed in old time. An inquisition not finding of whom the lands are holden is in substance the same as one finding the ignorance expressly: (See *House's case*, Cro. Jac. 40,) for in favour of the omission to find as directed, it must be presumed that the jurors did not know, rather than that they knew and would not return the fact: but in either case, the award of a melius inquirendum would be necessary. There is no ground for confining the statute to particular inquisitions only: Co. Litt. 77, b. considers it as applying generally to all inquisitions. The statute, therefore, is decisive upon this point. The case, then, is reduced to the demise by the king: and if the king could not grant or let to farm, without office, we do not see how

the count upon his demise can be supported. The Court cannot treat the demise as *nominal* only, to bring the king's title into discussion; but must consider it as an actual demise; and an actual demise is in the teeth of the stat. 18 H. 6. We are, therefore, of opinion, that the plaintiff is not entitled to recover, and that the *postea* must be delivered to the defendant.

Steward v. Lund.

12 East, 116. Feb. 5, 1810.

Serving notice of declaration filed, together with the writ, at the same time, is irregular.

THE writ was sued out (a) on the 22d, returnable on the 23d of *January*, and was served, together with notice of the declaration filed, on the return day. Whereupon *Gaselee* obtained a rule *nisi*, on a former day, for setting aside the declaration, with all subsequent proceedings, for irregularity; as having been filed before the service of the writ, which was a manifest inconsistency: and cited *Brook v. Bennet*, Tidd's Pract. 397, 4th edit. which cites 3 Smith 531, where it was held that the writ could not be served and notice of declaration given at the same time; as such notice presupposed the declaration to have been filed before, and it could not regularly be filed till after the writ was served. *Laves* opposed the rule, on the ground that the practice was calculated to save trouble and expence, and was no prejudice to the defendant. But *The Court*, after consulting the Master, said that the practice, having been once settled, they would not alter it: and made the rule absolute.

The King v. The Justices of the West Riding of Yorkshire.

12 East, 117. Feb. 5, 1810.

Where before the stat. 12 G. 2. c. 29, the county rates had been assessed upon the entire district or place of *Hartishead with Clifton*; but the two townships of *H.* and *C.* separately maintained their own poor, and were used to contribute towards the county rates in certain fixed proportions between themselves; yet as that statute only establishes the accustomed proportions of contribution to the county rates as between the entire districts which were before assessed to such rates within the limits of respective counties, &c. and does not meddle with the proportions which had been used to be observed as between the subdivisions of those districts; this case was held to fall within the 3d section, which provides that where there is no poor's rate in the *parish, township, or place* assessed to the county rates (by which must be understood no entire poor's rate co-extensive with the place or district assessed to the county rates) the county rates shall be raised by the petty constables in such manner as by law the poor's rate is to be assessed and levied; that is, by an *equal* rate on all the inhabitants, &c.

AN application was made in the last term to this Court for a *mandamus* to the defendants, directing them at the then next Quarter Sessions to make an order for *A. Horsfall*, one of the petty constables of the constabulary of *Hartishead with Clifton* in the W. R., to raise and levy 52*l.* 5*s.* 11*d.* by an *equal* rate upon the owners and occupiers of messuages, lands, &c. within the said constabulary liable to be rated to the relief of the poor, for the purpose of reimbursing him the money which he had paid for the proportion of the said constabulary towards the country rate. Upon shewing cause against the rule, it was agreed that the matters in dispute should be tried in feigned issues at the then next Summer assizes at *York*, wherein *A. Horsfall* should be plaintiff, and *J. Goldthorp*, defendant: and that the questions tried in those issues should be, 1st, Whether the two townships, vills, or places of *Hartishead* and

Clifton in the W. R. did or did not, before and since the stat. 12 Geo. 2. c. 29, for the more easy assessing, collecting, and levying of county rates, form *one* constabulary or place known by the name of *Hartishead with Clifton*, for the purpose of raising such rates. 2d, Whether *Hartishead* and *Clifton* were, or were not, before and since that statute, two separate townships, vills or places, for the purpose of raising such rates. And by the rule of Court it was agreed to be admitted, that the townships of *Hartishead* and *Clifton*, before the statute usually contributed between themselves to the county rates, or some of them, in the proportion of 1-3d by *Hartishead* and 2-3ds by *Clifton* of the whole sum paid by the two townships of *Hartishead*, and *Clifton*: and by the rule of Court it was left to the Judge, before whom the issues should be tried, to cause any special matter to be indorsed on the postea which he thought fit. The jury found for the plaintiff on both the issues; thereby establishing the unity of the two townships in one joint constabulary, which had been always assessed together for the county rates as one entire district. Upon this finding the application for the *mandamus* was renewed; which

Topping Ainslie, and *Littleddale*, now opposed, and observed that the ground of the application was not that the justices in Sessions had refused to make any rate for the reimbursement of the constable, but that they had refused to make an *equal* rate upon the owners and occupiers of lands within the two townships, now found indeed to constitute one constabulary for the purpose of raising county rates, but so found, upon evidence, all of which went to establish that such joint rate, with respect to the Riding at large, had always been raised as between the two townships in certain proportions: namely, 1-3d by *Hartishead*, and 2-3ds by *Clifton*. And it appears that there is no joint poor rate out of which the county rate can be paid: for each township has always had separate overseers; and the poor's rate has always been raised in the proportions before mentioned, at least from 1739 to 1810, as appeared in evidence. The question then is, whether there be any thing imperative in the stat. 12 G. 2. c. 29, to compel the Court to direct a deviation from the accustomed mode of raising the rate as between these townships. That statute, which was made for the better collecting of county rates than was before done under several antecedent acts, directs the justices in Sessions to make one general rate for all the purposes of the recited acts, instead of the separate rates before made for each distinct purpose; which general rate however is directed to be assessed "upon every town, parish, or place, &c. in such proportions as any of the rates heretofore made in pursuance of the said several acts have been usually assessed." And then it enacts "that the several sums so assessed upon each and every town, parish, or place, &c. shall be collected by the high constables of the respective hundreds and divisions in which any town, &c. doth lie, in such manner, and at such times as is hereinafter directed." By s. 2, the churchwardens and overseers of the poor of each parish and place are required out of the money collected for the poor's rate to pay to the high constable of the hundred or division in which it lies the sum assessed upon such parish or place within 30 days, after the demand in writing; and the receipt of the high constable shall be a discharge to the parish officers for so much in their accounts. And then sect. 3, provides (which seems to include the case in question,) "that in case *no rate*" (by which must be understood no poor's rate co-extensive with the district charged) "shall be made for the relief of the poor in any parish, township, or place, the justices in Sessions shall by their order direct the sum assessed on such parish, township or place, for the purpose of this act, to be rated and levied on any such parish, &c. by any petty constable, &c. in such manner as money for the relief of the poor is by law to be rated or levied:" and the sum so assessed is to be paid over to the high constable, and is leviable on the petty constable in the same manner as the rates under the 2d clause are leviable upon the parish officers. Now here it appears, that there is no equal joint poor's rate for *Hartishead*

and *Clifton*; but that the rate has always been raised in certain distinct proportions. [*Le Blanc, J.* It comes to this question, whether this division of the county rate between *Hartishead* and *Clifton* was a proportion agreed to be observed between themselves; or whether the rate were by law necessarily to be raised in those distinct proportions. I rather consider that the proportions spoken of by the act meant the proportion which one entire district bears to other entire districts within the jurisdiction of the justices, and do not relate to the subdivisions of each particular district.] In *The King v. The Inhabitants of St. Paul, Covent Garden*, Cald. 158, this Court held, that the Sessions had no power to vary the proportions in which the county rate had usually been assessed on the several *parishes*; and by a parity of reason, the same construction ought to apply to such subdivisions as have been accustomed to raise their poor rates in certain distinct proportions. The legislature never meant to meddle with the proportions in which the poor rates were accustomed to be raised in any "parish, township, or place," but to adopt those proportions in raising the general county rates; and the word *place* seems to have been used in order to meet such a case as this. The county rate, then, having as far back as can be traced been paid out of the poor rates in the proportions stated to exist as between the two townships, should so continue to be raised, as the act directs the rate to be assessed in the several places in such proportions as had been usually assessed. [*Le Blanc, J.* noticed the 4th clause of the act enabling the justices in certain counties, including the county of *York*, to order, if they think fit, the money assessed on every such town, parish, or place, for all or any of the purposes of the act, to be paid by and levied on the petty constable of the town, parish, or place, in the manner directed to be pursued where there is no poor's rate: probably contemplating, that in those counties the poor's rate was principally collected separately by different townships in the same parish, when the county rates were assessed and raised on the parishes at large.]

Park, contra, was stopped by the Court.

Lord ELLENBOROUGH, C. J. The act of the 12 Geo. 2, provides in the first section, that one general rate shall be levied upon the towns, parishes, and places in the aggregate, within the limits of the different commissions of the peace, instead of so many separate rates as were before leviable on each under different acts of parliament for the like purposes; which general rate, however, is to be assessed upon every town, parish, or place in such proportions as had been usually assessed: that is, the proportions of the general rate, as between the several towns, parishes, and places which had before been separately assessed, were to be preserved, but the money was to be raised upon each by one aggregate rate, instead of by the several distinct rates before leviable under different acts of parliament for distinct purposes. Then were these townships of *Hartishead* and *Clifton* rated, and did they pay before the act of Geo. 2, as one town, parish, or place, or as separate townships, &c.? The fact appears to be, that though acting as two townships for some purposes, yet for the purpose of county rates, and *quoad* the act of the 12 Geo. 2, they constituted but one place. The second section provides, that the payment of the county rate shall be made out of the money collected for the poor's rate in each parish and place: but that must be understood of parishes and places in which one general poor's rate is collected, and cannot therefore apply to a case like the present, where there is no such general fund raised upon the entire district which is assessed to the county rate. The case, therefore, must come within the provision of the 3d section, that where there is no poor's rate, that is, no poor's rate co-extensive with the district assessed, the county rate shall be levied by the petty constable "in such manner as the money for the relief of the poor is by law to be rated or levied:" that is, by *equal* taxation of the inhabitants, &c. of the place rated. The rate therefore must be levied equally on the whole of this artificial place or district, being that on which the county

rates had before the act been usually assessed, as if it had been one parish ; such being, as it appears to me, the true meaning of the act.

GROSE, J. declared himself of the same opinion.

LE BLANC, J. The several rates which now compose the aggregate county rates were not used to be collected in the same subdivisions as the poor's rate ; and the object of the legislature in the act of the 12 Geo. 2, for facilitating the collection of the county rates, was to provide that in all those cases where the county rates had been collected in the same district for which a poor's rate was collected, the county rate should be paid out of the poor's rate : but if there were no poor's rate collected in the entire district co-extensive with the assessment for the county rate, then the latter was directed to be raised by the petty constable in the same manner as the poor's rate is by law to be levied ; which must be by an equal rate. The proportions to be preserved, spoken of in the first clause of the act, are the proportions between the several entire districts on which the county rates were assessed before the act, and not the several subdivisions of those districts, which were made for other purposes.

BAYLEY, J. Before the act of the 12 Geo. 2, several distinct sums were directed to be raised by county rates under different acts of parliament from the time of Hen. 8th to that of Queen Anne ; and these were raised by so many distinct assessments, which were difficult to be collected from the smallness of the fractions into which the sums to be paid by the individuals of the different districts were to be divided : the act of the 12 Geo. 2, was passed to remedy that inconvenience by directing all these several sums, leviable under the different statutes, to be collected in one general rate, but preserving the same proportions of the integral rate to be paid as between the several districts on which the separate rates had before been assessed. The fallacy of the argument consists in applying the word *proportions* used in the act to the subdivisions of those districts on which the county rates had been used to be assessed, and which were not in the contemplation of the legislature, who only meant to preserve the same proportions as between the several districts before assessed to the county rates with reference to the counties at large ; but did not mean to split the collection into shares of the subdivisions of those districts between themselves. Now for the purpose of this act there is no poor's rate in the district of *Hartishead* with *Clifton*, because there is no entire poor's rate collected throughout that district ; and, therefore, the county rate must by the 3d section be raised as the poor's rate is by law liable to be raised, that is, by an equal rate.

Rule absolute for the *mandamus*.

Puller and Another v. Glover.

12 East, 124. Feb. 6, 1810.

The plaintiff having shipped goods on an adventure to *St. Petersburg*, on board a vessel chartered for the purpose, made insurance on ship and goods in the common printed form, in blank ; and by a written memorandum in the policy " the underwriters agreed to pay a total loss in case the ship *Ann* should not be allowed by the *Russian* government to discharge her cargo at *St. P.*, on which voyage the vessel had then sailed chartered by the plaintiffs." Held, that the insured were entitled to recover upon this policy on an allegation that the vessel on her arrival at *St. P.* was not allowed by the *Russian* government to discharge her cargo, but was obliged to return back with it, by which the value of the cargo was reduced below the amount of the invoice price, together with the charges paid thereon, and the premiums of insurance, &c.

THIS was an action on a policy of insurance, made at *London*, and dated the 25th of *May* 1808, on ship and goods, in the common printed form ; leaving blanks for the name of the ship and the description of the voyage ; the ship and goods being valued at 2500*l.* ; and a policy containing a memorandum,

that, in consideration of 10 guineas *per cent.* thereby received, the underwriters agreed to pay a total loss in case the ship *Ann*, Captain S. Flower, should not be allowed by the Russian government to discharge the cargo then on board at St. Petersburg, on which voyage the vessel had then sailed chartered by Messrs. C. and N. Puller (the plaintiffs). The declaration then alleged, that the plaintiffs had a licence from the British government for the voyage mentioned in the memorandum; and that at the time of effecting the policy, and from thence, until, and at the time of the loss after mentioned, the plaintiffs were interested in a large cargo of goods on board the said ship on their own account, and which cargo was to be carried in the ship upon the said voyage, and to be unloaded and sold on their account at St. Petersburg, and in certain premiums of insurance necessarily expended by them upon the said cargo to insure the same upon the said voyage, and which premiums amounted to all the money by the said policy expressed and therein valued thereon: and that the said insurance was made for their own use and benefit. That the said ship, with the said cargo on board, sailed from London upon the said voyage, and arrived at St. Petersburg, but was not allowed by the Russian government to discharge the cargo then on board at St. Petersburg, on the said voyage on which she was then chartered by the plaintiffs, but was wholly prevented by the Russian government from discharging her said cargo, and was obliged to leave St. Petersburg, without discharging the same, and to return back with the said cargo from St. Petersburg: by means of which premises the value of the said cargo has been greatly diminished to the plaintiffs, and has been reduced below the amount of the invoice price of the said cargo, together with the charges paid thereon, and the said premiums of insurance so expended by them upon the insurance of the said cargo as aforesaid; and the plaintiffs have been damaged in consequence of not being allowed by the Russian government to discharge the said cargo at St. Petersburg, and have lost the premiums of insurance as aforesaid so insured by them; by means of which, and of the promise of the defendant, he became liable to pay to the plaintiffs 200*l.* the amount of his insurance, &c. To this the defendant demurred specially; because it did not appear with sufficient certainty what loss the plaintiffs had sustained, nor how or in what respect they had been damaged: and because it was not averred with sufficient certainty, that the ship had a licence from the king in council, or otherwise, &c.

Taddy, in support of the demurrer, contended, first, that this policy was void as a gaming or wagering policy within the stat. 19 Geo. 2. c. 37; 2dly, that it was void at common law, as being made upon the voyage only, and not upon the ship or goods; 3dly, that at any rate the declaration contained no sufficient statement of loss. 1st, A gaming policy is not only where the assured had no interest in the subject matter, but where the event insured does not affect the safety of the thing insured: as here, the fact insured against, of the ship's not being permitted to load at St. Petersburg, is not connected with the safety of the ship or cargo; whereas a policy of insurance is a mere contract of indemnity against the loss or deterioration of the property insured. On that principle the Court in *Kent v. Bird*, Cowp 533, held, that an agreement by the plaintiff to pay a premium to the defendant of 20*l.* at the next port an *East Indiaman* should reach; provided that if she did not save her passage to China the defendant would pay the plaintiff 1000*l.* in a month after she arrived in the *Thames*, without reference to any property, was void by the statute: although the plaintiff had goods on board liable to suffer by the loss of the season. [*Bayley, J.* The plaintiff there did not shew any damage suffered in consequence of the non-arrival at China in time.] In *Kulen Kemp v. Vigne*, 1 Term Rep. 304, a Danish ship and cargo, bound from Riga to *Marseilles*, was captured by an English privateer and brought into *Falmouth*, where ship and cargo were condemned, but afterwards the sentence was reversed, and the expences of the reversal were ordered by the Court of Admiralty

to be a charge upon the cargo. The plaintiffs, who were only interested in the cargo, having paid the expences of reclaiming ship and cargo, insured the amount by a policy on the goods at and from *Falmouth to Marseilles*; with a memorandum, that the loss was to be paid *in case the ship did not arrive at Marseilles*. The ship was again captured by a *Spaniard*, and never in fact arrived at *Marseilles*, and the cargo was lost to the plaintiffs by the expences attending the second capture and reclamation: yet as the goods were preserved in specie and sold for the benefit of the owners, it was held that they could not recover the sum expended in reclaiming those very goods, upon an allegation of a loss *by capture*; because the event insured, being the arrival of the ship at *Marseilles*, that event might still have happened notwithstanding the capture, inasmuch as the ship was restored; and therefore the event insured did not affect the safety of the thing insured. [Lord *Ellenborough*, C. J. The events in those cases were not connected with the subject matter of the losses: but how do they apply to this case where loss has in fact happened from the very event insured against, the non-allowance by the *Russian* government of permission to discharge the outward cargo at *St. Petersburg*? It is the *causa causans*. It cannot be stated, that if a man be at the expence of shipping goods to a foreign port, and when the ship arrives there, he is not permitted to land them, but is obliged to bring them back, he does not sustain a loss. He certainly loses the expences of carrying them there, including the premiums of insurance.] 2dly, The insurance is on the mere *voyage*, and not on the ship or goods. [Lord *Ellenborough*, C. J. The insurance was on the adventure of the goods shipped on the voyage described in the charter party to which reference is made.] Then, 3dly, there is no averment that the goods were lost, but only that they were reduced in value below the invoice price, with the charges paid thereon and the premiums of insurance. This is an attempt to involve the underwriter in the risk of the market, which he does not insure: the goods have not been deteriorated by any of the marine perils insured against. [Bayley, J. Have not the premiums of insurance been thrown away upon an adventure which has become useless by means of the event insured against?] The premiums of insurance have not been lost, for the policy took effect so as to cover the safety of the goods against all marine perils during the voyage, and the assured had the benefit of it: but *the voyage*, so far from being lost, has been performed in safety. [Bayley, J. The voyage has become inoperative by the event insured against. *Grose*, J. The premiums of insurance may be added to the invoice price of the goods. *Le Blanc*, J. If the invoice price of the goods were 100*l.* and the premiums of insurance 20*l.*, and the goods be returned again on the hands of the assured after the voyage out and home, it is clear that he must sustain a loss of 20*l.* on them at all events.] The premiums cannot be taken to be insured as part of the price of the goods, unless specifically stated as an object of insurance in the policy. The insurance is not to give the party a benefit in case of loss, but strictly to indemnify him against a loss of the identical subject matter of the insurance. [Lord *Ellenborough*, C. J. Nothing is more common than to add the cost of the insurance to the value of the goods: and therefore any thing which causes a loss upon that value by any peril insured against is a loss within the policy.]

Puller, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. It is first objected, that this is a wagering policy within the statute: but it is any thing else than a wagering policy. The plaintiff sends out goods upon an adventure to *St. Petersburg*, and he insures against the event of their not being suffered to be landed on their arrival by the *Russian* government. When the ship arrives there, the goods are prohibited to be landed, and the plaintiff loses the benefit of his adventure, and is obliged to bring back his goods charged with all the expences of the voyage. Can we say then, that this is a wagering policy, and that he had no

interest in the subject of the insurance? The goods are his; the adventure is legal; and he meant by this policy to guard against the event from which the loss has in fact happened. There is, therefore, no pretence to say that it is a wagering policy within the statute.(1) It is next objected, that it is an insurance upon the mere *voyage*, and not upon the property embarked on it: but the *voyage* mentioned evidently refers to the adventure stated. It is an insurance on the goods for the voyage on which the ship was chartered, and with reference to the event described in the memorandum. Then, 3dly, it is objected, that there is no averment that the goods, as the subject matter of the insurance, were lost. But the loss is averred from the ship not having been allowed to discharge the goods at *St. P.* Some loss must have been incurred by that: the parties, indeed, agree by the memorandum to consider that event as a total loss: and though that would not make it a total loss, if it were in its nature less than total; yet it would be open to the party at the trial before a jury to shew how much loss, if any, had been incurred by the event. There is no ground, therefore, for the demurrer, upon any of the objections stated.

GROSE, J. concurred.

LE BLANC, J. This was clearly an insurable risk, and within the policy: for it appears that the assured were interested in the goods, and that they chartered a vessel to carry them out to *St. Petersburg*; and they have clearly sustained a loss by the happening of the event insured against? for they have had the goods returned upon their hands with all the charges of the voyage out and home added to the original invoice price.

BAYLEY, J. This is no wagering policy, and the plaintiffs seek to recover nothing but an indemnity for the loss actually sustained by them upon the goods. They sent the goods out upon an adventure to *St. Petersburg*, and they insured against the event of their not being suffered to be landed by the *Russian* government; considering that in that event, though they got the goods back again, they should get them charged with all the expences out and home: and they might well say that, contemplating the probability of the event which happened, they would not engage in the adventure, unless the underwriters would indemnify them in case the goods were not suffered to be landed. The underwriters agreed to this, and the contract was legal; and as the goods were not suffered to be landed, and the plaintiffs have incurred the loss charged by them, they are entitled to recover the amount of it from the underwriters.(2)

Judgment for the plaintiffs.

(1) The cases most analogous to the present are—1. Of insurance upon profits expected. *Grant v. Parkinson*, Marsh. 97, 107. *Barclay v. Cousins*, 2 East, 544. *Henrickson v. Margetson*, 2 East, 540, n. *Tom v. Smith*, 245, 9. *Munford v. Hallett*, 1 Johns. 433. *Abbott v. Sebor*, cited 1 Johns. 435. *Fosdick v. The Norwich Marine Insurance Company*, 3 Day, 108. 2. Of insurance upon freight expected. Marsh. 92, 278, and cases cited in *notis* by Condry. 3. Of insurance upon commissions expected. *Plint v. Mesurier*, Park. 268. Marsh. 107, 138. 4. Of insurance upon the expected interest of a captor. *Le Gras v. Hughes*, Marsh. 108. 5. Of insurance upon the interest of trustees for the care and disposal of ships and goods under the direction of third persons. *Craufurd & al. v. Hunter*, 8 Term Rep. 13. *Lucena v. Craufurd & al.* in error, 3 Bos. & Pull. 75. S. C. in Dom. Proc. 2 New Rep. 268.

(2) Where goods shipped from this country were carried to the place of destination, and accepted by the consignee, but not being permitted to be landed, were brought back to the *United States*, it was held, that freight was earned for the outward voyage. *Morgan & al. v. The Insurance Company of North America*, 4 Dal. 455.

Laroche and Others v. Oswin.

12 East, 131. Feb. 6, 1810.

An insurance on goods shipped on a certain voyage is not avoided by the ship, while lying in a roadstead at anchor under orders of the convoy, and after a signal to prepare for sailing, and about the time when the signal for weighing was made, taking in other goods on board: by which it was found, that no delay was occasioned, and that the ship got under weigh as soon as she could otherwise have done.

THIS was an action upon a policy of insurance on goods on board the ship *Juno* from *Gottenburgh* to a port or ports in the *Baltic*, with liberty in case of non-admittance to unload at *Carleshaunn*, warranted free of capture in ports. The interest was averred to be in *James Ausset*; and the declaration alleged in one count a loss by capture, not in any port or ports; and, in another, a loss by barratry: and at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, a verdict was found for the plaintiffs for 200*l.* subject to the opinion of the Court on the following case.

The goods in question were shipped by Mr. *Ausset*, on whose account the insurance was made; and formed part of a large cargo shipped by various persons at *Gottenburgh*. The ship sailed from thence bound to *Memel* or *Lisbon* on the 22d *May* 1809, under convoy of the *Thunder* bomb vessel. On the 26th, the fleet anchored in *Malmoe* roads, and, on the 3d of *June* got under weigh again; but, in obedience to a signal from the commodore, returned to *Malmoe* roads and remained at anchor there until the 9th; on which day at about half past 12, the commodore made a signal to prepare for sailing, and about an hour afterwards the signal to weigh: but before the signal for weighing was made, a boat came along-side the *Juno* with eleven small boxes and two parcels of indigo, which were taken on board about the time when the last mentioned signal was made: about three o'clock she got under weigh with, and was amongst the foremost of, the fleet, which consisted of seventy-six vessels, when she unfortunately ran aground, and was, with some other vessels of the fleet, captured and burnt by *Danish* gun-boats at some distance from the road, and not in any port. The indigo was not part of the original intended cargo, but had been ordered by some merchant on board the ship, with whom Mr. *Ausset* had no concern, after the arrival of the ship at *Malmoe*, and was brought off from the shore as soon as it arrived from up the country. Mr. *Ausset* was not interested in it. The time consumed in taking it in was not more than from ten to twenty minutes; and bulk was not broken for the purpose of stowing it away; but it was stowed on the cable stage. No delay was occasioned by the taking it in, and the ship got under weigh as soon as she could otherwise have done. If the Court were of opinion that the plaintiffs were entitled to recover, the verdict was to stand: if not, a nonsuit was to be entered.

This case was desired to be reserved for the purpose of taking the opinion of the Court again upon the point decided in *Raine v. Bell*, 9 East, 195, where it was held not to be an implied condition in a common marine policy on ship and freight, that the ship should not trade in the course of her voyage, if it might be done without deviation or delay, or otherwise increasing the risk of the insurers. In that case, the ship insured having put into *Gibraltar* in the course of her voyage from her loading port or ports in *Spain* to *London*, in order to get a supply of provisions; Lord *Ellenborough*, C. J. left it to the jury to say whether her going into *Gibraltar* were of necessity for the purpose stated; as if so, whether her stay there were longer than was necessary for that purpose: telling them, that if there were no necessity for going there, or for staying there so long for the purpose of being supplied with provisions, the policy would be avoided; but not otherwise. And this Court afterwards

confirmed the propriety of that direction. The only difference in fact now pointed out by *Scarlett* for the defendant, between that case and the present, was, that this was a policy on *goods*, and that on ship and freight: but it was not pretended that this made any difference in principle. And he also observed, that the judgment in that case might have been sustained by considering *Gibraltar* as a port in Spain. But *Bayley*, J. observed, that it was not a port on the coast of *Spain*, within the meaning of the contracting parties: and the Court did not decide that case upon that ground, but upon the general principle stated. And Lord *Ellenborough*, C. J. now asked, how the risk could be shewn to have been enhanced or varied in any manner by the circumstance of taking in the goods, when it is found as a fact that no delay was occasioned by it, and that the ship got under weigh as soon as she could otherwise have done. To this *Scarlett* answered, that though the risk were not enhanced, yet it was varied: for the voyage from *Gottenburgh*, the ship's loading port, had commenced: and afterwards while the ship was taking in other goods, it constituted a different adventure, and so made the risk different.

Lord *ELLENBOROUGH*, C. J. The risk insured was neither enhanced nor varied, but something was done in the course of the voyage which made no difference in either, and therefore was no discharge of the underwriters' liability. The cases of *Stitt v. Wardell*, 2 'Esp. 610, and *Sheriff v. Potts*, 5 'Esp. 96, in which a different opinion had prevailed, were duly considered and over-ruled by the Court in *Raine v. Bell*, which governs the present.

The other judges concurred, and *Le Blanc*, J. added, that the rule laid down in *Raine v. Bell* had been since acted upon in another case of *Cormack v. Gladstone*, 11 East, 347.

Postea to the plaintiffs.

Gaselee was to have argued for the plaintiffs.

Coupland and Another, Assignees of Leedham, a Bankrupt, v. Maynard and Another.

12 East, 134. Feb. 6, 1810.

One being in possession of premises as tenant from year to year under an agreement for a lease of 14 years, and the rent being in arrear, enters into an indenture with his landlords, whereby, reciting such tenancy and arrears of rent accrued, and that *he had agreed to quit and to deliver up the premises to them*, and that a valuation should be made of his effects on the premises by two different persons, to be chosen, &c. and that the same should in the mean time be assigned and delivered up to a trustee for the landlords: the deed assigned his effects on the premises to such trustee, on trust to have the valuation made, and out of the amount to retain the arrears of rent, and pay the residue to the tenant: held, that the tenant not having in fact quitted the possession, nor any valuation having been made of his effects; such agreement to quit, &c. being conditional, and the condition not performed, nor the agreement in any manner acted upon, did not operate as a surrender of the tenant's legal term from year to year, and, consequently, that the right of the landlords to distrain for the arrears of rent continued after six months from the making of the indenture.

THE plaintiffs declared in *assumpsit*, that on the 7th of August 1806, it was agreed between them, as assignees of *J. Leedham* a bankrupt, and the defendants, on behalf of themselves and other proprietors of certain inns at *Matlock* in *Derbyshire*, that the plaintiffs should deliver to the defendants and the said other proprietors the actual possession of the said premises, late in the occupation of the bankrupt, on the 1st of Nov. 1806, and should pay a half year's rent for the same, becoming due on the 10th of October 1806, and all taxes up to the 5th of April 1807; which possession and payment the defendants thereby agreed to accept in satisfaction for all rent due since the 5th of April 1806; and agreed that they would, without prejudice to the right,

if any, claimed by the proprietors of the said inns, of distraining upon the said premises for all arrears of rent due at *Lady-day* 1806 from the bankrupt, accept at a valuation all the household goods, &c. on the premises; and would, upon such valuation being made, and upon receiving the possession of the said goods and other property, give to the plaintiffs their promissory note for the amount of such valuation payable on the 1st of *May* 1807. The count then stated, that the valuation of the goods amounted to 2966*l.* 16*s.* 7*d.*; and that the defendants thereupon accepted the said goods and other property at that sum, and received the possession thereof from the plaintiffs, but had not given their promissory note according to their agreement. The declaration also contained the common counts for goods sold and delivered, money had and received, and upon an account stated: to which the general issue was pleaded; and at the trial before Lord *Ellenborough*, C. J. in *Middlesex*, a verdict was taken for the plaintiffs for 1874*l.* 16*s.* 11*d.*, subject to the opinion of the Court on this case.

On the 7th *Nov.* 1798, a written agreement was made between the defendants and others, as proprietors of the premises mentioned in the declaration, for a lease of those premises to *J. Leedham* for 14 years, at certain rents, and at a further rent of 7*l.* per cent. upon all money which the proprietors should expend in the improvement of the premises. *Leedham* held the premises under this agreement, but no lease was ever granted. In 1804, several sums having been expended by the proprietors in improvement of the premises, the rent was fixed at 500*l.* per annum for a certain part called the *Old Bath*, and 50*l.* per annum for the other part called the *Temple*. On the 12th of *Feb.* 1805, the rent being considerably in arrear, an indenture of this date was executed between *Leedham*, *Maynard* the defendant, and one *J. Wilkinson*, on behalf of *Maynard* and the other proprietors; whereby, after reciting the agreement of the 7th of *Nov.* 1798, and that certain arrears of rent were then due, and further rent would be due from *Leedham* on the 7th of *April* then next; and further reciting that *Leedham* had agreed to quit and deliver up the premises to *Wilkinson* in trust for the proprietors and for the defendant *Maynard*, on the 5th of *April* then next; and that it had been agreed that a valuation should be made of the household goods, furniture, stock and effects, by two indifferent persons to be chosen, &c., and that the same should in the mean time be assigned and delivered up to *Wilkinson* upon the trusts thereafter mentioned; it was witnessed, that for the considerations therein mentioned, *Leedham* did assign all his household goods, &c. personal estate and effects upon the premises, to *Wilkinson*, upon trust to have such valuation made as aforesaid; and out of the amount to retain the sums due for rent and arrears up to the 5th of *April* then next, and to pay the residue to *Leedham* on the said 5th of *April*. No possession was ever taken under this indenture by or on behalf of the proprietors; neither was there any valuation made of the furniture and effects; but *Leedham* continued to occupy as before as well the premises as the furniture and effects, until the 10th of *Feb.* 1806; when no payment having been made on account of the rent, and more rent having become due, a second indenture was made between the same parties as the first; whereby, after reciting in substance as before, and that *Leedham* had agreed to quit and deliver up possession of the premises to *Wilkinson* on the 5th of *April* 1806, *Leedham* assigned all his household goods, &c. personal estate and effects upon the premises, to *Wilkinson*, upon trust to have such valuation made as aforesaid, and out of the amount to retain what was due for rent and arrears, as mentioned in the second indenture, up to *April* 1806, and to pay the residue to *Leedham* on or before that day. Upon the execution of this last indenture, possession was taken by *Wilkinson* of the goods, furniture, and effects thereby assigned; but this possession was afterwards abandoned when it had continued a month, and *Leedham* was again left in full possession of the premises. No payment of the rent then in arrear was made by *Leedham*,

but every thing remained as before until the 1st of *March* 1806, when a third indenture was made between the same parties, similar in all respects, except that it recited an agreement on the part of *Leedham* to quit on the 5th of *April* 1807; by which last indenture *Leedham* assigned all his household goods, stock, &c. personal estate and effects upon the premises to *Wilkinson*, on trust to have such valuation made as aforesaid, and out of the amount to retain and pay the several sums in that indenture mentioned, and also the growing rents from *Leedham* during such his holding as aforesaid, and to pay the residue to *Leedham* on or before the 5th of *April* 1807. On the 3d of *June* 1806, a commission of bankrupt issued against *Leedham*, under which his effects were duly assigned to the plaintiffs; the act of bankruptcy on which he was declared bankrupt being the said deed of assignment of the 12th of *February* 1805. On the 7th of *August* 1806, the agreement stated in the first count of the declaration was entered into between the plaintiffs and defendants; and the goods and effects therein mentioned upon the premises were afterwards valued at 2966*l.* 16*s.* 7*d.* at which sum the defendants accepted the same. The defendants never gave their promissory note for such sum or any part thereof, but paid into court under the common rule 1194*l.* 11*s.* 4*d.*, which was the balance due from the defendants to the plaintiffs, after deducting all rent and arrears of rent for the premises up to the 10th of *Oct.* 1806, part of which rent accrued before the 5th of *April* 1805, and part afterwards. The plaintiffs took the money out of court. It was admitted on the part of the plaintiffs, that under the agreement of the 7th of *August* 1806, the defendants were to be in the same situation as if they had actually distrained upon the premises at the time of making the agreement, or at any time since; it being understood at the time, that it was for the interest of all the parties, both plaintiffs and defendants, that no actual distress should be made upon the premises. The question for the opinion of the Court was, whether at the time of making the agreement in the declaration mentioned the defendants and the other proprietors of the premises were entitled to distrain for the arrears of the rent due on the 5th of *April* 1805. If the Court were of opinion that they had such right of distress, a verdict was to be entered for the defendants: if not, the verdict entered for the plaintiffs was to stand for 1874*l.* 16*s.* 11*d.*

Fell, for the plaintiffs, denied the right of the owners of the premises to distrain for the arrears of rent: and contended that the effect of the indenture of the 12th of *Feb.* 1805 was to put an end to the former tenancy from year to year, under the agreement of *Nov.* 1798, for a lease of 14 years, which was never executed; and to make a new tenancy; and therefore, that the landlords lost their right to distrain for the arrears of rent due under the former tenancy, after the expiration of six months from its determination. The principal question is, whether the preceding tenancy were determined by that indenture; and this depends on others; 1st, Whether the recital in the indenture of the agreement by *Leedham*, to quit and deliver up the premises, operated as a surrender in law of the term; and if so, 2dly, Whether the subsequent circumstances amounted to a waiver of that surrender, so as to set up the former term: and also, 3dly, Whether, as that indenture assigned all *Leedham's* effects, and amounted to an act of bankruptcy, it were not void *in toto*, so as to do away the whole agreement. 1st, The indenture recites an express agreement by *Leedham* to quit and deliver up the premises to *Wilkinson* on the 5th of *April* 1805, which operates as a surrender in law of the term from year to year under which the tenant held. Lord C. B. *Gilbert*, 4 Bac. Abr. 209. Leases, S., says, "that any form of words whereby such an intent and agreement of the parties may appear (*i. e.* for the tenant to yield up the estate), will be sufficient to work a surrender; and the law will direct the operation and construction of the words accordingly, without the formal mention of the word surrender in the conveyance," "Therefore, (he adds) if lessee for years say to the lessor, that his will is, that the lessor shall enter into his lands

and shall have the same, or is content that the lessor shall have again the land, and by virtue thereof the lessor enters into the land; this is a sufficient surrender." And with this agree *Perk. s. 607, 608, E. 40 Ed. 3. 24, and Sleight v. Bateman, Cro. Eliz. 487.* He was proceeding to argue on the other points of the case; But the Court being against him upon this point, it became unnecessary.

Lord ELLENBOROUGH, C. J. Is there any case where the tenant having agreed to surrender his term for a particular purpose to be effected, and that purpose is not effected, such conditional agreement has been held to operate as an absolute surrender; though the tenant has never in fact quitted the possession? Here there were mutual acts to be done; the tenant's stock and effects upon the premises were to be valued, and he was to give up possession; but no such valuation was made; nor did the tenant relinquish the possession of the premises. How then can we take this to have been an actual-surrender of the term merely from the agreement to surrender, when it appears that neither of the parties acted upon that agreement? Though the word *condition* be not used in the indentures, it is in effect an agreement to surrender on condition, and that condition was not executed. The consequence is, that the tenancy continued to subsist, together with the right of the landlords to distrain for the arrears of rent.

The other judges concurred.

Postea to the defendants.

Balguy for the defendants.

William, Lessee of Hughes and Hesther his Wife, v. Thomas.

12 East, 141. Feb. 6, 1810.

Tenant for life having levied a fine, and afterwards devised the premises, and died seised: the entry and continuing possession of the devisee (the defendant in ejectment) is no disseisin of the reversioner; *disseisin* importing an ouster of the rightful tenant from the possession, and an usurpation of the freehold tenure. And, therefore, no question could arise whether, considering the devise of the reversion as a disseisee, a fine sur cognissance de droit come ceo, levied by her before entry as a stranger, without any declaration of uses, would bar her right of entry by estoppel, and fortify the estate of the disseisor; or whether it would simply enure to her own use, or be altogether inoperative.

After a devise to one and *her heirs* of certain lands in *A.*, and other devises to the same person and *her executors*, administrators and assigns of leasehold interests in *B.*, *C.*, and *D.*, a devise of all the residue of the testator's estate and effects, real and personal whatsoever, and wheresoever, not before disposed of, after payment of debts, legacies, and funeral expences to the same devisee, *her executors, administrators, and assigns*, for *her own use absolutely*, will carry a distant reversion in fee in the lands in *B.*; the words of the residuary clause being large enough to carry the fee, as comprehending all the residue of the devisor's *real estate*, and giving it to the devisee *absolutely*; and the intent to devise the whole interest in all his remaining property not being rebutted by limiting the estate to her and *her executors, &c.* omitting *heirs*; or by the limitation of other lands to her and *her heirs*; or by the prior devise of a leasehold interest to the same person in the same lands of which the devisor had such distant reversion.

THIS was an ejectment for certain lands called *Placey Parke, Crygistiller, Fynmbeder, Pantygwr, and Cwrndwrywyns*, in the parishes of *Treleack ar Bettws, Leanwinio, and Mydrim*, in the county of *Carmarthen*; and upon the trial before *Graham, B.*, at *Hereford*, a verdict was found for the plaintiff, subject to the opinion of this court on the following case.

Richard Davies, being seised in fee of the premises in question, by his will duly executed and attested, dated *Aug. 16th, 1783*, devised the same to certain trustees and their heirs, upon trust to the use of his wife *Grace Davies* for life: remainder to the use of his brother *Thomas Davies* for life; remainder to the trustees to preserve contingent uses, &c.; remainder to the first and

other sons of the body of *T. D.* successively in tail male, in strict settlement; with like remainders to his brother *William* for life, and to his first and other sons in tail male, in strict settlement; remainder to his sister *Ann* (then *Ann Evans*, widow) for life; remainder to the trustees to support the contingent uses, &c.; remainder to her first and other sons, in strict settlement, in like tail; with reversion to the testator's own right heirs for ever. By the same will he also devised other lands, &c. and also all other his real estates, not before devised, unto his said brother *Thomas Davies*, his heirs and assigns for ever. The testator died without issue in 1783, after making his will, leaving *Thomas Davies* him surviving, his brother and heir at law. On the death of the testator, his widow, *Grace*, entered upon and became seised of the premises in question, under the devise to her for life; and died seised on the 27th of *March*, 1788. *Thomas Davies*, the brother and heir of the testator, died *Oct. 9th*, 1787, without issue, having previously made his will on the 4th of *Sept.* 1787, duly executed and attested, whereby he devised as follows: "First, I give and devise unto my wife *Hester Davies* all that messuage and lands called *Lhoindiviis*, in the parish of *Egermont*, in the county of *Carmarthen*, and all that messuage and lands called *Blaenyrrnant* in the several parishes of *Mydrim* and *Llanvihangel Abercurn* in the said county, to have and to hold the same to her, her heirs and assigns for ever. Also, I give and devise unto my said wife all that messuage and lands called *Pantyrathro*, and all that messuage and lands called *Dyffryntravel*, in the parish of *Llanstephen*, in the county of *Carmarthen*, to have and to hold to my said wife, her heirs and assigns for ever." He then gives her in the same words his other tenements in the parish of *Langunaock*, which are particularly described in the will, and also the tenement of *Nantyreagle*, which is there particularly described. Then follows "Also, I give and devise unto my said wife all my leasehold estate, that is to say, the lease on the messuage and lands called *Plasyparke*, including *Prigystydir*, and *Parkmaur*, in the said parish of *Treleach ar Bettws*, the lease on the messuage and lands called *Llancarthgimir*, in the said parish of *Mydrim*, and also the lease in the messuage and lands called *Weynreed* and *Llainmarget*, in the parish of *Llanwinio*; to have and to hold to her my said wife, her executors, administrators, and assigns, to and for her and their use and benefit. Also, I give, devise and bequeath 400*l.* together with all the interest thereon due to me by mortgage on the messuage and lands called *Aberarthur*, in the parish of *Pembryn* in the county of *Cardigan*, unto my said wife, her executors, administrators and assigns for ever." And after thereby giving two legacies of 30*l.* and 20*l.*, also a legacy of 20*l.* to his brother *William*, and another of 20*l.* to his sister *Anne*, is the following clause. "And finally, all the rest, residue and remainder of all my estate and effects, real and personal, whatsoever and wheresoever, not hereinbefore given and disposed of, after payment of my debts, legacies and funeral expences, I do give, devise and bequeath unto my wife *Hester Davies* (one of the lessors of the plaintiff,) her executors, administrators and assigns, to and for her own use and benefit absolutely: and I do hereby constitute my said wife sole executrix," &c. The said *Hester Davies* on the 17th of *Feb.* 1791, intermarried with *J. Hughes*, the other lessor of the plaintiff. *William Davies* lived in *London*, and died there in *August* 1788, without issue. Soon after the death of *Grace Davies*, the said *Anne Evans*, by virtue of the entail created by the said *Richard Davies*, took possession of all the lands and tenements in question, and on the 22d of *March* 1792, levied a fine of the premises in question, and died on the 13th of *May* 1806, without issue; having previously made her will, duly executed and attested, by which she devised the premises in question to the defendant, who, upon her death, entered on and took possession of the same under the said will, and has so continued in possession of the same from thence to the bringing of this action. The lessors of the plaintiff, on the 25th of *August* 1806, levied a fine sur conuissance de droit come ceo of the

premises in question in this action to one *T. Waters* as conusee thereof, who previously thereto had no interest or estate in the premises, and on the 1st of *Sept.* 1808, and prior to the day of demise in this ejectment, an entry was duly made upon the premises in question on the part of the lessors of the plaintiff, for the purpose of avoiding all fines levied of the premises; which purpose was duly declared at the time of such entry. If the lessors of the plaintiff were entitled to recover possession of the premises, the verdict for the plaintiff was to stand: if not, a nonsuit was to be entered.

Owen jun. for the lessors of the plaintiff, stated, that the objections intended to be raised to the title were, 1st, that the reversion in fee of the premises did not pass by the will of *Thomas Davies* to his widow, one of the lessors: but if it did; 2dly, that the effect of the fine levied by *Mrs. Evans*, the tenant for life, was to disseise the reversioner, and discontinue or displace her estate: and if so, then 3dly, that the effect of the fine of the 25th of *August* 1808, by the lessors of the plaintiff, was to confirm the estate of the disseisor, and estop their own recovery. Upon the first, there can be no doubt that by the devise in the will of *Thomas Davies*, of all the rest, residue, and remainder of all his estate and effects, real and personal, whatsoever and wheresoever, &c. after payment of his debts, &c. to his wife *her executors, administrators and assigns*, to and for her own use and benefit *absolutely*," the fee of the real estate passed, notwithstanding the devise is to her, and *her executors, &c.*; the devise being in terms of his *real estate* to her *absolutely*, construing the words *reddendo singula singulis*. And he cited *The Countess of Bridgewater v. The Duke of Bolton*, 6 Mod. 106. [But Lord *Ellenborough*, C. J. said, that it was unnecessary to cite cases upon that point: and called upon the defendant's counsel to know whether he meant to dispute it: who admitted, that the words of the residuary devise where in themselves sufficient to carry the fee in the real estate undisposed of, unless he could satisfy the court from other parts of the will that there was no such intention in the testator.] On the 2d question the case is, that *Ann Evans*, the last tenant for life in possession under the will of *Rd. Davies*, levied a fine of the premises in question in 1792, but did not die till *May* 1808, without issue; having previously devised to the defendant, who took possession on her death: and that fine is meant to be set up as a disseisin of the lessors of the plaintiff. But without going the length of that which is intimated in *Taylor v. Horde*, 1 Burr. 107—119, that there can be no such thing as a disseisin in modern times, without the election of the party injured so to consider it, it is sufficient to say, that there does not appear to have been any disseisin in this case. The lessors of the plaintiff had a vested interest in the reversion before the fine levied by *Mrs. Evans* in 1792, who was then in possession: the possession was not charged by her fine, but continued in her till her death; and she devised to the defendant. Littleton s. 279, defines disseisin to be "properly where a man entereth into lands where his entry is not congeable, and ousteth him who hath the freehold." And Lord *Coke* in his Comment notes, that every entry is no disseisin, unless there be an ouster also of the freehold; as an entry and a claimer or taking of profits. Now, the tenant for life levying a fine, it cannot be said that her entry was not lawful; for in fact she made no entry, being already in possession; and her continuing in possession during her life could not be said to be a disseisin of the reversion expectant on her death. Lord *Coke*(a) defines disseisin to be the "putting of a man out of seisin, and ever implieth a wrong." [*Bayley*, J. How can a person be said to be put out of seisin, who was not entitled to the actual seisin at the time?] It should seem not. A remainderman cannot be put out of possession who never was in possession. Lord *Coke* says, in another place, Co. Litt. 277, a. "a disseisin is a wrongful putting out of him that is *actually* seised of a freehold; but a remainderman, or rever-

(a) Co. Litt. 153, b. Vide *Doe v. Danvers*, 7 East, 312.

sioner, is not *actually* seised, and therefore Mrs. *Hughes* the reversioner cannot be said to have been disseised. Even an entry on another, without an expulsion, will not, according to the opinion of Lord *Holt*,^(a) work a disseisin, though it will give the party a seisin in law sufficient to have the possession adjudged to him if he have the right. But here there was neither an entry on nor an ouster of her in remainder; and the tenant for life could not disseise herself. It may be argued, that a feoffment by tenant for life disseises the reversioner; and that Lord *Coke*, Co. Lit. 10, says, that a fine is a feoffment of record. But though it be so in form, it is not so in substance; and Lord *Coke* had before, Co. Lit. 9, a., distinguished between a feoffment, which cleareth all disseisins and other wrongful and defeasible estates, where the entry of the feoffor is lawful; and a fine, which he says, does not: the material difference between them was shewn by Lord C. J. *Willes* in delivering the unanimous opinion of the Judges in the House of Lords upon the case of *Parkhurst v. Smith*, *Willes*, 342, and by the Lord Ch. J. *Lee* in delivering the opinion of this Court in the same case, 18 Vin. Abr. 413, 414, where the operation of a fine is put in opposition to that of a feoffment. And in 9 Vin. Abr. 456. Entry, E. pl. 23, it is said, that a fine is a feoffment of record only by fiction of law; for if another be in by tort, it will not amount to an entry, as a feoffment shall: per *Bridgman*, C. J. Cart. 176. The ground of the distinction is, that a fine is secret; but a feoffment derives its force from its publicity; for it is of no effect without livery of seisin. Co. Lit. 7, a. And in *Fermor's* case, 3 Rep. 78, b. 79, the case of *Lanne v. Toker* is referred to, wherein it was adjudged, that where tenant for life levied a fine with proclamations, and 5 years passed in his lifetime; yet he in remainder shall have 5 years to make his claim after the death of tenant for life.^(b) And it was also agreed, that if tenant for life make a feoffment in fee to one who had lands in the same town, and the feoffee levy a fine with proclamations, it should not bind the remainderman, but he should have 5 years after the death of the tenant for life; for he could not know of what land the fine was levied: though where one pretending title to land enters and disseises another, and afterwards, with intent to bind the disseisee, levies a fine with proclamations, this fine shall bind the disseisee by the express purview of the stat. 4 Hen. 7, if he neither enter nor pursue his action within 5 years. Here, therefore, Mrs. *Hughes* had 5 years to make her entry in after the natural determination of Mrs. *Evan's* life estate by her death. The nature of disseisin by election is fully explained in *Taylor v. Horde*.^(c) The utmost effect of a fine levied by tenant for life is to displace the estates in remainder; leaving to the remainderman a right of entry, to be exercised either immediately in respect of the forfeiture of the estate for life incurred by reason of the fine, or within 5 years after the natural determination of the estate for life.^(d) In *Goodright v. Forrester*^(e) there was a change of possession, which distinguishes it from the present case. If any person were a disseisor in this case, it must be the defendant; and by the stat. 32 H. 8. c. 33, the right of entry of the party entitled is not tolled even by a descent from a disseisor, unless such disseisor had peaceable possession for 5 years after the disseisin without the entry or continued claim of the party entitled. And here there has been no descent; nor have 5 years

(a) Apon. 1 Salk. 246, and *Page v. Heywood*, 3 Salk. 135.

(b) The same point was adjudged in *Smy v. June*, Cro. Eliz. 220, "for (say the justices) it may be, that the remainderman had no conscience of the forfeiture; and if he had, it is at his election if he will take advantage of it: and so *Zome's* case was cited to be adjudged, 7 Eliz.:" and the opinion of the Court in the late case of *Goodright v. Forrester*, 8 East, 566, is to the same effect.

(c) Barr. 107—119, and vide Co. Litt. 330, b. a. 1, per totum to the conclusion of the note in p. 340, b.

(d) *Focus v. Salisbury*, Hardr. 401, 2. Co. Lit. 327, b. and *Goodright v. Forrester*, 1 East, 552, were cited.

(e) Ib. 557.

elapsed since the death of the tenant for life. *Noy's Max.* 44, pl. 16. Neither is there any discontinuance; for the party discontinuing must be actually seised of an estate of inheritance in the estate discontinued: therefore, in *Driver v. Hussey*, (a) a fine levied by tenant for life was held to be no discontinuance of the estate tail in remainder, which could only be discontinued by the fine of one who was actually seised at the time by force of the entail. [Bayley, J. It is quite clear that a fine by tenant for life cannot work a discontinuance of the estate in remainder.] Then 3dly, supposing there could have been a disseisin of Mrs. *Hughes's* estate in reversion by the fine levied by Mrs. *Evans* the tenant for life; still the fine sur cognizance de droit, &c. levied by Mrs. *Hughes* and her husband in Aug. 1808, no use being declared, nor any change of possession, and without any consideration moving from the conusee, who had no prior estate in the premises; would, notwithstanding her disseisin, enure to the use of herself and her husband as conusors, and not to the use of the disseisor: or if it did not enure to the use of the conusors, it would at least be inoperative. *Beckwith's case*, 2 Rep. 56, b.; *Armstrong v. Wolsey*, 2 Wils. 19; *Roe v. Popham*, Dougl. 24, Co. Lit. 23, a.; *Villers v. Beaumont*, Dy. 146, b. 13 Vin. Abr. 299, Fine. l. a.; and *Argoll v. Cheney*, Latch. 82. The defendant's counsel will rely on what is said at the end of *Buckler's case* in 2 Rep. 56.—“Sixthly, it was said, that if the disseisee levy a fine to a stranger, the disseisor shall retain the land for ever: for the disseisee, against his own fine, cannot claim the land, and the conusee cannot enter; for the right which the conusor had cannot be transferred to him; but by the fine the right is extinct, whereof the disseisor shall take advantage.” Now, that was not a point in judgment; for the case there was, that A., tenant for life, leased for 4 years to B., and then granted the reversion for his own life from a day subsequent to C., to whom B. attornied: and after the 4 years expired, C. entered and leased at will to D., to whom A., tenant for life, levied a fine come ceo, &c. on which the remainder-man in fee entered. Lord Coke says, that five points were resolved; the two first of which only, it appears, were necessary to decide the case: but after stating the five, the sixth is noticed in the manner abovementioned. There are three other reports, 2 And. 29. Cro. Eliz. 550, 485, and Moor, 423, of the same case which make no mention of any such point: and in fact, the remainder-man recovered in ejectment, upon the forfeiture of the tenant for life by conveying a greater estate than he had.

W. E. Taunton, contra, as to the first point, admitted, that the general words of the residuary clause would be sufficient to carry this reversion in fee, if the intent of *Thomas Davies*, the devisor, did not appear (as he contended it did) from other parts of the will, not to pass it. And here he relied on the previous devise of other lands to the wife “and her heirs and assigns for ever;” which shewed, that he knew how to pass the fee by proper terms, when he so intended: whereas the devise of the residue, by which alone the reversion in fee of the lands in question could pass, if at all, to the wife, was to her, “her executors, administrators, and assigns.” [Lord Ellenborough, C. J. The devises to her in the first part of the will were all of lands that passed into possession immediately.] They were so; but if he contemplated this reversion at all, it is more likely that he would have included it in that part of his will where he devised the rest of his property to her in fee. Again, in another part he gives a leasehold interest to his wife in part of the very premises in question, called *Plasyparke* (*Place y parke*). It does not appear whether any lease was outstanding on those premises at the time: and none could have been granted by him that would not have terminated with his life. [Bayley, J. Supposing he had a beneficial interest in a lease on those premises, and the ultimate reversion in fee after the intermediate estates for life and in tail, what inconsistency would there be in his devising the leasehold interest first,

(a) 1 H. Blac. 269, and note 1 to *Clerk v. Pywell*, 1 Saund. 319.

and afterwards the reversion by the general clause?] He gives the subject matter of the residuary devise, subject to *debts, legacies, and funeral expences*; which shews he could not have contemplated a distant reversion. [Lord *Ellenborough*, C. J. The words being large enough to pass the reversionary interest, it will pass of course, if nothing appear upon the face of the will to restrain those words.] Then as to the effect of the fines, the lessors of the plaintiff are estopped from recovering the reversion; because when they levied the fine of August 1808, the premises were in possession of the defendant as a disseisor; and if the disseisee before actual entry made levy a fine to a stranger, such fine will enure by law to the disseisor. [2dly.] As to the disseisin, it is not necessary to rely on the single fact of the fine levied by Mrs. *Evans*, the tenant for life, in 1792, as constituting of itself the disseisin of the reversioner: it was at any rate a forfeiture of her life estate; and she having nevertheless continued in possession, and afterwards devised the premises to the defendant, his subsequent entry and possession upon her death, under her fine and will, at all events amounted to a disseisin: (a) otherwise there can be no disseisin committed at the present day. It falls within the definitions of a disseisin which have been referred to from *Littleton* and Lord *Coke*. [Lord *Ellenborough*, C. J. All the definitions include an *ouster* of the tenant, a *wrongful putting of him out*: and there lies your difficulty: there is an entry of the one party, but what ouster or putting out of the other is there? This keeping out of the lawful owner after the death of the tenant for life is, technically speaking, an intrusion; and every intrusion, as well as every abatement, is in law a disseisin. [Lord *Ellenborough*, C. J. asked what authority (b) he had for that position.] In their nature they are the same, and the difference is more in circumstances than in substance. [Lord *Ellenborough*, C. J. Perhaps the reversioner might elect to treat this as a disseisin, but he is not bound to do so.] Where there has been a pre-existing privity of estate, to which the possession of the wrongdoer might be attributed, there the party wronged may elect not to treat such possession as a disseisin; but where there was no such privity, but the true owner is put or kept out wrongfully by a mere stranger to the estate, it is difficult to understand how there can be any election to treat the adverse possession of the stranger as lawful. 1 Roll. Abr. 659. l. 5, states, as an instance of disseisin, a stranger taking in his hand the ring of the door of a house left locked by the owner, and saying that he claimed the house to him in fee, without entering. This possession of the defendant was sufficient to give him a seisin. 5 Com. Dig. Seisin A. [Bayley, J. What act has the defendant done that necessarily required the *freehold* to be in him, or that necessarily shews him to be any more than a mere possessor. He has not attended the lord's court as a freeholder. Lord *Ellenborough*, C. J. All that is stated here is, that on the death of the tenant for life the defendant entered and took possession: it is indeed added, that he did so *under the will* of Mrs. *Evans*; but that merely shews the occasion of his entry: he did not proclaim or announce to others that he entered as claiming the freehold, nor turn any person out of possession.] The doctrine of disseisin is founded on feudal tenure, which required that there should always be a visible tenant of the freehold, ready to perform the military services to the lord: and the defendant was the only person who could have been called upon to perform those services before the abolition of them by the legislature. But though now abolished, the principle of that law applies equally to the visible tenant in possession, holding in his own right. It cannot vary the case, whether the right owner be turned out of possession, or kept out by one who will not deliver it up. Then [3dly] taking the defendant to have been a disseisor at the time, the fine levied by

(a) Vide *Page and Jourden's case*, 1 Leon. 122.

(b) *Littleton*, s. 396, 397, points to a material distinction in respect to the right of entry of the lawful owner, between the case of an abatement and of a disseisin, after a descent cast. And vide *Co. Lit.* 277, for the definitions of abatement, disseisin, and intrusion.

Mrs. *Hughes* extinguished her right of entry, according to the 6th resolution in *Buckler's case*, 2 Rep. 56, before cited. [Bayley, J. The intention there was to levy the fine to the use of the stranger.] That does not differ the case; nor the rule that where there is no consideration moving from the donee, and no declaration of uses, the fine shall enure to the use of the donor; for that only applies where the fine is legally levied by a donor in possession. In *Nicholas Moore's case*, Palm. 365, husband and wife being tenants in special tail, with remainders over, the husband discontinued and died; after which the wife levied a fine; and it was resolved, that though the stat. 32 H. 8. c. 28, would have operated to have protected the entry of the wife after his death, notwithstanding the discontinuance; yet that till her entry, there was a discontinuance of her estate, and that her fine levied before entry during such discontinuance barred her entry, and so fortified the estate of the disseisor who claimed under her husband. He also cited *The Earl of Petersborough v. Sir Thomas Bludworth*, 1 Lev. 128, where a disseisee having levied a fine and declared the use by deed to the donee, *Bridgman*, C. J. held, that it should not enure to the use of the disseisor; but if no use had been declared, it should have been to the use of the disseisor, and extinguished the right of the disseisee. And also to *Weale v. Lower*, Pollex, 66, where, by way of illustration of the case in judgment, it is recognized that the fine of a disseisee to a stranger operates to the benefit of the disseisor in possession.

Lord ELLENBOROUGH, C. J. The first step of the defendant fails, in making out that there has been any disseisin at all. Supposing there had been a disseisin, a further question has been argued, as to what would have been the effect of the fine levied by the disseisee; whether it would have enured to the use of the disseisor: (a) but if there were no disseisin, the whole of the argument falls to the ground. Now here tenant for life levied a fine, and continued in possession till her death; having devised to the defendant, who after her death, entered, and continued in possession; and this is contended to be of necessity a disseisin: but what act has he done to make him a disseisor? The lessor of the plaintiff never was in possession, and therefore could not be disseised or put out of possession. It does not even appear that the defendant was cognizant of the claim of the lessor. Disseisin was formerly a notorious act, when the disseisor put himself in the place of the disseisee as tenant of the freehold, and performed the acts of the freeholder, and appeared in that character in the lord's court. But what act of notoriety is here stated to have been done by the defendant, as claiming to put himself in the place of the rightful freeholder? It would be carrying the doctrine of disseisin further than any other case has done, to say, that the mere taking of the rents and profits, as devisee of the land, is a disseisin, without meaning to do this adversely to the party entitled; for it does not even appear that when he entered he knew of the lessor's claim. A previous point was made, upon which there can be no doubt, and which was abandoned in the course of the argument, relative to the lessor's title under the will of *Thomas Davies*. It was properly admitted, that the words of the residuary devise, giving all the rest of his estate and effects, real and personal, whatsoever, and wheresoever, not before disposed of, to his wife, her executors, &c. for her own use and benefit absolutely, were competent to carry this reversion, unless rebutted by something else in the will shewing that he did not mean to pass it. But the omission of the word *heirs* in that clause, which is introduced in others, is relied on for this purpose. But where the words of the residuary clause are so strong and

(a) By *Popham and Gawdy*, J., *Goulsh. 162*. If during the disseisin, the disseisee, where he hath nothing but a right, levy a fine to a stranger, the disseisor shall not take advantage of it. And by *Bramston*, and *Croke*, Js. in *Fitcherbert v. Fitcherbert*, Cro. Car. 484, the fine by a disseisee to a stranger shall not enure to the benefit of the disseisor, but to the use of the donor himself; for otherwise a disseisin, being secret, may be the cause of disinherison of any one who intends to levy a fine for his own benefit.

clear for carrying the fee in this reversion, we cannot collect a contrary intent from the mere omission of the word *heirs* which is fully supplied by other words. Then, the reversion in fee having passed to the lessor *Mrs. Hughes*, and no disseisin of her having been made which could in any manner give an effect to the fine levied by her in favour of the defendant, that fine, there being no use declared of it, enured to her own benefit.

GROSE, J. No one can look at the words of devise to the wife in the residuary clause, without seeing that the deviser meant to give her all his real estate absolutely which he had not before disposed of, and consequently to include this reversion in fee; and there is nothing in the rest of the will to shew that he meant to give her less. And here was no disseisin by the defendant; for he never meant, by any thing which appears, to dispossess the lessor *Mrs. Hughes*.

LE BLANC and BAYLEY, Justices, concurred.

Postea to the plaintiff.

The King v. The Glamorganshire Canal Company.

12 East, 157. Feb. 8, 1810.

By an act for making and maintaining the *Glamorganshire Canal*, power is given to the canal company to make all such works as they shall think necessary and proper for "effecting, completing, maintaining, improving, and using the canal, and other works," and the company were required to lay before the Sessions an account of the sums expended in making and completing the canal, up to the time of its completion; and after that, an annual account of the rates collected and of the charges and expences of supporting, maintaining, and using the navigation and its works: and the Sessions are authorised, in case it appears to them, that the clear profits exceed the per centage limited by the act on the sums mentioned in the first account to have been expended by the company (i. e. in making and completing the canal and its works,) to reduce the canal rates: held that the Sessions, even after the period fixed for the completion of the canal, and after the first account delivered of the capital expended in the undertaking, and on which the dividends were to be calculated, Were not authorized to reject charges and expences, stated in the annual account of disbursements, for new works such as a reservoir and steam-engine, which the company deemed necessary, and proved by evidence to have been enacted for the support and improvement of the original line of canal, and for the better supplying it with water in dry seasons. Though it seems that if the new works had been shewn to be merely colourable, and erected for purposes collateral to the navigation authorized by the act of parliament, such charges would have been rightly rejected by the Sessions.

THIS case came on upon a rule, drawn up on several affidavits, and papers, including an account current delivered by the defendants to the Quarter Sessions for the county of *Glamorgan* in the year 1802, and two annual accounts of receipts and payments ending *Mich. 1807*, and *Mich. 1808*, returned into this court by *certiorari* at the instance of the defendants; by which the prosecutors were ordered to shew cause why an order of Sessions for reducing the rates to be taken by the company under the act of the 30 Geo. 3. c. 82, for making and maintaining a navigable canal from *Merthyr Tydfil* to and through the *Bank*, near *Cardiff* in the county of *Glamorgan*, should not be quashed for insufficiency.

By that act the defendants are incorporated as a company for the making, completing, and maintaining the canal, according to the rules and directions expressed in the act, "and to supply the said canal with water while the same shall be making and when made;" and the act contains the usual powers for making such reservoirs, feeders, and aqueducts, and setting up such engines and other machines for supplying the same with water, "and for any other purposes necessary for the said canal, as to the company should seem necessary" and proper;" "and all such other works, matters and conveniences, as they shall think proper for effecting, completing, maintaining, improving, and

"using the said canal and other works." And they are also empowered "to make, and repair, support, vary, or alter such reservoirs, engines, &c. and other works, as and when the company should think requisite and convenient for the purposes of the said navigation." The company were, in the first instance, limited to raise 60,000*l.* for these purposes: and if that were not sufficient, they might raise 30,000*l.* more amongst themselves: and the act limited the tonnage and wharfage rates to be taken by the company for goods carried upon the canal. Then after limiting the dividends of the company upon their capital to 8*l.* per cent. "upon all such money as shall be actually expended in making and completing the said navigation, and the several works relating thereto," &c. the act proceeds—"and in order to ascertain the amount of the clear profits of the said navigation, the company shall cause to be entered in a book a true and particular account of the charges and expences of obtaining the act, and of all money already laid out, and which shall from time to time be laid out and expended in or anyways relating to the making and completing the said canal, and of all charges and expences which shall from time to time be incurred on account of the said navigation and the several works thereunto belonging, previous to and until the same shall be made and completed. And the company are also required from Michaelmas next after the expiration of two years from the time of completing the said canal to cause a true, exact and particular account to be kept and annually made up and balanced to the 29th of Sept. of the rates collected by virtue of the act, and of the charges and expences attending the supporting, maintaining, and using the said navigation and the several works thereunto belonging;" which is to be laid before the justices at their Mich. Sessions next after the making up such annual account: "and if by any such annual account it shall appear to the justices at such Sessions, that the clear profits of the said navigation shall, upon the average of three years then next preceding, have exceeded the rate of 8*l.* per cent. upon all such money as shall appear by the first-mentioned account to have been laid out and expended as aforesaid; the said justices shall and are hereby authorized, by their order at such Sessions, to make such reduction in the rates to be collected by virtue of the act for one year then next, as in the judgment of the said justices shall be sufficient; so that the clear profits of the said navigation for that year may be as near 8*l.* per cent. upon the money which shall by the said first-mentioned account appear to have been expended as aforesaid as may be." And the company are prohibited from taking any higher rates. For the better ascertaining the truth of the said accounts, the said justices at any Sessions, when and as often as they shall think fit, may authorize any person to examine the account books of the company, and take copies, and examine witnesses on oath.

A subsequent act passed in the 36 G. 3, enabling the company to extend their navigation, and to raise a further capital of 20,000*l.* within two years; but limiting the dividend thereon to 5*l.* per cent.

It appeared by the affidavits, that when the accounts of the receipts and expenditures of the company were returned to the Mich. Sessions in 1802, the actual capital expended by the company amounted to 103,600*l.* But by an order made after the examination of the accounts at an adjourned Mich. Sessions in Dec. 1802, that Court stated that the sum actually laid out by the company in making and completing the canal, which they had declared to be so completed since the 31st of December 1798, amounted to 96,340*l.* And that Mr. J. Wood, on behalf of the freighters of the canal, having offered to give evidence that 15,175*l.* and other sums, part of the said sum of 96,340*l.* principal, had been improperly laid out by the company, and ought not to be allowed, the Court were of opinion that they ought not to go into the same, but reserved a case thereon for the opinion of this Court. But upon the removal of this order by *certiorari* into this Court, it was quashed. After this, an-

nual accounts were delivered in at the Mich. Sessions, containing accounts of the rates collected and of the charges and expences attending the maintaining and using the navigation and works thereto belonging. The last of these, on which the question arose, was the account from Mich. 1808, to Mich. 1809, in which was included, amongst other items of expence objected to, amounting altogether to above 9700*l.* *a new steam engine and a reservoir for better supplying the canal with water*; the items of which charges were carried to the *annual account of disbursements by the company*. Certain freighters upon the canal objected before the Sessions to these items, on the ground that the acts of parliament under which the company were incorporated did not authorise any further expenditure for *new works*, as the time for completing the canal had expired: though it appeared, that the company had not divided more than they were entitled to by the said acts; and that these *new works* were erected for the support and improvement of the original line of canal, and the better supplying it with water in dry seasons, and not for any extension of that line. But though it appeared that the surplus, after paying these disbursements, was not quite sufficient to pay the authorized dividends, the justices at their last Mich. Quarter Sessions, disallowing the sums for such new works, which turned the balance, made an order for reducing the rates; which order stated in substance, that having had laid before them the annual accounts of the company, made up and balanced to the 29th of *Sept.* last, of the rates collected and received by virtue of the act of parliament, and of the charges and expences attending, and for supporting, maintaining, and using the said navigation, and the several works thereunto belonging; and it appearing to the said justices by the said annual account, and by the annual accounts of the said company by them laid before the justices at their *Michaelmas* Quarter Sessions in 1807 and 1808, that the clear profits of the said navigation have, upon the average of three years next preceding the said 29th of *Sept.* 1809, exceeded the rate of *8*l.* per cent. per ann.* on the first year's account in 1803 of the sums expended by the company in making and completing the canal, and all charges of navigation, and the works thereto belonging previous to and until the same were made and completed; therefore the justices ordered such reduction of the rates to be made as therein stated, as in their judgment would be sufficient, so that the clear profits of the said navigation for the year ensuing might be as near *8*l.* per cent.* as might be upon the money which by the said account appeared to have been so expended.

This order having been removed by *certiorari* into this Court, the question upon the respective affidavits and documents was reduced to this, whether the Sessions in estimating the receipts and disbursements could exclude from the latter the expences of those *new works* which had been made with a view to the supporting and improvement of the old line of canal, and for better supplying it with water, as so much added to the capital of the company after the period when the original works were declared to be completed with the capital then invested: and whether the company were strictly confined to the repair and sustentation of the original works constructed with the original capital?

Garrow and *Abbott* shewed cause against the rule, and contended, that the object of requiring the accounts of the capital expended in completing the canal and the original works, and of the charges and expences of maintaining them, to be laid before the Sessions, was to enable them to restrain the company by their order from taking more than the stipulated dividends on the capital actually advanced by them for the purposes of the act; and to take care that the amount of the capital on which the dividends were calculated was not enhanced by sums expended out of the rates upon new works; and that the allowance of disbursements for charges and expences should strictly be confined to the necessary support and repair of the original works, and not be extended to cover new works and improvements, the expence of maintaining

which would hereafter add to the annual charges, and defer the reduction of the rates in which the public were interested: the act, therefore, properly constituted the Sessions judges of the necessity and utility of any new works to be erected after the original scheme was declared to be completed, and the company entitled to collect the rates. The original sum to be expended in making the canal and its works was limited by the first act, and extended afterwards to a certain amount; but if the company by raising their full rates can expend *ad libitum* the surplus after paying the limited dividends in making new works in which the members of their own body may have a personal interest, they may invest a capital in the concern much beyond the intentions of the legislature: they may undertake collateral cuts. [*Le Blanc, J.* That would exceed the authority given them by the act.] So it is an excess of their authority if they erect unnecessary works upon the proper line. [*Lord Ellenborough, C. J.* The company are to judge of the particular works: "necessary and proper for effecting, completing, maintaining, improving, and using the canal and other works." Suppose an additional lock was found wanting, are they not to judge of that? You require us to read the act as if the Sessions were appointed the judges of the propriety or fitness of the particular works, admitting such works to have been erected for the purpose of maintaining and using the canal. But I do not conceive that to have been the meaning of the act. Is there not a middle line to be taken? The account is afterwards to be laid before the Sessions "of all charges and expences attending the supporting, maintaining, and using the said navigation and the several works thereto belonging;" they are to judge, therefore, whether the charges and expences stated in that account are charges and expences attending the maintaining and using of the navigation authorized by the act, or wholly irrelevant to it. If, indeed, the new works were merely colourable, I suppose the counsel for the company will not contend that the Sessions would not have power to disallow such charges. *Le Blanc, J.* The new works are not for the purpose of giving the canal a new line, but merely for the better supplying of the original canal with water, which may have failed from accidental causes. *Bayley, J.* These are fairly charges for using the canal. *Lord Ellenborough, C. J.* The legislature must certainly have contemplated the making and support of a canal which should be always full of water and useable, and not one which should have its dry periods: and these works were for the purpose of making the canal at all times useable.] The prosecutor's counsel then admitted, that if the Court were satisfied that the new reservoir and steam engine were works made for the using of the canal, the charges ought to have been allowed: but they objected that this Court could not review the judgment of the Sessions upon this, which was a matter of fact within their jurisdiction to decide.

LORD ELLENBOROUGH, C. J. We may always exercise a controul over the judgment of the Justices below in these matters, when we see clearly that they have proceeded upon a wrong principle or rule in ascertaining the quantum of rates submitted to their inquiry. There is no doubt upon this act of parliament, that the company may erect new works in furtherance of the purposes of the old line of navigation: but the judgment of the Sessions in disallowing these charges has proceeded upon the consideration, that the company could not execute any new works for those purposes: that is an erroneous principle; for though the works may be new in specie, yet being for the maintenance of the old canal and works, the company were authorised to make them. If, indeed, there appeared to be any ground to suspect that the works had been colourably executed for the benefit of individuals, and used for collateral purposes, in fraud of the benefit in which the public had a right to participate, after payment of the fair expences of supporting, maintaining, and using the canal navigation and its works, and of dividing the stipulated profits of *8l. per cent.* on the capital advanced under the first act, and of *5l. per cent.*

on the capital advanced under the second act, we should look at any extension of the works with great jealousy, and should repudiate every charge for such as appeared to have been so colourably executed: but that does not appear to have been the case in this instance; and the Sessions having proceeded upon a wrong principle in rejecting the charge for these works, their order must be quashed.^(a)

The other judges concurred.

The Attorney-General, Hall, and Maule, appeared for the company.

Whitehead and Others v. Firth.

12 East, 165. Feb. 8, 1810.

The affidavits made in answer to a rule *nisi* for attachment must be intitled on the civil side of the court in the cause out of which the motion arises: but after the rule for the attachment is granted, the affidavits in any matter concerning such attachment are intitled on the crown side. Upon a submission by bond of all matters in difference between the parties in a cause, without making any mention of costs, the arbitrator has no authority to award costs as between attorney and client. But the plaintiff waiving his costs, and having only demanded the principal sum awarded, took his attachment for that sum.

AFTER action brought, the parties entered into a general submission by bond, which was made a rule of Court, to refer all matters in difference between them; but nothing was said as to costs. The arbitrator made his award in favour of *Whitehead* and others, the plaintiffs in the action, and gave them costs as between attorney and client. Cross motions were afterwards made in this court: one by *Topping* on the part of *Firth*, to set aside the award, on the ground that the arbitrator had exceeded his authority in giving costs at all, but at all events in giving any other costs than as between party and party: the other by *Burrough*, on the part of *Whitehead* and the others, to enforce the performance of the award by attachment. Both the rules now came on together; when it appeared, that the affidavits to set aside the award were intitled, "*In the matter of Firth and Whitehead and others,*" to which no objection was made.^(b) But the affidavit against the rule for the attachment being intitled, "*The King v. Firth,*" the reading of them was objected to on the ground that they were wrongly intitled in that manner: for that the king was no party to the proceeding until the rule for the attachment was made absolute: and that the affidavits against the rule *nisi* for the attachment ought to have been intitled on the civil side in the cause or matter out of which the motion arose; which was the rule laid down in *Wood v. Webb*, 3 Term Rep. 253; *The King v. The Sheriff of Middlesex*, 7 Term Rep. 439, and *The King v. Harrison*, 6 Term Rep. 60, though the practice was afterwards incorrectly stated to be otherwise in a note to *Bainbrigge v. Holton*, 5 East, 21.

The Court, upon this last point, said, that upon consideration of the cases, and adverting to the principle of the thing, the case could not be in the crown office until the attachment was granted. That *The King v. Harrison* was a much stronger case than this, for there the affidavits read in answer to a rule for a criminal information were not intitled at all.

With respect to the other objection, against the award itself, they said, that as, if costs in general terms had been expressly mentioned in the submission, it must have been taken to mean such costs as the Court would have awarded

(a) Vide *Rez v. The Conservators of the River Tone*, 8 Term Rep. 286.

(b) According to the received notion of the practice, as there was a cause in court, the affidavits to set aside the award ought to have been intitled in that cause: but where there is no cause in court, but only a submission by bond to an award made a rule of court under the statute, the affidavits may be intitled *in the matter, &c.*, though they need not be intitled at all.

between party and party; so, nothing being said of costs, though the arbitrator was, according to the case of *Roe v. Doe*, 2 Term Rep. 644, considered to have an incidental power of awarding costs where an action was depending: yet the omission could not be considered as giving him a greater power to award costs as between attorney and client, than he would have had if the power of giving costs generally had been expressly mentioned in the terms of the submission. But they desired *Burrough* to look into the cases, and see if there were any authority for supporting the award on this ground: and though he offered to waive that part of the award, yet the Court would not give him his rule for the attachment at that time.

Burrough, on a subsequent day, said he had looked into the cases upon the point, and must admit, that the case of *Marder v. Coz*, Cowp. 127, was an authority against him, to shew that the arbitrator, even under an express general power to award costs, could only give costs of the cause as between party and party, and not as between attorney and client. And as by the case of *Candler v. Fuller*,^(a) it also appeared that the arbitrator could not, without an express authority, award the costs of the reference, he was content to waive the award for so much: and as the demand on the defendant had only been made for the sum awarded, without the costs, he was still entitled to the attachment as to the principal sum awarded. This was assented to by *Topping*, upon an agreement that the rule for the attachment should lie in the office for a certain time.

Poole v. Bentley.

12 East, 168. Feb. 9, 1810.

An instrument containing words of present demise will operate as a lease, if such appear to be the intention of the parties, though it contain a clause for a future lease or leases; as where the one *thereby agrees to let*, and the other *agrees to take land for 61 years at a certain rent for building*, and the tenant agreed to lay out 2000*l.* within 4 years in building 5 or more houses, and when 5 houses were covered in, the landlord agreed to grant a lease or leases, (which might be for the more convenient underletting or assignment of the leases), but *this agreement was to be considered binding till one fully prepared could be produced.*

IN an action for the use and occupation of certain lands, &c. which was tried before Lord *Ellenborough*, C. J. at *Westminster*, the only question was, whether a memorandum in writing upon a 16*s.* stamp, signed by the plaintiff and defendant, by virtue of which the defendant was let into possession, were a lease of the premises, or only an agreement for a lease? If it were a lease, it ought to have had a stamp of a different and higher denomination. Lord *Ellenborough*, C. J. being of opinion, that it was a lease, as containing words of present demise, and appearing on the face of it to have been intended to operate as such, nonsuited the plaintiff. And upon a rule *nisi* being granted for setting aside the nonsuit, which was moved upon the authority of *Goodtitle d. Estwick v. Way*, 1 Term Rep. 735, the memorandum appeared to be in the following terms: "Memorandum of an agreement this 12th of June 1806, between *J. Poole* and *P. Bentley*. The said *J. Poole hereby agrees to let* unto the said *P. Bentley*, and the said *P. Bentley agrees to take* of the said *J. Poole*, all that piece of land (describing it) *for the term of 61 years from Lady-day next, at the yearly rent of 120*l.* free and clear of all taxes, &c. the said rent to be paid quarterly; the first quarter's rent within 15 days after Michaelmas 1807, and that for and in consideration of a lease to be granted*

(a) Willes, 92. But it has since been held in *Wood v. O'Kelley*, 9 East, 436, that under a rule of reference in which the costs were directed to abide the event of the award, the Master might tax the costs of the reference as well as of the cause.

by the said J. Poole, for the said term of years, the said P. Bentley agrees, within the space of 4 years from the date hereof, to expend and lay out in five or more houses of a third rate or class of building 2000*l.*; and the said J. Poole agrees to grant a lease or leases of the said land and premises as soon as the said 5 houses are covered in: and the said P. Bentley agrees to take such lease or leases, and to execute a counterpart or counterparts thereof. This agreement to be considered binding till one fully prepared can be produced." Signed by both parties and witnessed.

Park and *Reader* were to have shewn cause against the rule; but the Court called upon

Garrow and *Storks*, contra, to support their objection to the nonsuit; who relied on the case before cited, where though the instrument contained the same words of present demise as the one in question, yet as it provided for a lease to be executed in *futuro*, it was held to operate only as an agreement for a lease, and not as a lease itself. The intention of these parties appears to have been, that the defendant, who was to take the ground upon a building lease, should have the present possession of it for the purpose of erecting the houses; but in order to secure his performance of the terms, he was not to have the legal interest conveyed to him until five at least of the projected buildings were covered in. They also referred to *Doe d. Broomfield v. Smith*, 6 East, 530, where a similar construction was put upon an instrument which referred to a future lease: and other cases are there mentioned to the same effect.

Lord ELLENBOROUGH, C. J. The rule to be collected from all the cases is, that the intention of the parties, as declared by the words of the instrument, must govern the construction: and here their intention appears to have been, that the tenant who was to expend so much capital upon the premises within the first four years of the term, should have a present legal interest in the term, which was to be binding upon both parties: though when a certain progress was made in the buildings, a more formal lease or leases, in which perhaps the premises might be more particularly described for the convenience of underletting or assigning, might be executed. The case of *Goodtitle v. Way* is the strongest in favour of the plaintiff's construction; in which, however, the exact date of the instrument does not appear: but the stipulation was, that leases, with the usual covenants were to be executed before *Michaelmas*, and the rent which was to be paid half-yearly was not to commence till *Lady-day*, though the tenant was to be let into possession immediately, which looked to a payment under the leases to be granted. The agreement also regarded several leases to be executed in future. In the case last cited there was a clause to be added to the lease: and all the other cases contain circumstances of distinction.⁽¹⁾

The other Judges concurred.

Rule discharged.

(1) [See Woodfall on Landlord and Tenant, 5 Ed. Lond. 1843, p. 118, &c., and cases cited in the notes. The Courts have in some cases looked at the acts of the parties to assist in the construction, when the words of the instrument were ambiguous. *Ibid.* But see *Alderman v. Neate*, 4 M. & Wels. 716, per Ld. Abinger.—W.]

Legge v. Thorpe.[S. C. at *Nisi Prius*, 2 Campb. 310.]

12 East, 171. Feb. 9, 1810.

A protest for non-acceptance of a foreign bill of exchange is not necessary to be proved in an action by the indorsee against the drawer, if it appear that the drawer had no effects, nor probability of any effects, in the hands of the drawee at the time, and it do not appear that there was any fluctuating balance of assets between them unascertained at the time which might then have afforded probable ground of belief to the drawer that his bill would be honoured.

THIS was an action by the indorsee of a foreign bill of exchange against the drawer, and the declaration stated the bill as drawn by the defendant in *Upper Canada* on the 26th of May 1807, on *C. B. Wyatt*, at one month after sight, for 21l. payable to *Alex. Legge*, or order, for value received; and that it was indorsed by *A. Legge*, the payee, to *Wm. Legge*, the plaintiff, and afterwards presented to *Wyatt* for acceptance, who refused to accept or pay the same. And then the plaintiff averred, that at the time of making the bill, and from thence until and at the time when the same was so presented to *Wyatt* for acceptance, and from thence until and at the time for payment thereof as aforesaid, he *Wyatt*, had not in his hands any effects of the defendant, nor had he received any consideration from the defendant for the acceptance or payment by him of the said bill, nor hath the defendant sustained any damage for or by reason of his not having notice of the non-acceptance or non-payment, by *Wyatt* of the said bill; of all which premises the defendant had notice, by means whereof, and according to the usage and custom of merchants, the defendant became liable to pay to the plaintiff the said sum of 21l. &c.; and in consideration thereof, promised, &c.

It appeared at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, by the evidence of *Wyatt* the drawee, that he had refused to accept the bill because he had no effects of the drawer's in his hands: but it appeared also, that *Wyatt* was one of the executors of a Mr. *Weeks*, who died in *Canada* leaving property, and that this bill had been drawn in favour of *A. Legge* by the defendant in consequence of the defendant's having, at the desire of the executors, employed *A. Legge* to do some carpenter's work on an out-building belonging to the house which the defendant had rented of *Weeks* before his death, with whom he had made an agreement that the rent reserved was to be laid out in certain improvements of the premises, the value of which had amounted to much more than the rent: but *Wyatt* having come to this country, and *A. Legge* wishing to remit the money to his brother here, the bill in question had been drawn in the expectation that *Wyatt* would discharge it; there being sufficient assets of the testator. *Wyatt*, however, disputed the existence of assets in his hands to answer the bill. It was objected, on the part of the defendant, that he was not liable, for want of a protest, though he had no effects in specie in the hands of the drawee, but only (as he contended) a reasonable expectation and equitable claim to have the bill accepted and paid: this being the case of a foreign bill of exchange, which, by the custom of merchants, required a protest at all events to make the drawer liable. But Lord *Ellenborough*, C. J. considering that a protest was not necessary in the case of a foreign bill, where notice of the dishonour would not be necessary in the case of an inland bill, overruled this objection, and a verdict was taken for the plaintiff; reserving leave to the defendant to move to set it aside and enter a nonsuit, if the Court should be of opinion that there ought to have been a protest. A rule *nisi* was accordingly obtained for this purpose; against which

Garrow and *F. Pollock* now shewed cause, and insisted, that foreign and inland bills of exchange stood on the same footing in this respect: the protest necessary to be made in general in the one case, and the notice of the dishon-

our to be given in the other, are the same thing in effect: the protest being only the formal and accustomed manner of notifying the dishonour of the bill: the reason is the same in both cases, being founded on the supposition that the drawer has effects in the hands of the drawee; and therefore, to enable the drawer on receiving the accustomed notification of the dishonour to withdraw his effects out of the hands of the drawee as speedily as possible. Then, if there be no such effects in hand, there can be no more reason for the accustomed notification of the dishonour in the case of a foreign than there is in the case of an inland bill, where it is admitted not to be necessary. And they referred to *Rogers v. Stephens*, 2 Term Rep. 713; *Gale v. Walsh*, 5 Term Rep. 299, and *Orr v. Maginnis*,^(a) as establishing or recognizing the uniformity of the rule.

Park and D. Pollock, for the defendant, said, it had been declared to be a subject of regret from high authority,^(b) that the old rule, requiring notice of the dishonour of a bill by the drawee to be given in all cases to the drawer, had ever been broken in upon: the exception, however, where the drawee has no effects of the drawer in his hands, is too well established in the case of inland bills to be now shaken: but it is still not too late, (there being only one express decision by the Court on the point) to revert back to the old rule in respect of foreign bills, which ought to be governed entirely by the custom of merchants recognized in foreign courts, by which a protest is always held necessary,^(c) and in some of them the protest itself is made evidence of the facts contained in it. In the case of *Orr v. Maginnis* the modern exception even with respect to inland bills, was narrowed: and now it is settled to be no excuse for not giving notice of the dishonour, that the drawer had no effects in the drawee's hands at the time when the bill was refused acceptance, if he had any effects, to whatever amount, in the drawee's hands when the bill was drawn. [*Bayley, J.* That case did not proceed upon any distinction between foreign and inland bills of exchange.] In *Watson v. St. Quinin*,^(d) *Ld. C. J. Eyre* assigns strong reasons why notice of the dishonour, which he considered to be part of the same custom of merchants which created the duty, and which is therefore peculiarly applicable to the protest for the dishonour of a foreign bill, ought never to be dispensed with; namely, that the grounds of such dispensation cannot generally be known to the holder at the time of the omission to give notice. And he cautions bill-holders not to rely on it as a general rule, that if the drawer has no effects in the acceptor's hands, notice is not necessary; and instances several cases where notice would still be deemed necessary. It is impossible in the present case to say that no inconvenience could have resulted to the defendant from the want of notice through the accustomed form of a protest; for he would then have lost no time in seeking his indemnity out of the assets of the testator in *America*.

Lord ELLENBOROUGH, C. J. This is an action by the indorsee against the drawer of a foreign bill of exchange, which was refused acceptance; and the question is, whether the drawer can protect himself against the payment of it for want of a protest? The fact is, that the bill was not drawn for actual value in the hands of the drawee, and yet the drawer was not altogether unwarranted under the circumstances, in expecting that his bill might be honoured, so that there is no imputation upon him for having drawn the bill. I do not mean to

^(a) 7 East, 359, and vide another case on a foreign bill of exchange referred to by *Buller, J.* in *Bickerdike v. Bollman*, 1 Term Rep. 410, as tried before him at *Guildhall*.

^(b) Vide what was said by *Lord Ellenborough, C. J.* in *Orr v. Maginnis*, 7 East, 362, which was now said to refer to *Lord Eldon*, when at the bar: and vide the report of the principal case, at nisi prius. 2 Campb. 311.

^(c) Vide *Brough v. Perkins*, 2 *Ld. Ray.* 993, by *Holt, C. J.*, a protest on a foreign bill is part of the custom; but on an inland bill no protest was necessary by the common law; but by the stat. 9 & 10 W. 3. c. 17. Note, that statute requires either a protest, or otherwise due notice to be given of the dishonour.

^(d) 1 Bos. & Pull. 654, 5. [And see the cases cited *ibidem in notis*, *Day's edit.*]

say that actual value in the hands of the drawee at the time of drawing is essentially necessary to entitle the drawer to notice in case of the dishonour; for circumstances may exist which would give a drawer good ground to consider that he had a right to draw a bill upon his correspondent; as where he had consigned effects to him to answer the bill, though they may not have come to hand at the time when the bill was presented for acceptance. But the defendant does not appear to have stood in any such situation, as would entitle him to draw this bill; for he had no effects at the time in the drawee's hands, nor had taken any means to furnish him with any: and therefore the question dryly is, whether without effects in hand, or that which might be deemed an equivalent, a protest were necessary in this case, being that of a foreign bill. But it has already been decided in the case of *Rogers v. Stephens* not to be necessary; and that if notice to the drawer of non-acceptance be not necessary, for want of his having effects in the hands of the drawee, neither is that special mode of notifying the dishonour, called a protest, necessary. I have often regretted that the strict general rule requiring notice of the dishonour to be given was departed from in the case of *Bickerdike v. Bollman*, on account of the drawer having no effects in the hands of the drawee; because, though I do not question the foundation on which that distinction rests, after the sanction which it has since received; yet I meet with continual instances of inconvenience resulting in practice from it. It has often happened to me, sitting at *nisi prius*, to be obliged to take an account between the parties, in order to see whether there were any and what funds, or more properly speaking, whether the drawer had probable funds left in the drawee's hands to answer the bill: whereas if the courts had adhered to the original simple rule, all such inquiries would have been unnecessary, and no doubt would have existed in any case; for in every action upon an inland bill against the drawer, the plaintiff must have shewn notice to him of the dishonour; and in every action on a foreign bill, he must have shewn a protest. In *Bickerdike v. Bollman*, indeed, the Judges did not merely consider it as a case of the drawer not having in fact value in the hands of the drawee at the time, but as a species of fraud to draw a bill on one on whom he knew that he had no authority to draw, for the purpose of negotiating it. If one party draw on another without any prospect of having value in the other's hands to answer it, he knows beforehand that his bill will not be honoured; and therefore notice cannot be necessary to tell him that which he must know already, not only that he had no value, but that he could have none which could warrant him to draw the bill. Then the case of *Rogers v. Stephens* decided that there was no difference in this respect between inland and foreign bills. Here then the defendant having drawn the bill with previous knowledge that he had no effects in the drawee's hands, and that his bill would be dishonoured, no protest was necessary to give him notice of it.

GAOSE, J. The cases of *Bickerdike v. Bollman*, and *Rogers v. Stephens*, have decided the present.

LE BLANC, J. The Court in *Bickerdike v. Bollman*, considering the difficulty of giving notice of the dishonour in all cases, (for instance where the drawer himself is dead, or keeps out of the way and cannot be found,) as a reason against the universality of the rule, looked to the reason for which notice was required to be given, and therefore laid down the rule, not generally, that where the drawer had no effects in the hands of the drawee at the time, (which perhaps might turn out to be the case upon a future settlement of accounts between them,) no notice of the dishonour should be given; but that it need not be given where the drawer must have known at the time that he had no effects to answer his bill. That has been acted upon ever since in the case of inland bills: and in *Rogers v. Stephens* the same rule was held to extend to foreign bills: and the subsequent cases of *Gale v. Walsh*, and *Orr v. Maginnis*, were in effect confirmatory of the decision in *Rogers v. Stephens*;

for the effort in both was to take the case out of the general rule, by shewing the fact that the drawer had no effects in the hands of the drawee. There may perhaps be an inconvenience in adopting a rule upon this subject in our courts which is not acted upon in foreign courts, as to dispensing in these cases with the production of a protest; if any subject of this country should thereby be led to omit making and sending out a protest, in order to charge the drawer of a foreign bill in another country: but that would only take place where it was necessary to institute proceedings against the drawer in a foreign court which did not adopt our rule; and is an inconvenience which must be left to the prudent precaution of the parties interested to provide against.

BAYLEY, J. Before the case of *Bickerdike v. Bollman*, the application of the general rule to all cases was often attended with great injustice: for persons drew bills in payment of just debts upon others in whose hands they had no effects, and on whom they had no right to draw, and then if it happened that they did not receive due notice of the dishonour, they could not be sued; although in fact they had suffered no loss from the want of such notice. To remedy this the rule was laid down in that case, that where the drawer had no effects at the time in the hands of the drawee, and could have no reason to believe that his bill would be honoured; as he could not be injured for want of notice of the dishonour, it was not necessary to be given by the holder. The same rule was applied to foreign bills above 20 years ago, in the case of *Rogers v. Stephens*, and has prevailed ever since. It was acted upon in *Gale v. Walsh*; for at first it did not appear there, that the drawer had no effects in the drawee's hands, and the rule for a nonsuit was made absolute in the first instance, for want of proof of a protest for non-acceptance; but it was afterwards opened again upon a suggestion that the fact of there being no effects in the drawee's hands at the time would appear upon the Judge's notes: that fact, however, did not appear upon the report; and therefore the rule stood for entering a nonsuit. But the opening of the rule shews, that it was then fully understood, that if there had been no effects of the drawer in the hands of the drawee at the time, the want of a protest for non-acceptance would have been no bar to the plaintiff's recovery against the drawer.⁽¹⁾ Such then having been the acknowledged rule ever since the case of *Rogers v. Stephens*, and that, upon a matter recurring perhaps many times in every day, and where the rule itself is calculated to further justice between the parties, it would be attended with very great inconvenience if it were now to be altered.

Rule discharged.

(1) In the late *nisi prius* case of *Blackham v. Doren*, 2 Campb. 503, it was ruled by Lord Ellenborough, that if the drawer of a bill of exchange, when it is presented for acceptance, has effects in the hands of the drawees, though he is indebted to them to a much larger amount, and they without his privity, have appropriated the effects in their hands to the satisfaction of the debt; he is entitled to notice of the dishonour of the bill for non-acceptance, as he might expect, under these circumstances, that it would be accepted and paid. His Lordship said, that where the drawer has a fluctuating balance in the hands of the drawee, notice is peculiarly requisite. Without this, how can the drawer know that credit has been refused to him, and that his bill has been dishonoured?

On the subject of *dispensing with notice*, see note (1) to *Wilkes & al. v. Jacks*, Peake's Ca. 203, Day's edit.

Randall v. Lynch.

[S. C. at *Nisi Prius*, 2 Campb. 852.]

12 East, 179. Feb. 9, 1810.

Where a ship was let to freight by charter party from the plaintiff to the defendant, a clause in the deed; "and it is hereby *covenanted and agreed by and between* the said parties, that 40 days shall be allowed for unloading and loading again, &c.," was held to raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading, &c. beyond the 40 days: and if he detain her for any longer time, the owner's remedy is upon that covenant, and not in *assumpsit*, as upon an implied new contract.

THE plaintiff declared in covenant on a charter party sealed, made the 1st of March 1809, whereby the plaintiff, master of the ship *Albion*, let, and the defendant, a merchant, hired to freight the said ship on a voyage from *London* to *Lancerotto*, one of the *Canary Islands*, &c. there to deliver her onward cargo to the freighter's agents, and to load her homeward cargo, and return therewith to the port of *London*, and upon arrival there, at the *London* docks, after regular report being first made at the custom-house, make a faithful delivery of the said homeward cargo to the said freighter, &c. Then, after stating the covenant for payment of freight to the master according to certain rates, there followed this covenant: "And it is hereby *covenanted and agreed by and between the said parties, that 40 days should be allowed* for unloading, loading, and again unloading the said cargoes, to commence and be computed at *Lancerotto*, from and including the day after the said master should be ready to make discharge of his cargo to be landed there, and notice thereof to the freighter's agent, &c.; to commence again on the day of her being ready to take in her homeward cargo, &c.: and to commence in *London* from the day of reporting at the custom-house, &c. And likewise it was agreed between the said parties, that it should be lawful for and at the option of the freighter to detain the vessel for ten working days over and above the hereinbefore stipulated 40 days upon paying the said master 5*l.* per day for each of the said 10 overlaying days, or days of demurrage." The plaintiff then made the proper averments of performance of what was required to be done on his part during the voyage; and concluded with this averment, that afterwards on the 10th of *August*, in the year aforesaid, the vessel arrived with her homeward cargo at the port of *London*, that is to say, at the *London* docks, and then and there made a regular report at the custom house, and was then and continually afterwards ready and willing to have made a faithful delivery of the said homeward cargo to the freighter, &c.; of which the defendant then and there had notice: and although the plaintiff afterwards began to make, and on divers other days afterwards, viz. until and upon the 10th of *October* in that year, at the *London* docks aforesaid, made a faithful delivery, &c. and then ended and completed both the outward and homeward bound voyages, &c.: yet, &c.: and so the plaintiff proceeded to assign several breaches; the fourth of which charged, that the defendant did not nor would unload, load, and unload again the said respective cargoes of the said vessel within the 40 days in the charter party mentioned and stipulated and allowed for those purposes, computed as therein mentioned, and the 10 working days over and above the said stipulated 40 days; but kept and detained the vessel with a part of the homeward-bound cargo on board her in the *London* docks(a)

(a) The principal question at the trial on this part of the case was, whether the defendant were liable for a detention of the ship in the *London* docks; which detention was owing to the great press of business in the docks at that time, by which the company were prevented from unloading this vessel sooner. But he was held liable upon his covenant. Vide S. C. 2 Campb. Ni. Pri. Cas. 352.

aforsaid for 35 days after the expiration of the 40 days and 10 days; whereby the plaintiff, during all the time last aforsaid, lost the use and profit of his vessel contrary to the form and effect of the charterparty and of the defendant's covenant in that behalf made; to the plaintiff's damage, &c. The defendant by his pleas (*inter alia*) took issue upon the fact of such detention above 40 days and 10 days; which being found against him, and damages assessed thereon at the trial before Ld. *Ellenborough*, C. J. in *London*; it was on a former day in this term moved by

The Attorney-General to arrest the judgment; and the rule was now endeavoured to be supported by him, *Garrow*, and *Barrow*, on the ground that the breach alleged, for keeping the vessel beyond the 40 lay days and the 10 demurrage days, was larger than the covenant declared on; the covenant being only that 40 days should be allowed to the freighter for loading and unloading the vessel, and 10 days for demurrage; and no covenant that he would not keep it longer, or that he would deliver it up at the end of that time: and therefore they contended, that the action of covenant would not lie in this case for a detention beyond the days allowed; but that the plaintiff's remedy was by action of trover, or on the case, as for a tort, or by *assumpsit* as upon a new and distinct contract by implication. And they asked whether covenant could be maintained against a lessee by indenture for holding over after the end of his term.

But the Court, (stopping *Parke*, *Topping*, and *Marryat*, against the rule; who shortly referred to *Stevenson's* case,)(a) were clearly of opinion, that there was an implied covenant in the charterparty not to detain the ship beyond the stipulated number of days; and that the action was properly framed in covenant, and not in *assumpsit*.

LORD ELLENBOROUGH, C. J. A covenant is nothing more than an agreement of the parties under seal: and if they covenant together that it shall be lawful for one to hold the other's property for a certain time, that is emphatically an agreement that he shall not detain it for a longer time, but shall then give it up to the owner: if then he detain it beyond that time, it is a breach of his covenant. The possession of the ship beyond the stipulated time by the freighter was only unlawful as being against his implied covenant that he would not detain it longer than that time.

GROSE, J. agreed.

LE BLANC, J. There is an express covenant between these parties, that a certain time only should be allowed to the defendant to detain the ship; this detention of it, therefore, for a longer time, is in breach of that covenant.

BAYLEY, J. Where there is an express contract by deed between the parties, *assumpsit* cannot be maintained on any promise arising by implication of law out of the terms of that contract.

Rule discharged.

(a) 1 Leon. 324. The plaintiff had covenanted with the defendant, that it should be lawful for the defendant to cut wood for fire and hedge bote, without making any waste, or cutting more than necessary; and the defendant gave bond to the plaintiff, conditioned to perform all covenants. The plaintiff sued on the bond, and assigned for a breach of that covenant, that the defendant had committed waste in cutting wood: to which exception was taken that the condition only extended to covenants to be performed on the part of the lessee. But the exception was disallowed; for it is the agreement of the lessee, although it be the covenant of the lessor. And vid. *Pordage v. Cole*, 1 Saund. 319. If it be agreed (by writing under seal) between A and B, that B. should pay A. a certain sum for his lands on a particular day; this amounts to a covenant by A. to convey the lands, being the words of both parties, by way of agreement.

Elizabeth Want, Widow, and Gaskoin, Executrix and Executor of William Wyatt Want, deceased, v. Blunt and Others.

12 East, 183. Feb. 12, 1810.

The rules which govern the construction of conditions to create real estates do not apply to personal contracts, which must be performed according to the words and apparent meaning of the parties, and are not satisfied by a performance cypres. Where one, as a member of a life insurance society for the benefit of widows and female relations, entered into a policy of assurance with the society for a certain annuity to his widow after his death, in consideration of a quarterly premium to be paid to the society *during his life*; and the society covenanted to him and his executors, &c. that if he should pay to their clerk the quarterly premiums, on the quarter days, *during his life*, and if he should also pay his proportion of contributions which the *members of the society* should, *during his life*, be called on to make in order to supply any deficiencies in their funds; then, on due proof of his death, the society engaged to pay the annuity to his widow: and by the rules of the society, if any *member* neglected to pay up the quarterly premiums for fifteen days after they were due, the policy was declared to be void, unless the *member (continuing in as good health as when the policy expired)* paid up the arrears within six months, and 5s. per month extra; held that a member insuring, having died, leaving a quarterly payment over due at the time of his death, the policy expired; and that a tender of the sum by the member's *executor*, though made *within 15 days after it became due*, did not satisfy the requisition of the policy and the rules of the society, which required such payment to be made by the member *in his lifetime, continuing in as good health as when the policy expired*.

THIS case was argued in the last term by *Comyn* for the plaintiffs, and *Raine* for the defendant. The argument turned upon the particular words of the contract. The Court took time to consider of their opinion, which was now delivered by Lord ELLENBOROUGH, C. J. This came before the Court on a special case, reserved at the trial of an action of covenant on two policies of insurance, each dated the same day, viz. the 6th of June 1796. At the trial before me in *Middlesex* after the *Trinity* term, a verdict was found for the plaintiffs for 1000*l.* damages; subject to the opinion of this Court on the following facts. On the 6th June 1796, the defendants, being three of the committee of the Life Assurance Society for the benefit of widows and female relations, executed a policy, reciting that *Wm. Wyatt Want* of *Windsor* had become a member of the Society, according to the deed of settlement of 19th Dec. 1795, inrolled in the Court of *King's Bench*, and had proposed to make assurance with the said society for an annuity of 50*l.* to be paid to *Elizabeth* his wife for her life, in case she should survive him; and had delivered in a declaration, setting forth their respective ages, and his state of health: and reciting that the society had consented to assure such annuity *in consideration of a quarterly premium of 2*l.* 13*s.* 6*d.* to be paid by the society during the life of the said W. W. Want*. The policy then recites, that *W. W. Want* had executed the said deed of settlement, and had paid the premium for one quarter of a year from the date of the policy: thereupon the defendants, whose names were subscribed to the policy and their seals affixed, being three of the committee for managing the affairs of the society, did, for and on behalf of the said society, covenant, promise, and agree to and with the said *W. W. Want*, his executors and administrators, that if he shall well and truly pay or cause to be paid to the clerk and receiver of the society for the time being the full sum of 2*l.* 13*s.* 6*d.* on every 25th of March, 24th of June, 29th of September, and 20th of December, *during the life of the said W. W. Want, or within such time after those days respectively as is or shall be allowed for that purpose* by the rules of the said society; and if he shall also pay and contribute his proportion of the monies which the members of the society shall, *during his life*, be called upon to pay and contribute, according to the rules, towards making good any deficiency of the funds of the society to answer the claims upon it; and shall in

all other respects observe the rules and by-laws of the society ; then, on due proof being made of the death of the said *W. W. Want*, the committee of the society for the time being shall and will well and truly pay out of the stock and funds of the society unto the said *Elizabeth* or her assigns, after his death, in case she shall survive him, one clear annuity of 50*l.* during her life, by equal quarterly payments, on the 25th of *March*, 24th of *June*, 29th of *September*, and 20th of *December*, in every year ; the first payment to be made on such of those days as should first and next happen after the decease of the said *W. W. Want*. Added to the policy was a N. B. that, by the rules of the society, if any member neglect to pay the quarterly premiums for 15 days after the same become due, the policy will be void, *unless the member* (continuing in as good health as when the policy expired) *pay up within six calendar months then next all arrears*, together with 5*s.* for every month elapsed after such premium became due, or 5*s.* for the time elapsed, if less than a month. There was another policy of the same tenor and date for another like annuity of 50*l.* By the rules of the society it was, amongst other things, declared and agreed, that if *any member* of that society should neglect to pay any quarterly premium, which should be payable for any assurance, for the space of 15 days after the same should become due, then the policy should cease and determine, and the assurance be void to all intents and purposes, *unless the member making such default* should, within six calendar months next ensuing, (continuing in as good health as at the time the policy was suffered to expire) pay up all arrears of such premiums, together with 5*s.* for every month which should have elapsed.

The case then states, that continually from the time of making the two policies the quarterly premiums therein mentioned, which respectively became due before and on the 29th of *Sept.* 1808, were duly paid within the time allowed for that purpose : but that the quarterly payments which became due on the 20th of *Dec.* 1808, were not paid at the time they became due. That *W. W. Want* died on the 25th *Dec.* 1808. That he did not in his lifetime pay or tender, or offer to pay, the said quarterly premiums, which became due on the 20th *Dec.* 1808, or either of them : but that on the 27th *December* 1808, *which was after his death*, but *within 15 days after the said 20th Dec.*, when they had become due, *the said two quarterly premiums were tendered* and offered to be paid *by the executors* of the said *W. W. Want* to the clerk and receiver of the said society, (to whom also due proof of his death was offered) who refused to receive them.

This case has been argued, on the part of the plaintiffs, on the ground of its being, or bearing an analogy to, a case of a condition annexed to a real estate : and it was said, that the premium to be paid by the assured was a condition *to create* an estate ; that is, that the annuity to the wife for her life was to depend on the previous payments of the quarterly premiums by the husband, and which were to create, as it were, the annuity for the life of the wife ; and that such conditions need not be strictly performed according to the letter ; but that it is sufficient if such conditions be performed as near to the condition as may be, and according to its intent and meaning ; although the letter and words of the condition cannot be performed : different from conditions which are to destroy an estate : for those are to be taken strictly. And authorities^(a) were cited in support of such distinction, as to conditions annexed to real estates. But we are of opinion, that the analogy does not hold in the present case, and that the rules applicable to conditions with respect to land do not apply. This is a contract of assurance, and must be construed according to the meaning of the parties expressed in the deed or policy. It is an insurance on the life of a husband, not, as usually is the case, of a

(a) *Shep. Touch.* 140, 1, and *Lit.* 334, 337. And the cases of *Tarleton v. Stainforth*, 5 *Term Rep.* 696, and *Salvin v. James*, 6 *East*, 571, were also cited in the argument.

certain sum of money payable on the event of his death during the continuance of the policy or insurance; but of an annual payment of his wife, for her life, in case she shall survive him, to commence from and after his decease. *The risk insured against is his death:* and the premium is a quarterly payment to be made *by him* to the society, who are the underwriters, during *his* life. The duration of the insurance is so long as *he* shall continue to make those quarterly payments: but the insurance is not to be void, if he pay the quarterly premium within such time after the quarter day as is allowed by the rules of the society. The rules of the society, as stated in the case, are, that if any member should neglect to pay any quarterly premium for the space of 15 days after the same should become due, then the policy and assurance thereby made should absolutely cease and be void to all intents and purposes; unless *the member making such default* should, within 6 calendar months then next, (*continuing in as good health as when his policy was suffered to expire*) pay up all arrears of such quarterly premiums, and also 5s. for every month, and fraction of a month which should have elapsed since such premium became due. This is the only rule of the society allowing any further time beyond the quarter day: and by this rule it seems to be allowed to the *assured or member* to keep his assurance on foot and his policy in force, on the terms of simply paying up the quarterly premium, if the neglect has not exceeded 15 days after the same became due, without any additional penalty, and without the condition which is imposed in case of longer neglect, *of being in as good state of health as when his policy expired*. But the plaintiff contends, and her whole case depends on making out that point, that by the true construction of this rule of the society, and the clause in the policy referring to it, it is not necessary that *the party whose life is insured should himself* pay or cause to be paid the premium within the 15 days, or in fact be alive at the time it is paid; but that it is sufficient, if *any other person* interested in the insurance should cause it to be paid within the 15 days, though the event insured against might then have happened. In order to determine this point, it is material to consider, 1st, Whether at the time of the death of the person insured, the policy were or were not expired; because if the policy were expired at the time, the defendants cannot be held liable. Now, the insurance is for a quarter of a year, and so on from quarter to quarter, and it expires at the quarter day: such is the clear understanding of the parties as expressed in the rule of the society referred to by the policy, and stated in the case; viz. (*continuing in as good health as when his policy was suffered to expire*), that must refer to the quarter day up to which only the premiums had been paid, and cannot include the further term of 15 days which must be covered by the further premium; each premium being for an insurance for a quarter of a year only, and not for a quarter and 15 days. To this point the case of *Tarleton and Others v. Staniforth and Others*, 5 T. Rep. 695, is an authority. So that the death of *Want* happened during a period not covered by the policy; viz. on the 25th of *Dec.* Again, by the constitution of this society every person making an insurance on his life becomes a *member* of the society, and executes the deed of settlement, as it is stated in the policy, that *W. W. Want* had done in this case; and is liable to contribute to answer the claims made on the society: and the committee, that is, the defendants, covenant with *Want* to pay the annuity to his widow, after his death, if he shall pay the quarterly premiums on the day specified, or within the time allowed by the rules of the society; and if he shall also pay and contribute his proportion of the monies, which the members of the society shall, *during his life*, be called upon to pay and contribute, according to the rules of the society, towards making good any deficiency. It is clear therefore, that he was only to contribute to such claims as *the members* of the society should be called on to pay *during his life*; and if any calls had been made on the 26th of *Dec.* they could not have affected him or his estate; and yet after he has ceased to

be a member of the society, it is insisted that a payment may be made on his behalf, to revive the liability of the society to some person at the time of payment of the premiums not a member of the society. The whole tenor of the policy and rules and orders shews that no person can be assured *without being a member*. It is a society insuring each other. The first step required is to sign the deed of settlement, and become a member; and then the premium is paid by him as a member of the society. So that no person, except he or she be a member of the society, is entitled to make assurance with them; and the paying a premium for another quarter is making a new assurance, though under the former policy. The whole frame of the policy, too, shews that every premium must be paid during the life of the assured. The agreement for the insurance stated in the beginning of the policy is in consideration of a quarterly premium of 2*l.* 13*s.* 6*d.*, to be paid *during the life of W. W. Want*. The covenant on the part of the defendants to pay the wife's annuity, after *Want's* death, is "if *Want* shall pay or cause to be paid the quarterly premium on every quarter day, *during the life of Want*, or within such time after as shall be allowed by the rules of the society for that purpose:" in construing which sentence, the expression *during the life of Want* must be understood as applying and carried on to the latter part of the sentence, and is the same as if the words *during his life* had been repeated after the words *within such time after*, i. e. or within such time after *during his life*. It is observable, that throughout the policy, the words *executors or administrators*, are used only once, namely, in the covenant of the defendants, where they covenant with the said *Want, his executors and administrators*, to pay the annuity to his widow after his death: and there the addition of those words was proper and necessary, inasmuch as the covenant must necessarily be enforced by his executors or administrators; the same not being to be performed till after his death. In every other act to be done, it is expressed as being to be done by *Want*, or as being neglected to be done by *Want*, or by such *member* of the society, without any added words indicating an intention that it should be any other than the personal act or neglect of the assured. For these reasons, we are of opinion, that the death of *W. W. Want*, which happened on the 25th of *Dec.*, was during a period of time not covered by the policy: and that on the true construction of the policy and rules of the society, the insurance could not be continued beyond the expiration of the quarter, which ended on the 20th of *Dec.*, by a tender of the premium by his executors after his death, though within 15 days after the quarter day: so as to include within the policy the period of his death. The consequence is, that judgment of nonsuit must be entered.

The King v. The Inhabitants of the County of Bucks.

12 East, 192. Feb. 12, 1810.

The inhabitants of a county are bound to repair every *public* bridge within it, unless, when indicted for the non-repair of it, they can shew by their plea, that some other person or body politic or corporate, is liable; and every bridge in a *highway* is, by the statute of bridges, 22 H. 8. c. 5, taken to be a *public* bridge for this purpose.

Therefore, where Queen *Anne*, in 1708, for her greater convenience in passing to and from *Windsor* Castle, built a bridge over the *Thames* at *Datchet* in the common highway leading from *London* to *Windsor*, in lieu of an ancient ferry with a toll, which belonged to the crown; and she and her successors maintained and repaired the bridge till 1796, when being in part broken down, the whole was removed, and the materials converted to the use of the king, by whom the ferry was re-established as before; held that the inhabitants of the county of *Bucks*, who, in answer to an indictment for the non-repair of that part of the bridge 13 years afterwards, pleaded these matters, and traversed that the bridge was a common public bridge, were bound to rebuild and repair it.

THIS was an indictment for not repairing the half part of *Datchet Bridge* lying in the county of *Bucks*.

The defendants by their plea, protesting that the bridge indicted, called *Datchet Bridge*, was a common public bridge, and that the same never was used for all the subjects of the king by themselves, and with their horses, carriages, &c. in manner and form as in the indictment alleged; pleaded, that long before and at the time of erecting the bridge in question, *Queen Anne* was seised in her demesne as of fee, in right of her crown, of an ancient ferry with the appurtenances, called *Datchet Ferry*, across the said river *Thames*, at the same part thereof where the said bridge was erected for carrying over that river all persons and their horses, carriages, &c. in boats kept by her there for that purpose for certain ancient tolls, &c. therefore due and payable: and the queen being so seised, and being desirous to relieve herself, her heirs and successors from the burthen and expence of the said ferry, &c. on the 1st of *Jan.* 1708, at her own charge erected a bridge across the said river at the same part thereof where the said ferry was situated, being the said bridge in the indictment mentioned, in order that the subjects of the queen, &c. by themselves and with their horses, carriages, &c. might go over the same at their free will and pleasure, in lieu of their using the said ferry. That from the building of the said bridge until the removing of the same as aftermentioned, the said bridge has been repaired when necessary at the expence of the said queen and her royal successors. That the now king, being desirous to remove the said bridge, and in lieu thereof to re-continue and re-establish the use and exercise of the said ferry, and to receive and have the enjoyment and benefit of his tolls, &c. thereto belonging, on the 1st of *Jan.* 1796, did take down and remove the said half part of the said bridge in the county of *Bucks*; the said half part being then in good repair; and carried away and converted the materials thereof to his own use; and did thereupon re-establish and re-continue the use and exercise of the said ferry, as the same was in use and exercise before the erecting of the said bridge. That from the time of removing the said bridge by the now king hitherto, being for 13 years and upwards, all the king's subjects have used and still use the said ferry in the same manner as they were accustomed to use the same before the erecting of the bridge; *without this*, that the said bridge in the indictment mentioned was a common public bridge, and used for all the king's subjects, &c. in manner and form as in the indictment charged. At the trial before Lord *Ellenborough*, C. J. at *Westminster*, the defendants were found guilty, subject to the opinion of the Court on the following case.

Queen Anne, was seised in fee in right of the crown of an ancient ferry, with the appurtenances, called *Datchet Ferry*, across the river *Thames*, for the passage over that river of all persons, horses, carriages, and cattle, in boats kept by her there for that purpose, for certain ancient tolls; and being so seised, about the year 1706, built a bridge across the river about five yards above the place where the ferry was situated. The sign manual of her majesty to the Lord High Treasurer for building the said bridge is as follows; viz.: *Anne R.* "Whereas we have given directions to our trusty and well-beloved *Samuel Travers*, Esq., our surveyor-general, for building a bridge at *Datchet*, near *Windsor*, over the river *Thames*, for the better conveniency of our passage to and from our castle at *Windsor*: and whereas our said surveyor hath made a computation, (which is hereunto annexed,) of what timber he thinks will be necessary to build the said bridge; and it being represented to you by *Edward Wilcox*, Esq. surveyor-general of our woods on the south side of *Trent*, that there is timber in *Windsor Forest* proper and sufficient for the said works: Our will and pleasure is, and we do hereby authorize and command you to issue forth your warrant unto the said *Edward Wilcox*, directing him, with the assistance of the proper officers of the said forest, to mark, fell, and cut down so much timber (unfit for the service of the navy,) in such places where the same may most conveniently be spared within the said forest, as will be sufficient for building the said bridge pursuant to the said computation hereunto annexed, and to deliver the timber when felled to the said *S.*

Travers, or whom he shall appoint to receive the same, by indenture to be made between the said *S. Travers* on the one part, and the said *E. Wilcox* on the other part, &c. : and in case on converting the said timber, any parts thereof be found serviceable for the navy, you are to direct the said *E. Wilcox* to deliver such timber to a proper officer of the navy by indenture for the service of our navy, as hath been usual in the like cases. And you are further to direct the said *E. Wilcox* to sell the lops, tops, bark, and offal wood of the whole for the best advantage that can be got for the same for our use, and to account for the said service before the auditor of our county of *Bucks* on or before the last day of *Hilary* term next. And for so doing this shall be your warrant. Given at our court at *Kensington*, the 25th day of *March* 1706, in the 5th year of our reign. By her majesty's command, *Godolphin*." This was directed to the Lord Treasurer *Godolphin*. This bridge was constantly repaired by her majesty and her royal successors, from time to time, until the year 1771, when the surveyor-general having reported to the Lords of the Treasury, "that the bridge had become ruinous, and must of necessity be "taken down; that it had been built and always repaired by his majesty, who "had frequent occasions of passing over it;" an order was made by the Lords of the Treasury in 1772, to build a new bridge with stone piers; which bridge, being the bridge mentioned in the indictment, was finished in 1775, at an expence of 5187l. 6s. to his present majesty, who from time to time repaired the last-mentioned bridge at his own expence, until 1796, when it being much out of repair, and having given way and fallen in on the part which lies in *Buckinghamshire*, and becoming thereby wholly impassable, the wooden part of it was taken down by his present majesty, and the materials were sold or otherwise converted to his own use. The said bridge is situate in a principal highway from *London* to *Windsor*, and has always, except when it became at different times impassable for want of repair, and when it was rebuilding as aforesaid, until it was finally taken down in 1796, been used by the public on all occasions, for all purposes, of passage over it, without any toll ever having been paid or demanded; and was, during the discontinuance of the ferry, the means of passing the *Thames* in the said highway, and was at all times of great public use and convenience. At the time when Queen *Anne* built the first-mentioned bridge, she discontinued the use of the ferry, and the said ferry remained so discontinued from that time until the bridge was finally taken down in 1796, when his present majesty re-established the said ferry, which hath been used for the public ever since, and still is used by them for the purpose of passing over the *Thames* at the place aforesaid. During the time the ferry hath been in the hands of the crown, the same hath been and still is maintained at the expence of the crown, and the public have at all times used the same toll free. The question for the consideration of the Court was, whether this were a public bridge, the part of which lying in their county, the defendants were liable to repair and rebuild.

Bowen, for the prosecution, contended that this was a public bridge, and therefore the county were bound by law to repair it, unless they could throw the burthen upon some other person. The circumstances of its having been built in a public highway, having been always used by the public, and being found to be of great public convenience, establish it to be a public bridge within the principle of all the cases; and this conclusion is rather confirmed than otherwise, by the fact of its having been originally built by the crown for the particular accommodation of the sovereign. Even if a private man build a bridge for his own convenience, but dedicate it to the public, by suffering them to have the general use of it, and they do accordingly use it, and it is in fact a public convenience, the burthen of repair is thereby thrown upon the country at large. *Rez v. The Inhabitants of the County of Glamorgan(a)*,

(a) Before Lord *Kenyon*, C. J. in 1788, 1 *Bac. Abr.* by *Gwillim* 535, and 2 *East*, 356.

the *Glusburne Bridge* case, 5 Burr. 2594, and 2 Blac. 687, and *The King v. The Inhabitants of the W. R. of Yorkshire*, 2 East, 342, establish this doctrine. While the crown kept up the ferry, it was not competent for the county or any individual to have built a bridge in this place, as that would have been in derogation of the right of the crown to the tolls of the ferry; and in *Payne v. Partridge*, 1 Salk. 12, and 3 Mod. 289, it is said, that the owner of a ferry could not let down the ferry and put up a bridge, without licence, and an *ad quod domnum*. The crown, however, might do this by its prerogative; and having once erected the bridge, and suffered the public to use it for their convenience, the legal consequence follows: for it would lead to great public inconvenience if the ferry and the bridge could be substituted the one for the other from time to time. It can make no difference that the materials of the old bridge were taken away by the crown: for when the ruins of the old bridge were taken down, the property in the materials reverted to the crown, at whose expence the bridge had been built; *Harrison v. Parker*, 6 East, 154. But if the crown had no right to take them away, they may obtain redress by petition of right. Neither can the constant repair of the bridge since it was erected by the crown vary the question, though it might have been used as an argument that the bridge was in fact built and sustained for the personal convenience of the sovereign: but it having become a public bridge, the liability to repair it falls of course on the county, as soon as the crown ceased to repair it.

Tindal, contra, contended that the county were not bound to repair the bridge; it was not built in the original highway, but several yards on one side of it; and therefore, even if built by a private person, it could not have been indicted as a nuisance in the first instance. [*Le Blanc*, J. How is that statement to be reconciled with the finding in the special case, that the bridge is built in a principal highway? It has become a principal highway since by the using of the bridge: but taking all the circumstances of the case together, it appears not to have been in the highway at first. [Lord *Ellenborough*, C. J. It is stated to be now in a principal highway from *London to Windsor*; and we must presume that it was so from the first user of it; being built for the convenient passage of her majesty along the old highway.] Then taking it to be so; yet, 1st, if the queen meant to retain the dominion of the bridge to herself, her suffering the public to use it will not make it a public bridge against her consent. 2dly, the facts of this case shew that she did not retain the dominion of it. 3dly, Since the stat. 1 Ann. st. 1. c. 7. s. 5, there can be no grant of a bridge by the crown, to the inhabitants of a county. First, Where the builder of a new bridge shews by his acts that he means to retain the dominion over it, it does not become a public bridge by his merely suffering the use of it by the public. The allowance to the public of a limited or temporary use of it would clearly not be deemed an abandonment of the bridge to them. If one who was bound to repair an ancient bridge *ratione tenuræ* were to build a new bridge at a little distance while the old one was under repair, that could not be deemed an abandonment of the new bridge, but the public would still have a right of passage over the old bridge when repaired. So here, upon the removal of the new bridge, and the restoration of the ancient ferry, the right of the public to use the latter would be resumed. In the cases cited of *Glusburne Bridge*, 5 Burr. 2594, and *Pace Gate Bridge*, 2 East, 342, they were erected for the express purpose of being dedicated to the public use: and the *Glamorganshire Bridge*(a) was stated to be built in the king's highway. Then, 2dly, the facts here stated shew, that the crown meant to retain the dominion over *Datchet Bridge* during the time it was in existence. The warrant for building it shews that the queen only looked to her own convenience; the bridge was constantly repaired by the crown:

(a) Cited ib. 356.

which is a continuing act of ownership, and rebuts any presumption that the crown had abandoned it to the public: in 1771, the king pulled down the old bridge, and in 1775, built the new one; and this, again, was pulled down by the king in 1796, when the materials were sold for his majesty's benefit: which was the most complete assertion of ownership. [Lord *Ellenborough*, C. J. If it had become a public bridge before that time, the misconception of the crown as to its own right would not alter the right of the public.] It is available as evidence that the crown never meant to abandon the bridge to the public: the same intention was evinced by the keeping up of the ferry: it was an experiment of the sovereign to see whether the ferry or the bridge best answered the purpose of the royal convenience. Then as the user of the bridge by the public from 1775 would, if unexplained, be evidence of their adoption of it; so the user by the public of the ferry since 1796 is also evidence of their re-adoption of their ancient right. 3dly, Since the stat. 1 Ann. at 1. c. 7. s. 5, restraining grants of crown lands for any longer period than 31 years or 3 lives, the crown could not abandon the land on which the bridge is built in perpetuity to the county. [*Grose*, J. It is not stated to be crown land: it is only stated that the bridge was built in the public highway, which may be the land of a subject as well as of the crown.] The Court would rather presume that it was the land of the crown, than that the king had invaded the property of the subject. [Lord *Ellenborough*, C. J. If it were the land of a subject, his acquiescence would be evidence of his assent to dedicate it to the use of the public. But I draw no presumption either way: you assume it to be the land of the crown, in order to raise the argument. *Bayley*, J. The title to the land may still remain in the crown, though the bridge is public.] Considering it only as a grant of a right of passage, still the crown could not grant it to the subject. [*Le Blanc*, J. The question does not arise upon the case as stated.]

Bowen, in reply, observed, that the intention of the crown to continue its dominion over the bridge cannot controul the operation of law arising from the public user of it. And as to the acquiescence of the public for the last 13 years in the demolition of the bridge, it could only be evidence in any case of a grant or release, and the public cannot grant or release any right. He concluded by saying, that it was a case of consequence, and other gentlemen had taken notes for a second argument if the Court entertained any doubt upon it.

LORD ELLENBOROUGH, C. J. The only question is, whether it were a public bridge. The case is of novelty sufficient to induce us to take it into further consideration: and if we should entertain more doubt upon it than we do at present, we shall order a second argument.

His Lordship, on the last day of term, delivered the judgment of the Court.—This was an indictment against the inhabitants of *Buckinghamshire* for not repairing the half of *Datchet Bridge* lying in that county. The defendants pleaded specially, with a traverse that the bridge was a public one: and upon the trial before me at *Westminster*, a verdict was found against them subject to a case. His Lordship then stated the substance of the facts found in the case; after which he proceeded].—The question reserved upon this case for the consideration of the Court is, Whether this were a public bridge, the part of which lying in their county the defendants were liable to repair or rebuild. The county not having tendered an issue by their plea, that any other description of persons, i. e. that any body politic or corporate, or natural person or persons, were liable to the repair of the bridge in question, the burthen of repairing the half part of the bridge which was situate in *Buckinghamshire* will rest upon the defendants, if it be under the circumstances a public burthen to be by law imposed upon any body. And that depends upon the single question made at the close of this case, whether this were a public bridge. None of the cases cited profess to give an immediate definition or description

in terms of what shall be considered "public bridges;" although a distinction between a public and a private bridge is taken in 2 Inst. 701, and made to consist principally in its being built for the common good of all the subjects, as opposed to a bridge made for private purposes; and the instance put of a private bridge is a "bridge to a mill which *A.* was bound to maintain over which *B.* had passage." And the words themselves, i. e. "public bridges," do not occur in the stat. of 22 H. 8. c. 5, called the statute of bridges. But the sense of these words may be very distinctly inferred from the statute, which empowers the justices of peace in their general Sessions to inquire of "all manner of annoyances of bridges broken in the *highways*," and applies to bridges of that description all its subsequent provisions; and amongst others, that, which casts upon shires and ridings the repair of bridges situate within them (and without any city or town corporate)" where it cannot be known and proved what hundred, riding, wapentake, city, borough, town, or parish, nor what person certain or body politic ought of right to make *such* bridges decayed, i. e. such bridges *broken in highways*. Inferring, therefore, from the statute, that a bridge in a *highway* is a public bridge for all purposes of repair connected with the statute of bridges, we have only to refer to the case before us to see whether this be a bridge in a highway. And upon such reference we find it expressly stated to be "a bridge in a principal *highway*," and of course, as public as the highway itself is in which it is situate, and of which for the purpose of passage it must be understood to form a part. I say, must be understood to form a part, because if it had been a bridge built for the mere purpose of connecting a private mill, for instance, with the public highway, or for any other such merely private purpose; although the public might occasionally participate with the private proprietor in the use of it, the bridge would not merely on that account necessarily become a part of the highway. It has been said, that this is to be considered as a private bridge, because in the warrant of her majesty Queen *Anne* for the building of it, she describes it as being built "for the better conveniency of her passage to and from her castle of *Windsor*." But if the words themselves could be considered as importing a mere purpose of private conveyance and use; and which, with reference to the public station and dignity of her majesty, and the public resort which must be had to her in the place of her residence, can hardly be; yet the cotemporary as well as the immediately subsequent and continued use of this bridge on the part of the public, without any interruption, shews conclusively, that her majesty contemplated a more general and public use of the bridge which she had built: indeed, that she contemplated an use of the bridge as public as that of the ferry had been, which was discontinued upon the erection of the bridge. But it may be asked, is every sort of bridge, erected as it may happen to have been for a temporary purpose during a time of flood or the like, and which may have rendered the ordinary fords impassable, or the ordinary means of passage impracticable, to be considered as a *bridge in a highway*, to be repaired when broken down, according to the provisions of the stat. of Hen. 8? The answer is, certainly not. A merely occasional substitute of this nature, removed as soon as the temporary purpose of its erection is answered, is not a bridge within the contemplation of this act, which certainly relates only to bridges respecting which a reasonable question may arise as to "who ought to make them" and not to those, respecting which no question can ever arise whether they ought as a matter of public obligation to be made at all. If the meaning of the words "*public bridge*" could properly be derived from any other less authentic source than the statuteable one I have mentioned, they might safely be defined to be such bridges as all his majesty's subjects had used freely and without interruption as of right, for a period of time competent to protect them and all who should thereafter use them from being considered as wrong-doers in respect of such use, in any mode of proceeding, civil or criminal, in which the legality of such use might be questioned. And if a

free and uninterrupted use of a bridge for near 90 years be not sufficient for the purpose of such protection, I am at a loss to say what length of time, or that any time, however long, could be effectual for the purpose. The circumstances of the removal, and application of the materials of the bridge to his majesty's use, cannot render it less a public bridge within the statute, if it had effectually become so prior to that period: and the only way in which that circumstance operates is in the way of evidence, and in order to establish that the bridge was in its origin and purpose a private one; a supposition which is, in this case, entirely repelled, by the free and continued use of it, on the part of the public, from the moment of its construction about the year 1706, to its downfall and destruction in 1796. It is unnecessary to pronounce what effect, if any, the several circumstances stated may have upon the legal existence of the ferry in question. Upon that subject we have at present no occasion to intimate an opinion. It is enough for us to say, that neither the original existence and the use of the ferry, nor its discontinuance afterwards, nor its renewal since, have the effect of either precluding or qualifying the operation of the statute of bridges in respect to the bridge now under consideration. Upon the whole, therefore, in conformity with the letter and spirit of the statute of bridges itself, and with all the cases which have in later times been decided upon this subject, and particularly with that of *Glusburne Beck Bridge (Rex v. The Inhabitants of the West Riding of Yorkshire, 5 Burr. 2594.)* and the principles there established, and since recognized in several subsequent cases, we are of opinion, that this bridge, situate in a principal highway, and used, as it so long was, for all persons as a public bridge, and being also of great public use and convenience, was, and is, a bridge repairable (as to the half part now in question) by the county of *Bucks*, in which it was, until the period of its late dilapidation and destruction, situate: and of course, that the verdict found in this case against the defendants must stand.

Judgment for the Crown.

Truckenbrodt v. Payne.

12 East, 206. Feb. 12, 1810.

To trespass and false imprisonment a plea of alien enemy not allowed to be pleaded together with a special justification inconsistent therewith and the general issue.

TO an action for an assault and false imprisonment the defendant pleaded, 1st, not guilty: 2dly, that the plaintiff was an alien enemy; and 3dly, that the plaintiff having committed a felony, the defendant gave him in charge of a constable to be taken before a magistrate. *Abbott* thereupon obtained a rule calling on the defendant to shew cause why the rule before made for pleading several matters should not be discharged, on the ground that the Court would not suffer a plea of alien enemy to be pleaded with any other matter. *W. E. Taunton*, on shewing cause, said he was not aware of any general practice of the Court not to suffer alien enemy to be pleaded with other matters: though in *Shombeck v. De La Cour*, 10 East, 326, it had not been allowed to be coupled with a plea of tender to an action of *assumpsit*. But this was an action of a very different nature, and there was no reason for preventing the defendant from availing himself of every legal defence against it.

The Court, however, said it was now the practice here as well as in C. B. not to suffer the plea of alien enemy to be pleaded with other matter inconsistent with it; (1) and that the court in several instances of late had withdrawn per-

(1) Vide *Feron v. Ladd*, 2 Bla. Rep. 1326. *Angerstein v. Vaughan*, 1 Bos. & Pull. 222. n. (a). *Thyatt v. Young*, 2 Bos. & Pull. 72.

mission to plead several matters, unless the defendant agreed to strike out the plea of alien enemy : (1) but on this occasion they gave *Tauxton* leave to elect which of the special pleas he would abide by.

(1) As to the subject of pleading double under stat. 4 Ann. c. 16. s. 4 and 5, see 1 Chitty on Plead 540 to 543. 5 Bac. Abr. 447, Gwil. edit. In the *Supreme Court of Massachusetts*, a motion for leave to plead double to a writ of error was denied, the court doubting whether the statute allowing double pleading extended to writs of error. *Parker v. Gilson*, 1 Mass. Rep. 230.

CASES.
IN
EASTER TERM,

IN THE FIFTIETH YEAR OF THE REIGN OF GEORGE III.

**Evan Williams and Daniel Williams v. Catharine Williams,
Widow.**

12 East, 209. 1810.

By settlement before marriage the husband's estate was conveyed to trustees to the use of the husband for life, *sans waste*; remainder to trustees to preserve contingent remainders: remainder to the use of the wife for life, for her jointure, and in bar of dower; remainder to the first and other sons of the marriage in tail male; remainder to the first and other daughters in tail male; remainder to the heirs of the body of the husband and wife; remainder to the right heirs of the husband: the wife survived the husband, and had no issue; and after possibility of issue by the husband extinct; held, that she was tenant in tail after possibility, &c.; that she was unimpeachable of waste, and was entitled to the property of the timber when cut by her.

THIS was a case sent by the Lord Chancellor for the opinion of this Court. *Daniel Williams*, now deceased, was, prior to his marriage with *Catharine Williams*, then *Catharine Prosser*, seised in fee-simple of certain estates hereinafter mentioned; and by indentures of lease and release of the 7th and 8th of Oct. 1787, made between him of the first part, *J. Prosser*, and *Catharine Williams*, (then *Prosser*), daughter of the said *J. Prosser*, of the second part, and *T. Griffin* and *A. Barnes* (trustees) of the third part; after reciting the intended marriage, it was witnessed, that in consideration thereof, and of 1000*l.* paid by *John Prosser* to *Daniel Williams* for the marriage portion of *Catharine*, and for settling the lands, &c. aftermentioned to the uses therein limited and declared, &c. *Daniel Williams* conveyed to the trustees and their heirs a messuage and other premises called *New Wonastow*, and other closes of land named in such settlement, containing together 130 acres; and also a tenement and lands belonging thereto, called *Worthy Brook Lands*, containing 75 acres, all in the parish of *Wonastow*; to hold to the trustees and their heirs to the use of *Daniel Williams* in fee until the marriage, and after that to his use for life, without impeachment of waste: remainder to the use of the trustees to preserve contingent remainders; remainder to the use of *Catharine Prosser* for life, for her jointure, and in bar of dower; and after the several deceases of *D. W.* and *C. P.*, remainder to the use of the first and other sons of the marriage in succession in tail male; remainder to the first and other daughters of the marriage in succession in tail male: and in default of such issue, to the use of the heirs of the bodies of *Daniel Williams* and *Catharine Prosser*: and in default of such issue, to the use of the right heirs of *Daniel Williams*

for ever. The indenture also contained a power to *Daniel Williams* during his life, and after his decease to *Catharine Prosser* during her life, by indenture to demise and lease all or any part of the premises for any term of years not exceeding 21 years, to commence in possession, and not in reversion, or by way of future interest, *so as no such demises or leases, by any express words therein contained, should be made dispendable of waste.*

The marriage between *Daniel Williams* and *Catharine Prosser* afterwards took place, but they never had any issue. And *Daniel Williams* afterwards, by his will, properly executed and attested, dated the 5th of Feb. 1803, devised, from and after the decease of *Cath. Williams*, all his messuages, lands, &c. called *New Wonastow* and *Worthy Brook*, in the parish of *Wonastow*, and all other the settled lands to his nephews *Evan Williams* and *Daniel Williams*, (the plaintiffs) as tenants in common fee. The testator died in 1804, and left *Catharine* his widow, and his said two nephews, him surviving; one of whom, *Evan Williams*, is his heir at law. Upon the testator's death his widow entered into and hath since been in possession of the settled estates. There are a great many oak and ash timber trees growing on such settled estates so devised to the plaintiffs: and the defendant, *Catharine Williams*, having threatened to cut them down, in order to sell the same for her own use, the plaintiffs filed their bill in Chancery against her; praying for a perpetual injunction, to restrain her from cutting down any timber trees growing upon the settled estates. To which bill the defendant demurred, because the plaintiffs were not entitled to such relief: and it was insisted by her, that she took such estate and interest in the settled estates, by virtue of the said indentures of lease and release, as entitled her to cut the timber growing upon them for her own benefit. And upon the argument of such demurrer, the Lord Chancellor ordered this case to be made for the opinion of the Court, upon the following questions:

First, Whether the defendant, *Catharine Williams*, were unimpeachable of waste upon the estate and premises comprised in the indentures of lease and release or settlement in the bill mentioned? Secondly, Whether, having cut timber thereon, she be entitled to the timber so cut as her own property? And, thirdly, Whether the defendant's estate for life merged in the tenancy in tail after the possibility of issue extinct?

Dampier argued for the plaintiffs, in last *Michaelmas* term, and contended for the negative of the several questions proposed. If *Catharine Williams* were to be considered as tenant in tail after possibility of issue extinct, he admitted, upon the direct authorities of Co. Lit. 27, b. and 2 Inst. 302, that she was not impeachable of waste: though it did not follow, that the timber cut would be her property. But, first, be denied that her estate for life merged in her remainder in tail after possibility. (a) The two estates are said to be equal in quantity, and to differ only in quality: therefore, there can be no merger; for that is only where a greater and less estate come together in the same person. A life estate may be exchanged (b) with a tenancy in tail after possibility, &c.: which shews their equality as to quantity: and it would be absurd, that one estate equal in quantity to another should merge in that other; and by the third resolution in *Lewis Bowles's* case, 11 Rep. 81, the life estate does not merge in the estate tail after possibility, &c. There, indeed, the tenant for life with remainder in tail after possibility, &c. was held entitled to the timber of the barn which was blown down; but there are these distinctions between the two cases, that there the husband and wife were before the birth of issue seised of an estate tail in possession, liable only to be devested by the birth of issue male, and converted into estates for life without impeachment of waste, with remainder in tail; and after the birth and death of the issue male, and the death of the husband, the wife was held not to be tenant in tail after pos-

(a) Co. Lit. 28, a. *Lewis Bowles's* case, 2d Resolution, 11 Rep. 80, a. & b.

(b) Ibid.

sibility, &c. but to have the privilege of such a tenant *for the inheritance which was once in her*. Now here the widow is merely seised of an estate for life, with a remainder in tail after possibility, &c. in succession; and in the same deed power is given her to lease for 21 years on condition of making the lessee punishable for waste. [Bayley, J. That power was necessary, otherwise the first son of the marriage coming into possession would not have been bound by the lease. Lord Ellenborough, C. J. If she cut down trees, at whose suit could she be impeached for waste?] Supposing the person entitled to the intervening remainder in tail after possibility, &c. were not the same person as the tenant for life in possession, such intervening remainder would not divest the right of the first tenant in remainder of the inheritance to the timber: then it seems to follow, that if the estate for life be not merged, the same person having the two estates in succession would not effect the right of the owner of the inheritance. Another question arises, Whether these estates, having been settled upon the wife *provisione viri*, be not within the stat. 11 H. 7. c. 20, made against alienations by the wife of the lands of her deceased husband settled upon her for life or in tail. In *Cook v. Winford*, Hil. 1701, (a) a jointress, who was tenant in tail after possibility, &c., was held to be within the statute, and therefore restrained from committing a waste; the timber being part of the inheritance. That case, if accurately reported, is decisive; but search has been made, and no account of it is to be found in the Registrar's book; therefore some doubt has been thrown upon it, otherwise the present question would not have been sent here. But even before the statute, such tenant in tail after possibility could not have suffered a recovery and alienated the inheritance; yet if she could cut and convert the timber to her own use, which is often of more value than the mere soil, part of the land might be taken and wasted, against the manifest intention of the statute. And as *timber* passes by the word *land*, this case falls within the precise words of the statute: and there is no reason for restraining the words of it, as this case is equally within the mischief meant to be guarded against. The only difficulty is upon the remedy given by the statute, which is *by entry*, and which cannot apply to timber cut, and also upon the proviso at the end, that the widow may aliene for her life, which is equally inapplicable to the same subject matter. But, by Lord Coke, (b) the effect of the statute is to strip every tenant in tail *provisione viri* of the power of cutting timber, as a mode of alienating the inheritance. [Bayley, J. Do you mean to contend, that if the tenant in tail had had issue, she could not have cut timber?] If she were a jointress *provisione viri*, she could not. [Lord Ellenborough, C. J. It is one thing to say, that timber standing is land; but it is another question, whether committing waste by cutting it down, can be said to be an alienation of the land.] A jointress *provisione viri* could not sell the timber standing; but if she could cut it down and then sell it, she would be enabled to do that indirectly which the law does not allow to be done directly. But supposing the widow was not impeachable of waste, still she has no property in the trees when cut down; for it is said in *Herlakenden's case* (c) that "if tenant in tail after possibility, &c. fell the trees, the lessor (i. e. there, the next in remainder of the inheritance) shall have them; for inasmuch as he has but a particular interest for life in the land, he cannot have an absolute interest in the trees; but he shall not be punished in waste, because his original estate is not within the statute of Gloucester, c. 5. [Le Blanc, J. That was not the point in judgment: and it is introduced with, *It is said, &c.*] In *Abraham v. Bubb*, (d) Lord Chancellor Finch took the same distinction, and restrained such a tenant

(a) 1 Eq. Cas. Abr. 221, and ib. 400, by the name of *Cook v. Whalley*.

(b) Co. Lit. 365, b. Vide the cases upon the exposition of the statute collected there, and in p. 336, b.

(c) 4 Rep. 63, a. Sed vide *Pyne v. Dor*, 1 Term Rep. 55, and the cases there cited.

(d) 2 Show. 69, and 2 Freem. 53.

from doing waste; and referred to *Endall v. Endall*(a) for the opinion of Lord C. J. Rolle to the same effect. And in *Whitfield v. Bewil*, 2 P. Wms. 240, Lord Macclesfield held, that the property of timber cut down by tenant for life belonged to the first remainder-man in tail, though there were intervening estates for life. Now here the question is, who had the first estate of inheritance? Not the tenant in tail after possibility; for such an estate cannot merge an estate for life, but is in itself mergeable in an estate tail, Co. Lit. 28, a.: but the plaintiff. The situation of the defendant is this: she is tenant for life of an estate impeachable of waste, with remainder to herself of an estate for life without impeachment of waste; remainder to the plaintiffs in fee; the plaintiffs therefore having the first estate of inheritance in remainder, are entitled to the timber when cut.

Benyon, contra, in arguing for the affirmative of the questions proposed by the Lord Chancellor for the opinion of this Court, said, that though he could not, against the authorities, contend that in strictness a tenancy for life could merge in a tenancy in tail after possibility, &c.; the quantity of both estates being the same, though of different qualities; yet he insisted, that the defendant was entitled to enjoy all the interests of the greater estate in possession, notwithstanding her prior estate for life: which was merged, if at all, not in the tenancy in tail after possibility, &c. but in the immediate remainder in tail which she once had before the estate after possibility, &c. arose. For here, he observed, that upon the death of her husband, she became seised for life, with an immediate remainder in tail to her and her husband, while there was a possibility of issue of the marriage; and therefore her remainder in tail was not separated from her life estate by any intermediate estate of inheritance; as in *Lewis Bowles's* case, where there was a vested estate tail in *John*, the issue, intervening between the life estate and the tenancy in tail in remainder; which vested estate tail continued in *John*, who lived until after the time when the tenancy in tail after possibility arose. But here the remainder in tail in the issue was always in contingency, there having been no issue born. Now, during the period when the defendant, tenant for life, had such immediate remainder in tail, and before the tenancy in tail after possibility, &c. arose, the merger of her life estate took place in such immediate tenancy in tail, without any intervening vested estate of inheritance; and not after the commencement of the tenancy in tail after possibility, &c. In this view, the third question is not so properly framed in the terms of it as it should have been. [*Bayley*, J. asked if he had looked at the case of *Sutton v. Stone* in 2 Atk. 191, in the beginning of which he observed, that there must be some mistake in the report.(b)] But if the Court should consider that the defendant had only a bare tenancy for life, with a remainder in tail after possibility, &c.: still, by reason of the latter and greater estate, to the benefits of which she was entitled in possession, she is not impeachable of waste, and has the property in the timber cut. *Lewis Bowles's* case, 11 Rep. 81, a. was decided on

(a) In the report of *Abraham v. Bubb*, in 2 Freem. 54. Lord C. J. Rolle is stated to have been of opinion in *Endall v. Endall*, that trover would lie for the reversioner against tenant in tail after possibility, &c. for trees cut down by him; but that case, which is to be found by the name of *Udal v. Udal*, in *Alleyne*, 81, and of *Uvedall v. Uvedall*, M. 24 Car. 2, in B. R. in 2 Rol. Abr. 119, was not the case of tenant in tail after possibility, but the case of *A.* tenant for life, remainder to his first and other sons in tail, remainder to *B.* for life, and to his first and other sons in tail: and *A.* having no issue, cut the timber. And it was held, that that the possibility of the estate tail which might come to *A.'s* son, if he had any, was no impediment to *B.'s* son *C.* (or, as *Alleyne* has it, another remainder-man in tail), who has then the first tenant in tail, maintaining trover against *A.* the tenant for life in possession; the property of the trees when cut being in him who had the immediate inheritance of the land in him at the time when they were cut; though the intervening remainder for life to *B.* was an impediment to *C.'s* maintaining an action of waste during *B.'s* life. Note. The tenants for life there were not made unimpeachable of waste; and this is agreeable to the decision in *Whitfield v. Bewil*, 2 P. Wms. 240.

(b) This part of the case is noticed in *Fearne's* Cont. Rem. 81, 4th edit. as not being intelligible.

the ground that the wife should, on account of the inheritance which was once in her, have the same privilege as a tenant in tail after possibility, &c.; considering that the privilege of such an one plainly was not only to cut the timber, but to have the property of it when cut; and there was no question, it was said, but that a woman might be tenant in tail after possibility, &c. of a remainder, as well as of a possession. As to the objection, that this interest, coming to the defendant *provisane viri*, is therefore unalienable by the stat. 11 H. 7, and that the cutting of timber by a jointress was held, in *Cook v. Winford*, Eq. Cas. Abr. 221, 400, to be within the prohibition of the statute: the distinction attempted to be taken in that case is an admission of the general right of tenant in tail after possibility, &c. to cut and enjoy timber; but that distinction is not supported by any other authority, and much doubt has been thrown upon that case, which is not to be found in the Registrar's book, and has never been acted upon since. The case does not come within the words of the statute, which is against the alienation of *lands* coming to the wife *provisane viri*: and the application of it to *timber* is neither consistent with the remedy given by entry, nor to the proviso for the wife to alienate during her life. The reason, too, given in the case why a jointress tenant in tail after possibility, &c. cannot cut timber, because she cannot alienate the land itself, would equally apply to a tenant for life *without impeachment of waste*, to whom the statute has never been contended to apply: and it is impossible to distinguish the two cases in principle: the one is not impeachable of waste by the act of the parties: the other by the act of law. *Abraham v. Bubb* was not the case of a tenant in tail after possibility, &c. restrained from cutting trees at all, as might be supposed from the short note in 2 Shower, 69, but restrained from wasting ornamental trees, as it appears by the fuller report of the same case in 2 Freeman, 53. It is not improbable, that the case of *Cook v. Winford*, which was in Hil. 1701, may have been of the same description; for shortly after, in Hil. 1704, the Master of the Rolls decided, 2 Freem. 278, Anon. that a woman tenant in tail after possibility, &c. had a right to cut timber in general; though he restrained her from cutting ornamental timber, because that seemed to be malicious. Then as to the property of the timber when cut, there can be no doubt that it belonged to the tenant in tail after possibility, &c. what was said to the contrary in *Herlakenden's case*, 11 Rep. 63, a. was an *obiter dictum*, which was denied to be in *Lewis Bowles's case*, 11 Rep. 83, a.: it was in fact thrown out at a time when the same doctrine was supposed to extend also to prohibit tenant for life, without impeachment of waste, from taking timber when cut. But it has been long settled, that tenant for life *sans waste*, has the property in the timber when prostrated: and this was recognized in *Pyne v. Dor*, 1 Term Rep. 55, in this court, and in the *Bishop of London, v. Web*, 1 P. Wms. 528, in Chancery.

Dampier, in reply said, that a separate estate for life could never merge in a joint remainder in tail; for then the husband's estate for life would in his lifetime have merged in the joint remainder in tail. That this was not so strong a case for a merger, if there could have been any, as *Lewis Bowles's case*; for there the husband and wife had a joint estate for lives, with a joint remainder in tail, after the intermediate estates tail limited to the first and other sons unborn; but even there, where the estates in possession and in remainder to the husband and wife were both joint, yet it was only held, that the joint estate for lives merged *sub modo* in the joint remainder in tail, till issue was born, and then by operation of law the husband and wife became tenants for their lives, remainder, &c. Here, then, after the death of the husband, and while there was still a possibility of issue of the marriage, *Catharine Williams* could only take a remainder in special tail *sub modo*, that is, till after possibility of issue extinct, (and the daughter of a daughter of the marriage could not have taken under that entail;) and after that, she took a general estate tail after possibility, &c. in remainder after her life estate.

And though she should be dispunishable of waste in respect of her estate tail after possibility, &c.; yet having such estate *ex provisione viri* she is within the statute 11 H. 7, which will also extend to jointresses, tenants for lives without impeachment of waste, if the cutting of timber be a species of alienation within the statute, according to *Cook v. Winford*: and it must be taken, that the legislature meant to restrain husbands from giving this power to their wives over the husband's estate, which with respect to the timber, amounts to an absolute grant, inconsistent with the limited grant professed to be made. [*Le Blanc, J.* The grant of an estate for life without impeachment of waste would take the case out of the statute.] This is claimed, not by the express grant of the husband, but as a privilege of law; tenant in tail after possibility takes not by the act of the party, but by the operation of law; and the law only favours such an estate more than a common estate for life, (which in other respects it resembles,) on account of the inheritable nature of the estate which was once in her; but here the inheritable quality of the estate being gone, nothing but the bare privilege of being dispunishable for waste remained, and the property in the timber cut is gone.

It was intimated, that gentlemen had taken notes for a second argument: but *The Court* said, that if upon consideration they had any doubt upon the subject, they would direct the case to be argued again: and afterwards they sent the following certificate:

This case has been argued before us by counsel; we have considered it, and are of opinion, first, that *Catharine Williams* is unimpeachable of waste upon the estate and premises comprised in the said indentures of lease and release or settlement in the bill mentioned. Secondly, That having cut timber thereon, she is entitled to the timber so cut as her own property. And, thirdly, That the said defendant became tenant in tail after possibility of issue extinct.

ELLENBOROUGH.

N. GROSE.

S. LE BLANC.

J. BAYLEY.

Doe on the Demise of Clarke and Others, v. Grant.

12 East, 221. May 11, 1810.

In ejectment brought upon the joint demise of several trustees of a charity, it is not enough for the defendant who had paid one entire rent to the common clerk of the trustees, to shew that the trustees were appointed at different times, as evidence that they were tenants in common: for as against their tenant, his payment of the entire rent to the common agent of all is, at all events, sufficient to support the joint demise, without making it necessary for them to shew their title more precisely.

THIS was an ejectment brought to recover possession of some land in the parish of *Linslade* in the county of *Bucks*, which belonged to the trustees of a certain charity, called *Wilkes's Charity*; and the first count, on which the plaintiff proceeded, was upon the joint demise of seven persons who were the trustees; whose title was proved by shewing the payment of rent by the defendant to their common clerk: but it appeared upon the cross-examination of the clerk, who attended at the trial with the books belonging to the charity, that some of the seven had been appointed to the trust, and been in the receipt of the rent, together with others now dead, before the present clerk had come into office; and the rest of the seven had been appointed since, and at different times. Whereupon it was objected at the trial before *Grose, J.* at *Aylesbury*, that the seven trustees coming to their title at different times, were tenants in common, and not joint-tenants, and therefore could not demise jointly: but the learned Judge over-ruled the objection, and suffered the plaintiff to recover; reserving

leave to the defendant's counsel to move to enter a nonsuit, if the objection were well founded.

Peckwell, Serjt. now moved accordingly, and renewed the objection. [*Bayley*, J. The defendant paid one entire rent to the clerk for all the trustees, which was an admission that he held under all jointly.] Such payment only admitted their rights as they legally had them: and whether they were tenants in common, or joint-tenants, the clerk was accountable at law to each for his share; but it did not make them joint-tenants, when it appeared by the evidence that they were tenants in common. [*Bayley*, J. The clerk must know whether he paid the rent into one common fund, as the case was, or whether he distributed it into seven different shares.] There was at least evidence sufficient of a tenancy in common to call upon the lessors of the plaintiff to shew their joint title in court.

Lord ELLENBOROUGH, C. J. In favour of the lessors of the plaintiff, whose tenant, the defendant, held out against them, his act in paying the one entire rent to their clerk should enure in the most beneficial way for them, in support of their title as brought forward by themselves, unless the defendant had expressly proved them to be entitled in a different manner.

Per Curiam,

Rule refused.(a)

Rawlinson, Bagot, and Mullion, v. Janson.

12 East, 223. May 11, 1810.

A licence to export goods to certain places within the influence of the enemy interdicted to British commerce, granted to *H. N.* on behalf of himself and other British merchants, &c. is sufficient to legalize an insurance on such adventure, if it appear that *H. N.* was the agent employed by the British merchants really interested in it to get the licence, though he had no property in the goods himself.

THIS was action on a policy of insurance on goods on board the ship *Daukberkeit*, from *Liverpool* to *Bremen*, in the river *Jalide*; and the place of destination being within the influence of the enemy, and interdicted to British commerce, it was necessary to have the king's licence, in order to legalize the voyage. Accordingly the plaintiffs, at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, put in a licence from the king, reciting, that "whereas it had been represented to his majesty by *Henry Nodin*, on behalf of himself and other British merchants, that they were desirous of obtaining a licence to export a cargo of salt, colonial produce, &c. from *Liverpool* to the *Elbe*, *Weser*, or *Jalide*, on board the *Bremen* galliot *Daukberkeit*, *J. R.* master, &c. his majesty thereby granted licence to suffer such ship with the cargo to pass and be exported, to whomsoever such goods might appear to belong, and notwithstanding all the documents which accompanied such cargo might represent the same to be destined to any other neutral or hostile port: and that if the ship should be brought into port here, it should be liberated upon a claim being given in for the same by or on behalf of the said *Henry Nodin*, and bail given, &c.; and that it should be finally restored upon satisfactory proof being made, that such cargo was really shipped by or under the directions of the said *Henry Nodin*, or his agents, for the purpose of being exported to some port on the river *Elbe*, *Weser*, or *Jalide*." It appeared, that *Henry Nodin*, on whose application this licence was obtained, after the goods were shipped, was only an agent for the persons really interested in the cargo, who were British merchants at *Liverpool*. Lord *Ellenborough*, C. J. held, that this was sufficient to protect the adventure under the licence, and the plaintiffs recovered.

The Attorney-General now took the opinion of the Court, upon a motion

for a new trial, whether this were a sufficient compliance with the terms of the licence. But all the Court were satisfied that it was sufficient; and Lord *Ellenborough*, C. J. said, that the object of inserting the name of a particular person in these licences was to prevent their being obtained and handed about at large, by which means they might be made an improper use of. But he had no doubt that *Henry Nodin*, the person named, being proved to be the agent of the *British* merchants really interested in the adventure, sufficiently identified the licence with it. Rule refused.

Oom and Others v. Bruce.

12 East, 225. May 11, 1810.

An insurance having been made on goods at and from a port in *Russia* to *London*, by an agent residing here for a *Russian* subject abroad, which insurance was in fact made after the commencement of hostilities by *Russia* against this country, but before the knowledge of it here, and after the ship had sailed, and been seized and confiscated; held that the policy was void in its inception; but that the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities.

THIS was an action on a policy of insurance, effected on the 20th of *November* 1807, on goods on board the ship *Elbe*, lost or not lost, at and from *St. Petersburg* to *London*, including the risk of craft and lighters from *St. Petersburg* to *Cronstadt* from shore to ship, &c.: and there was a count for money had and received. The insurance was made by the plaintiffs as agents of *John Platoonoff*, a *Russian* subject abroad, in whom the interest was averred to be at the time of the insurance and of the loss. The ship, which was nineteen days in loading, was ready and sailed from the *Russian* port on the 17th of *Oct.* 1807: but was brought back on the same day, and confiscated in *Russia*; hostilities having been commenced by that government against *Great-Britain* on the day before: but which event was of course unknown at the time when the insurance was effected by the plaintiffs in *London*. It was admitted at the trial at *Guildhall*, that the *Russian* assured had obtained the restoration of his goods, upon payment of a certain sum; and the only question made was upon the return of premium, under the count for money had and received; the insurance having been made after the commencement of hostilities by *Russia*: but Lord *Ellenborough*, C. J. considered that the plaintiffs, having effected the insurance without any consciousness of its illegality at the time, were entitled to recover back the premium, as money had and received by the defendant to their use, without consideration: and they obtained a verdict for the amount.

Marryat now moved to set aside the verdict, and by leave to enter a nonsuit; contending that the plaintiffs were not entitled to a return of premium. The insurance was either legal, or illegal: hostilities not having been declared by our government at the time when the policy was effected, the contract was then legal on the part of the plaintiffs, as *British* subjects; and nothing which was done in *Russia*, even if it had been known here, would have bound them, until the state of war was known and recognized by this government. Then if the risk attached for an instant, there can be no return of premium. On the other hand, if the insurance were illegal from its inception, the authorities shew that the assured cannot recover back the premium.

LORD ELLENBOROUGH, C. J. It is so, without doubt, if the party making the insurance know it to be illegal at the time; (1) but here the plaintiffs had no knowledge of the commencement of hostilities by *Russia* when they effected

(1) Vide *Lowry & al. v. Bourdieu*, Doug. 468. *Vandyke & al. v. Hewitt*, 1 East, 66. *Morck & al. v. Abel*, 3 Bos. & Pull. 35. *Lubbock v. Potts*, 7 East, 456.

this insurance; and therefore, no fault is imputable to them for entering into the contract; and there is no reason why they should not recover back the premiums which they have paid for an insurance from which, without any fault imputable to themselves, they could never have derived any benefit. The commencement of hostilities by *Russia* against this country placed the two countries in a state of hostility, and made the subjects of *Russia* enemies of this country at the time when the insurance was effected here. Formal declarations of war only make the state of war more notorious; but, though more convenient in that respect, are not necessary to constitute such a state. In *Furtado v. Rogers*, 3 Bos. & Pull. 201, the insurance was effected before the commencement of hostilities, and therefore the risk having once attached, there could be no return of premium; (1) but here the risk never attached at all.

LE BLANC, J. To entitle the underwriter to retain the premium, he should have shewn that the policy would have attached on any loss happening to the cargo on board the lighters in their way to the ship before the commencement of hostilities, though the contract were not made till after hostilities commenced; but the period to look to, as to the legality of the contract, is the time when it was made; and then the subjects of *Russia* had become enemies of this country, and it was no longer competent for the subjects of this country to enter into such a contract. But no blame attaches to the plaintiffs, who were ignorant of the fact at the time, and therefore they are entitled to a return of premium. (2)

GROSE and BAYLEY, Justices, assented.

Rule refused.

Mason v. Pritchard.

[S. C. at *Nisi Prius*, 2 Campb. 436.]

12 East, 227. May 11, 1810.

A guaranty by the defendant to the plaintiff "for any goods he *hath* or *may* supply W. P. with to the amount of 100*l*." is a continuing or standing guaranty to that extent for goods which may at any time have been supplied to W. P. until the credit was recalled, although goods to more than 100*l*. had been before supplied and paid for.

THE defendant engaged in writing to guaranty the plaintiff "for any goods he *hath* or *may* supply my brother W. P. with to the amount of 100*l*," and declared in *assumpsit* as upon a contract by the defendant to guaranty goods to be at any time afterwards delivered to his brother to that amount. It appeared at the trial before Wood, B. at Worcester, that at the time when the guaranty was given, goods had been supplied to W. P. to the amount of 66*l*., and another parcel was supplied afterwards, amounting together to 124*l*. all which had been paid for; and the sum now in dispute was for a farther supply of goods to W. P. And the question was, Whether this were a continuing

(1) Vide *Tyris v. Fletcher*, Cowp. 666. *Jukel & al. v. Church*, 2 Johns. Ca. 333. *Taylor v. Lovell*, 3 Mass. Rep. 331. *Hendricks v. The Commercial Insurance Company*, 8 Johns. 1.

(2) Vide *Martin v. Sitwell*, 1 Show. 156. *Henkle v. Royal Exchange Assurance Company*, 1 Ves. 319. *Penson v. Lee*, 2 Bos. & Pull. 330. *Stevenson v. Snow*, 3 Burr. 1237. S. C. 1 Blac. Rep. 318. *Rothwell v. Cooke*, 1 Bos. & Pull. 172. *Scribu v. North American Insurance Company*, 1 Hall's Amer. Law Journ. 36. *Graves & al. v. The Marine Insurance Company*, 2 Caines, 399. *Murray v. The Columbian Insurance Company*, 4 Johns. 443. *Tuppan v. Atkinson*, 2 Mass. Rep. 365. *Delavigne v. The United Insurance Company*, 1 Johns. Ca. 310. *Murray & al. v. The United Insurance Company*, 2 Johns. Ca. 168. *Porter v. Bussey*, 1 Mass. Rep. 436. *Holmes v. The United Insurance Company*, 2 Johns. Ca. 329. [See 2 Phill. on Ins. 551.—W.]

contract for guarantying the supply of goods at any time afterwards furnished as long as the parties continued to deal together; or, whether it were confined to the first hundred pound's worth of goods furnished? The learned Judge held it to be a continuing contract to guaranty to the extent of 100*l.* goods which might at any time be furnished to the brother, till notice to put an end to it; and the plaintiff recovered accordingly; but leave was given to move to enter a nonsuit if the Court thought that this was not the true construction of the contract. Upon which

Abbott now moved to enter a nonsuit; contending for the limited construction of the guaranty.

But all *the Court* were of opinion with the plaintiff, that this was a continuing or standing guaranty to the extent of 100*l.* which might at any time become due for goods supplied until the credit was recalled. The words, they said, were to be taken as strongly against the party giving the guaranty as the sense of them would admit of; and the meaning was, that the defendant would be answerable at all events for goods supplied to his brother to the extent of 100*l.* at any time, but that he would not be answerable for more than that sum.(1)(2)

Rule refused.

Hill v. Yates.

12 East, 229. May 11, 1810.

The son of a juryman summoned and returned, having answered to his father's name when called on the panel, and served as one of the jury on the trial of a cause, is not of itself a sufficient ground for setting aside the verdict, as for a mistrial.

THE plaintiff having obtained a verdict upon the trial of this cause before *Le Blanc, J.* at the last assizes at *Lancaster, Littledale*, on behalf of the defendant, moved to set aside the verdict and to have a new trial, on the ground of a mistrial; because the son of one of the jurymen returned upon the panel had answered to his father's name when called, and had served upon the jury; which fact was now verified by the affidavits of the son, and of the defendant's attorney, and also of the sheriff's officer who summoned the jury, and who swore to having summoned the father, and not the son. And he referred to the case of *Norman v. Beaumont*, of which a very full report is given in *Willes' Rep.* 484, and which is also reported in *Barnes*, 453, where upon great deliberation, a verdict was set aside for the same cause. He also mentioned a subsequent case of *Wray v. Thorn*, *Willes*, 488, where a new trial was refused, on an objection taken, that one of the jurors, whose christian name was *Harry*,

(1) The same point was ruled by Lord ELLENBOROUGH, at *Nisi Prius*, in the late case of *Merle & al. v. Wells*, 2 Campb. 413. The guaranty there was for any debt *W. W.* may contract with the defendant in his business as a jeweller, not exceeding one hundred pounds. The plaintiffs continued to supply *W. W.* with goods in his business above a twelve-month afterwards, to a considerable amount, during which time they several times balanced accounts with him, and he paid them above the sum of 100*l.* The question was, whether the defendant's guaranty was limited to the first hundred pounds, for which the plaintiffs gave credit to *W. W.*, or extended to any sum of that amount which he should thereafter owe them for goods supplied to him in his business. Lord Ellenborough thought the latter was the true construction. The guaranty, he said, was not confined to one instance, but applied to debts successively renewed. If a party means to be surety only for a single dealing, he should take care to say so. By such an instrument as this, a continuing suretyship is created to the specified amount.

(2) See, to the same point, *Bent v. Hartshorn*, 1 Met. 24. See also, *Aldricks v. Higgins*, 15 S. & R. 212, and *Anderson v. Blakely*, 2 W. & S. 237, where, under the circumstances, the guaranties were not held to be continuing guaranties. See also, *Hargreave v. Smea*, 6 Bing. 244, 3 M. & P. 573. *Melville v. Hayden*, 3 B. & A. 593. *Kay v. Groves*, 3 M. & P. 634. *Ulster Co. Bk. v. McFarland*, 5 Hill. 432. *Dufau v. Wright*, 25 Wend. 636. *Curtis v. Hubbard*, 6 Met. 186. *Smith v. Brandram*, 2 Man. & Gran. 244.—W.]

was named *Henry* in the *venire*, &c. and had answered to the latter name when called and sworn on the jury : but there, he observed, the Court had distinguished that from the former case, because the jurymen who served was the person really intended to be returned and summoned.

The Court, however, considering the extreme mischief which might result to the public from setting aside a verdict upon a motion for a new trial on such ground ; inasmuch as the same objection might happen to lie against every verdict on the civil and criminal sides at the assizes ; and recollecting that the same objection had been taken and overruled since the case in *Willes*, though the name of the case did not then occur ; refused to entertain the motion ; but said, that if upon consideration, and consultation with the other Judges, they found themselves bound to grant it, they would of their own accord award the rule prayed for.

And afterwards, on the 2d of *June*, towards the end of the term, Lord *Ellenborough*, C. J., after adverting to the motion which had been made, and to the two cases which were then mentioned, observed, that in the latter of them, the Court appeared to have considered the application as a matter within their discretion ; and no injustices having been done, they had refused to interfere. His Lordship then said, that he had mentioned this case to all the Judges, and they were all of opinion, that it was a matter within their discretion to grant or refuse a new trial on such a ground ; and that if no injustice had been done, which was not pretended, in this instance, they would not interfere in this mode, but leave the party to get rid of the verdict as he might. That if they were to listen to such an objection, they might set aside half the verdicts given at every assizes, where the same thing might happen from accident and inadvertence, and possibly sometimes from design, especially in criminal cases. His Lordship also now mentioned the case, which had been before alluded to by him on the former occasion, where a jurymen answered to another name in the panel, and was sworn and served by that wrong name, upon the trial of a prisoner for forgery, before Mr. Baron *Eyre* at *Newcastle* in 1783 : (a) and though that was the case of a conviction for a capital offence, the Judges upon a reference to them would not interfere. There, however, the person who served was summoned upon the jury but answered to a wrong name. His Lordship added, that he had mentioned this matter again in Court, in order to put at rest the question once for all, that applications of this sort might not be made again and again.

Per Curiam,

Rule refused.

The Case of a JURYMEN.

Where *R. C.* answered to the name of *J. C.* on the sheriff's panel, at the trial of a prisoner for a capital felony, it is mere matter of challenge, and after verdict cannot be taken advantage of, by the party convicted, as a mistrial.

AFTER the business on the Crown side at the Summer assizes for the county of the town of *Newcastle* was finished, it was discovered that *Robert Curry*, who served upon the jury, had answered to the name of *Joseph Curry*, in the sheriff's panel, and had been sworn by that name. Upon further inquiry it appeared that there was a person of the name of *Joseph Curry*, belonging to *Newcastle*, but not at that time resident within the town or county. That *Robert Curry* was qualified to serve on juries, and had been summoned by the bailiff to attend on the crown side as a jurymen at this assize. All this was mentioned to Mr. Baron *Eyre*, who conceiving it to amount to nothing more than mere misnomer in the panel of the jurymen intended to be returned, and who did serve, and that it was but cause of challenge, which, on being stated, would have been instantly removed by altering the panel ; and that after judgment it could not be assigned as error ; did not incline to interpose upon the ground of a supposed irregularity in the pro-

(a) A note of that case is here subjoined from my copy of the MS. book of Crown cases, the original of which is in the custody of the Lord Chief Justice of K. B. for the time being. See the Preface to my Pleas of the Crown, p. xiii. article 1.

ceedings: but Mr. Chamber and Mr. Villiers (counsel) having afterwards, in the *Nisi Prius* Court for the County of Northumberland, stated these facts to the Baron, and pressed them as amounting to a mistrial, the Baron thought fit to respite the execution of a convict for forgery, that he might have an opportunity of advising with the Judges upon this occurrence. On the first day of *Michaelmas* term 1783, the Judges were unanimously of opinion, that this was no ground of objection, even if a writ of error were brought; much less on a summary application.

Hindsley v. Russell, Executor of Barff.

12 East, 232. May 11, 1810.

On plea of *plene administravit*, proof of an admission by the executor that the debt was just and should be paid as soon as he could, is not evidence to charge him with assets. The executor having pleaded *non assumpsit* as well as *plene administravit*, and *plene administravit præter*, &c. and thereby forced the plaintiff to go to trial; the plaintiff obtaining a verdict on the *non assumpsit*, and being entitled to judgment of *assets quando acciderint*, is entitled to the general costs of the trial, though the issue of *plene administravit* was found for the defendant.

THIS was an action on a promissory note for 63*l.* given by the testator to the plaintiff; to which the defendant pleaded, 1. *non assumpsit*; 2. *plene administravit*; 3. *plene administravit. ultra* what was due on bond and mortgage; on which latter the plaintiff took judgment of *assets quando acciderint*. And at the trial of the two first issues at York, before Lawrence, J. the handwriting of the testator to the note being proved, the evidence, as to the *plene administravit*, was, that the defendant admitted that the debt was just, and should be paid as soon as he could. The learned Judge had great doubt whether this admission were evidence of assets on that plea; and therefore, though he suffered the plaintiff to take a verdict on both issues, he gave leave to the defendant's counsel to move the Court to set aside the verdict on the plea of *plene administravit*, and to enter it for the defendant on that issue.

Barrow moved the Court accordingly, in the last term, for a rule to shew cause why the verdict and judgment entered for the plaintiff on the plea of *plene administravit* should not be set aside, and a verdict and judgment entered thereon for the defendant: and he also produced an affidavit stating that Russell the executor had died since the trial, and there were no assets of the original testator to satisfy this debt. These facts were not denied now by Lambe on shewing cause in this term. And after hearing him shortly on the question of evidence,

The Court were satisfied, that the admission proved was not evidence to charge the defendant with assets. They said, that his admission must be taken with a reasonable intendment; for he could not mean to pledge himself to commit a *devastavit* by paying this debt before others of a higher nature. But they held that the plaintiff was entitled to retain his verdict and judgment on the plea of *non assumpsit*.

In *Trinity* term following, Barrow moved to have the *postea* delivered to the defendant, to have his general costs of the same taxed: on the ground that as the plaintiff would have been obliged upon the plea of *plene administravit*, on which the verdict was now entered for the defendant, to have proved the quantum of his demand, he was not put to any additional expence by the plea of *non assumpsit* having been pleaded. And he referred to *Garnens v. Heskeith*, E. 22 G. 3, and *Cocksan v. Drinkwater*, T. 23 G. 3, cited in 2 Tidd 883, last edit. (vi. ib. 896, 7, 2d edit.)

But The Court (without hearing Lambe, who was to have shewn cause in the first instance) said, that the plaintiff, being at all events entitled to judgment of *assets quando*; and having been compelled by the defendants pleading *non assumpsit*, to go down to trial; was entitled to retain the *postea*, and to have the general costs of the trial: and therefore they refused the rule.

De Metton and Another v. De Mello.

[S. C. at *Nisi Prius*, 2 Campb. 420.]

12 East, 234. May 12, 1810.

The plaintiffs a *Frenchman* and a *Swiss*, carrying on trade at *Lisbon* under the name of the defendant, a *Portuguese*, shipped a cargo from thence for a port of *France*, which cargo being captured by a *British* cruiser, and libelled for condemnation in the Court of Admiralty as *French* and enemy's property, was ordered to be restored to the defendant on his putting in and establishing, with the plaintiff's privity and consent, a claim to it as his own property: held that the plaintiffs were, by thus colluding with the defendant to withdraw from the Admiralty the decision of the true question by establishing a false fact, estopped from maintaining an action for money had and received against the defendant for the proceeds, by shewing the true fact, that the property was their own, and that the defendant was their agent.

THE plaintiffs having been nonsuited on the trial of this cause before Lord *Ellenborough*, C. J. at *Guildhall*, *The Attorney-General* now moved to set aside the nonsuit: and stated, that this was an action for money had and received brought to recover the proceeds of a cargo, which having been originally shipped at *Lisbon* for *Nantes* on board a *Portuguese* ship by the plaintiffs, a mercantile house settled at *Lisbon*, had been taken by a *British* cruiser, and libelled in the court of Admiralty for condemnation as enemy's property: when a claim of property having been put in by the defendant, a *Portuguese*, on his own account, the cargo was ordered to be restored to him: which was done accordingly, and he disposed of it in this country, and received the proceeds, for which this action was brought. It appeared now, that the defendant was only a clerk to the plaintiffs, who carried on their house of trade at *Lisbon*, where they were domiciled, under his name, which was done to protect them from interruption during a period of great public troubles, and when, as it was said, a *Frenchman* as *De Metton* was, (the other plaintiff being a *Swiss*) could not safely have traded at *Lisbon* except under the cover of a *Portuguese* house: and evidence was given at the trial, that the defendant had acknowledged by letter, that the property of the cargo was exclusively in the plaintiffs, and that he had only lent his name to them for the purpose of neutralizing the property. But Lord *Ellenborough*, C. J. nonsuited the plaintiffs, on the ground that it did not lie in their mouths to gainsay that the property of the cargo was in the defendant, after he had with their privity and direction put in a claim as owner before the court of Admiralty, which had been induced on that statement of facts to award restitution of the cargo to the defendant, as neutral property belonging to himself.

But in answer to this, *The Attorney-General* now urged, that though the property were *French*, yet the defendant's name had not been used by the plaintiffs for any collusive purpose as against this country, but for the purpose of protection in *Portugal*. That the plaintiffs were regularly domiciled there, and *quoad* this country were to be considered as *Portuguese* and neutral. That the trading from *Lisbon* to a port of *France* was lawful for them there, and contravened no law of this country. That as between the parties themselves the transaction was *bona fide*; and whatever the question might have been in the court of Admiralty, if the real state of the case had appeared to that Court, yet when the proceeds got into the defendant's hands by whatever means, he who was only an agent of the plaintiffs, could not defend himself against their demand by alleging what had passed before another forum for a different purpose. [Lord *Ellenborough*, C. J. Have not the plaintiffs colluded with the defendant by setting up a claim of property in him to withdraw from the jurisdiction of the court of Admiralty the decision of a question, which, if the true fact had appeared, that this was the property of a *Frenchman*,

might have led to a very different result? for it is certain that the cargo was destined to a *French* port.] If the property be taken to be *French*, the question is against the plaintiffs; but they are entitled to be considered for all trading purposes as *Portuguese* [Lord Ellenborough, C. J. If that were so, by this sort of contrivance the cargo would have the security of *Portuguese* property to cover it here and in *Portugal*, and on the seas, and the security of *French* property to cover it in *France*. But the plaintiffs having defended the suit in the court of Admiralty here, by proving it to be *Portuguese* and the defendant's property, shall they be permitted, in another court of justice here, to recover it from the defendant as *French* property and their own?] The proceedings which took place in the court of Admiralty, with the privity of the plaintiffs, only raised a strong presumption of fact against them, that the property was in the defendant, until they proved by his own admission in writing that he only acted as agent for them.

LORD ELLENBOROUGH, C. J. I think that the plaintiffs are estopped by their own act in setting up and establishing in the court of Admiralty the claim of *De Mello* to this property, from now turning round and insisting upon it as their own. If they could have shewn that *De Mello* had acted tortiously as against them in setting up a false defence and claim to the cargo as his property in that court, that might have served them; but on the contrary, it appeared that he had acted all through with their privity and consent. *De Mello* may have behaved like a rogue to the plaintiffs; but both plaintiffs and defendant have behaved wrongfully as against this country in colluding to make *French* property appear to be *Portuguese* in the court of Admiralty upon a question of prize as against the captors. The plaintiffs should go back to the Admiralty, and have the matter set right there; that the opinion of that court may be taken upon a true statement of facts.

Per Curiam,

Rule refused.

Doe, on the Demise of Sir Mark Wood, v. Morris.

12 East, 237. May 12, 1810.

In ejectment, the landlord having proved payment of rent by the defendant, and half a year's notice to quit given to him, cannot be turned round by his witness proving on cross examination, that an agreement *relative to the land in question* was produced at a former trial between the same parties, and was, on the morning of the then trial, seen in the hands of the plaintiff's attorney, *the contents of which the witness did not know*; no notice having been given by the defendant to produce that paper: for though it might be an agreement *relative to the land*, it might not affect the matter in judgment, nor even have been made between these parties.

SHEPARD, Serjt. moved to set aside a verdict which had been obtained at the trial of this ejectment in *Surry*, before the Ld. Chief Baron, by the lessor of the plaintiff, who had lately before become the owner of the land by purchase, against the defendant, who had before and since the purchase occupied it as tenant. He stated, that the landlord proved his case by shewing that the defendant had paid him rent, and that he had given the defendant half a year's notice to quit, which was expired before the ejectment was brought. But on the cross-examination of the plaintiff's witness, he was asked whether there was not an agreement in writing relative to the holding of these lands; to which he answered, that an agreement in writing relative to these lands was produced at the last trial of this ejectment, (this being the second trial) but he did not know the contents of it: and then another witness was called, who proved that he had seen the same paper in the hands of Sir *M. Wood's* attorney on the same morning (i. e. of this trial.) Whereupon it was objected, on the part of the defendant, that no parol evidence of the

tenancy could be given, when it appeared that there was an agreement in writing concerning it; and it did not appear that the landlord had any right to determine the tenancy in the manner he had done. [Lord *Ellenborough*, C. J. If there were any writing relative to this holding in the possession of the landlord, the defendant ought to have given him a regular notice to produce it; otherwise, in this collateral way, he would get the whole benefit of it, without giving such a notice, when if notice had been given and the paper were produced, it might not support the objection.] If the plaintiff's witness had not shewn that there existed such a paper before known to the landlord, I admit that the defendant could not have objected that there did exist a paper with such and such contents, without having given notice to produce it; but here it appeared that the landlord himself was in possession of the document relating to the tenancy, and therefore he could not be taken by surprise. The objection arose out of the plaintiff's own evidence.

LORD ELLENBOROUGH, C. J. How can we say, that the plaintiff ought to have been nonsuited for want of giving the best evidence of the tenancy, unless it appeared that there was other and better evidence of it in an agreement in writing between the landlord and his tenant, which the landlord kept back. Enough at least ought to appear to shew that the paper not produced was better evidence of the terms of the tenancy than the evidence which was received; but it did not appear that it was an agreement between these parties, or that it was an existing agreement at this time: it might have been an agreement between the defendant and his former landlord, or it might have related to a former period of the tenancy: the witness did not profess to know any thing of the contents of the paper, only that it was an agreement relative to the lands in question. We determined a case of *Doe, on the demise of Shearwood, v. Pearson*, similar to this in the last term where the rule for a new trial, which was moved on the same ground, was finally discharged.^(a)

The other Judges concurred, and the rule was refused.

Garrow, who was for the plaintiff at the trial, then said, that the fact was that the paper spoken of was drawn up between the defendant and the former owner of the estate, and that it had no relation to the matter in dispute between these parties.

Leaths, Clerk, v. Levinson.

12 East, 239. May 12, 1810.

Though by the general rule a farmer may not at his pleasure tithe and carry *part* of a field of corn which has been cut, before the *whole* be tithed, and then proceed to another field, &c. so as to oblige the parson to come again to the same field at another time to take his tithes; which general rule, however, being levied against fraud, vexation, and caprice, must, where these have no application, be understood with all necessary exceptions of partial ripeness and weather, the neglect of which would be prejudicial to the crop; yet there is no rule of law which obliges a farmer (all fraud and vexation apart) to tithe the whole of that part of a field which lies in one parish before he proceeds to tithe any part of the same field lying in another parish. And, therefore, where a farmer cut the whole of a field of barley lying in the two parishes of *A.* and *B.*, and after rolling (i. e. cocking) and tithing part in *A.*, proceeded to roll and tithe part in *B.*; and the weather being catching, he carried that part which was tithed in *A.* the day before the rest of the field in *A.* was rolled and tithed; and this without previous notice of the intention to carry such part: held that this being done *bona fide* was lawful.

THIS was an action of debt on the stat. 2 & 3 Ed. 6. c. 13, for not setting out tithes; and the question made at the trial before *Grose*, J., at the last

(a) The short note which I took of this case, on the motion for the new trial by *Cockell*, Serjt. in *Michaelmas* term last, was this—The objection arose upon the notice to quit. The son of the lessor of the plaintiff proved, that he had received rent of the defendant

assizes for the county of *Norfolk*, was as to the regularity and legality of the manner in which the tithes had been set out. A verdict having passed for the defendant,

Frere, Serjt. now moved to set it aside and for a new trial, and stated the case thus. The tithes in question arose out of a field of 24 acres in barley, 3-4ths of which was in the parish of *Reedham*; of which the plaintiff was rector, and the other 4th was in the adjoining parish of *Limpenhaw*. On a *Tuesday* in last *August*, the whole crop of barley was cut down, and lay in the swarth; and in the evening of that day, above half of that part of it which was in the plaintiff's parish was rolled and tithed in the customary manner ready for carrying. *Rolling*(a) is where the labourers go along the field and rake the barley transversely from the swarth into cocks or rolls, as far as the rake can reach; and this the Court have held to be a legal mode of tithing. Then the defendant, after rolling and tithing the better half of that which was in *Reedham*, left off, and proceeded to roll and tithe about an equal proportion of that which was in *Limpenhaw*, and did not resume the rolling and tithing of the remainder in *Reedham* till the *Thursday*; but on the intervening *Wednesday* about noon, he carried off his nine parts of that portion which was rolled and tithed in *Reedham*, before the remaining part of the swarth was rolled and tithed. Now the general rule is, that the whole of a field shall be tithed together before any part of it is removed.(b) [Lord *Ellenborough*, C. J. Do you mean to say, that this must necessarily be done, notwithstanding one part of a field may be in a fit state for cutting and carrying, and the other part not ripe? *Grose*, J. Or whatever the state of the weather may be, which may require the corn to be saved as speedily as it can be done?] The necessary exceptions of partial ripeness and catching weather must be always understood. [Ld. *Ellenborough*, C. J. If the cutting and saving be done fairly, and in the ordinary course of husbandry, and not fraudulently or capriciously, is there any decision which limits the farmer as to the mode of doing it?] In *Hall v. Matchet*, 3 Anstr. 915, it was held, that though a farmer might cut down any part of a field at a time, as best suited his convenience, unless done with design to defraud or vex the parson; yet that all the hay cut down at any one time must be tithed before any part of it could be carried away. [Lord *Ellenborough*, C. J. Every person shall be taken to intend the necessary consequence of his acts: and if the necessary consequence of an act be vexation and injury to another person, to be sure we cannot enter into the question of the actor's intention. It would necessarily be vexatious to the parson, if the farmer could cut and tithe half a field, and then proceed to cut and tithe another field, or part of the same field in another parish: it necessarily compels the parson to come twice to the same field: whereas if the farmer cannot carry any part of a field in the same parish till the whole be cut and tithed, that will insure the parson against unnecessary labour, expence, and vexation, without subjecting him to the great difficulty in most cases of proving a vexatious intention in the farmer. It did not appear that any necessity existed for cutting and tithing the field in the partial manner here practised; but the defendant did so for his own convenience; admitting that he had no vexatious intention against the parson. [*Grose*, J. All the witnesses agreed, that the barley was tithed in the fairest manner. The defendant left off rolling and tithing the rest, and began to carry what was rolled and tithed because it was

for his mother, and the time of these receipts agreed with the time for which the notice to quit was given: but he also spoke of the time for quitting from a written agreement entered into at the time of the taking between his mother and the defendant, which he said he had then lately seen in the possession of his mother: whereupon the objection arose that the agreement ought to have been produced; which was over-ruled at the trial at *York* before *Chambre*, J. I have no note of the case when the rule was discharged.

(a) Vide *Newman v. Morgan*, 10 East, 5, as to *tedding* in the process of hay-making.

(b) *Erskine v. Ruffe*, M. 10 G. 3. 3 Gwil. Tithe Cas. 961, but this rule is there stated with various exceptions and modifications.

doubtful weather.] If the defendant had had nobody's convenience to consult but his own, I do not say that it could have been done in a more convenient manner. But the practice itself is prejudicial to the parson, as liable to be abused; and there is no other way of trying the right but this. This case stands upon an alleged irregularity, without fraud, in the manner of tithing and carrying part of a field in the same parish before the remainder was tithed. At any rate, if the practice be legal, there ought to have been previous notice given to the parson, that the farmer only meant to roll and tithe part of the field, so as to prevent him from coming for the remainder; according to *Franklin v. Gooch*, 3 Anstr.

LORD ELLENBOROUGH, C. J. I own I have no microscope to enable me to see the particular inconveniences of which the plaintiff complains in this case. The whole of the field was cut down before any part of it was carried: the plaintiff does not pretend to complain of any grievance until the farmer began to carry a part on the *Wednesday* at noon before the whole field was tithed: a reason was assigned for this because the weather appeared doubtful; and no prejudice is stated to have accrued to the plaintiff from it: the rolling and tithing of the remainder was resumed on the next day. The jury had the whole of the evidence submitted to them, and they were satisfied that the tithing was done as fairly as the state of the weather admitted. Rules of mere regularity are after all only laid down to prevent fraud: but we are now called upon to decide on them with a rigour which belongs to no rule of any kind.

GROSE, J. I told the jury that the tithing of the field was not to be done piece-meal unnecessarily, but when begun should be continued fairly according to the state of the weather: and they found that it was so done.

LE BLANC, J. We do not interfere with the rule of law which requires that if a farmer begin to cut down and tithe a part of a field, he shall not stop at his pleasure and go on to another field, and cut part of that, and so proceed to a third, &c.: so as to put the tithe owner to the trouble and expence of coming again to each field, to take part of his tithe of the field at one time, and part at another. But I know of no rule of law which obliges a farmer when he has begun cutting a field to stop in it when he comes to the boundary line of the parish, and finish tithing all which lies in one parish before he proceeds with the rest of the field. But that is in truth what is complained of in this case.

BATLEY, J. according,

Rule refused.

Grosvenor, Executor of Ellis, v. The Inhabitants of the Lath of St. Augustine, in the County of Kent.

12 East, 244. May 12, 1810.

An action of debt for 100*l.* lies upon the stat. 19*G.* 2. c. 34. s. 6, against the inhabitants of a lath in *Kent* by the executor of a revenue officer, who, being in a boat between high and low water mark in pursuit of a smuggling boat in which were offenders against the act, received a mortal wound by a shot fired by a person on the shore within the lath, though the officer afterwards died on the high sea beyond the low water mark, and consequently out of the lath; and the act gives the remedy against the inhabitants of the lath, &c. where the fact shall be committed, i. e. where the officer endeavouring to apprehend the offenders shall be killed.

Qu. The application of the stat. 8*Geo.* 2. c. 16, as to the mode of levying the money recovered, which by that act is directed to be by two justices of the peace of the county, riding, or division, where the fact happened within the jurisdiction of the Cinque Ports, which has an exclusive commission of the peace.

THIS was an action of debt for 100*l.* upon the stat. 19*Geo.* 2. c. 34. s. 6, (a)

(a) This which was a temporary act, has been continued by different acts, of which the 26*Geo.* 3. c. 80, the last I have any account of, carries it down to the end of the next session of parliament after 1788.

which enacts, that if any officer of the revenue, or other person employed in seizing uncustomed goods, &c. or in endeavouring to apprehend any offender against that act, shall be *killed* by any offender against that act, &c. the inhabitants of every rape or lath in counties so divided, and in every other county in *England* the inhabitants of every hundred *where such fact shall be committed*, shall pay 100*l.* to the executor or administrator of the person so killed: to be recovered by action against such inhabitants. And that if the plaintiff in such action recover, all the inhabitants of the lath, &c. shall be rateably and proportionably assessed towards the payment of the damages and costs, and also of the expences of defending the action, to be levied by the ways and means, and in the manner and form prescribed by the stat. 8 Geo. 2. c. 16, relative to actions on the statute of hue and cry. The fact in this case was, that the testator, a revenue officer, being in a cutter in pursuit of a smuggling boat in which were offenders against the act, received a shot while in the cutter between high and low water mark, which shot was fired by an accomplice of the smugglers from the shore, within the lath of *St. Augustine*, and the jurisdiction of the Cinque Ports, and lingering for a short time was carried out in the pursuit beyond low water mark, and died in the cutter upon the high sea. And the plaintiff having recovered at the trial in *Kent*, before the Lord Chief Baron,

Marryat now moved, by leave of the learned Judge, to set aside the verdict, and enter a nonsuit, if this Court were of opinion that the objections taken at the trial, and then over-ruled, were well founded. These were 1st, that the party having died at sea, out of the jurisdiction of the county, the fact of his being *killed* could not be said to have happened *within the lath* of *St. Augustine* whose inhabitants were sued; and that the jury of the county had no jurisdiction to try the action for the penalty. That by s. 5, of the act, special provision was made for the trial of any indictment or information for any offence made felony by that or her acts relating to the revenues of customs or excise, in any county in *England*; but no similar provision was made in respect to this action. 2dly, That the place from whence the shot was fired, and where the mortal wound was received, was within the jurisdiction of the Cinque Ports, which has an exclusive commission of the peace, and within which the Justices of the county at large cannot interfere. Then, as the money to be recovered by action against the inhabitants of the lath is to be "*levied* by the ways and means and in the manner and form prescribed by the statute 8 G. 2. c. 16;" and as by that act (s. 4,) the sheriff charged with the writ of execution, "*instead of serving the same on any inhabitants (i. e. of the hundred) shall cause the same to be produced to two justices of the peace of the county, riding, or division,*" who are to cause the taxation to be made and levied in the manner prescribed by stat. 27 Eliz. c. 13: there does not seem to be any mode by which the money recovered in this action can be levied, and therefore it is *casus omissus*, and not within the remedy given by the act. He said that, after making inquiry, he could not find that any similar action had been before brought upon this statute: but *Grose, J.* said he remembered an instance of such an action brought many years ago, which was tried in the county of *Cornwall*.

Lord ELLENBOROUGH, C. J. The shot which produced the death having been fired from the shore within the lath brings the case within the fair meaning of the act, the object of which was to make the inhabitants of that place where the act was done which caused the death answerable for it, in order to interest them in repressing the offences against which the act was levelled. Then the inhabitants of the lath are mentioned *nominatim* as being liable to pay the money to be recovered by action; and whatever difficulty there may be in applying the directions of the 8 G. 2, as to the levying of the money to this case, we will leave that difficulty to be settled when it judicially arises.

It is sufficient at present to say, that there is no ground for setting aside the verdict which has been obtained.

Per Curiam,

Rule refused.

Henkin v. Guerss.

[S. C. at *Nisi Prius*, 2 Campb. 408.]

12 East, 247. May 12, 1810.

The Court will not try an action upon a wager on an abstract question of law or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest.

AN action of *assumpsit* upon a wager of 300*l.* upon the practice of the Court, whether a person could be lawfully held to bail on a special original for a debt under 40*l.* was entered for trial at the last sittings at *Guildhall* before Lord *Ellenborough*, C. J., who, on hearing the nature of the cause, reprehended the indecorum of the attempt to obtain in this manner the opinion of the Court upon a question of law or judicial practice, in which the parties had no apparent interest other than what the wager itself created: and his Lordship therefore refused to try the cause; telling the plaintiff's counsel, that he might apply to this Court upon the subject, if his client felt himself aggrieved by such refusal.

Park now submitted to the Court, that there was no legal objection to the trial of the cause. When Lord *Loughborough* formerly refused to try a cause of *Brown v. Leeson*, 2 H. Blac. 48, on a wager respecting the number of chances of throwing 7 and 11 on two dice, the Court approved of such refusal, not on the ground that the parties had no particular interest in the wager, but because it respected the mode of playing an illegal game with dice, and was therefore of an immoral tendency. (1) He said he was unwilling to make any specific motion that the cause should be tried at the next sittings in *London*, as that would follow of course, if the Court thought it a fit cause to be tried.

(1) By the common law of *England*, a wager is in general legal, where the subject of it has no immediate tendency to a breach of the peace; or to injure the feelings, character or interests of third persons; where it is not *contra bonos mores*; nor opposed to sound policy; nor prohibited by statute. Thus, it has been held, that a wager between two sons as to which of their fathers should die first, is legal. *Earl of March v. Pigot*, 5 Burr. 2802. So where the wager was that *A.* had purchased a waggon of *B.* *Good v. Elliot*, 3 Term Rep. 693. So where the wager was as to the event of a judicial determination. *Jones v. Randall*, Cowp. 37. So where the wager was upon the rules of a game not prohibited by law. *Pope v. St. Ledger*, 1 Salk. 344. So it has been held, that money fairly won at play, if under the sum prohibited by statute, is recoverable at law. *Bulling v. Frost*, 1 Esp. 235. The cases of *Andrews v. Herve*, 1 Lev. 33, and *Walcott v. Tappin*, 1 Keb. 56, where the wager was, that *Charles Stuart*, then in exile, would be restored within twelve months, may be adduced as supporting the general principle above stated; though it may well be doubted whether the subject of the wager in those cases be not within one of the exceptions. In *Bunn v. Riker*, 4 Johns. 434, 438—9 all the judges agree in considering the law as settled, that a wager upon an indifferent subject is recoverable.

The following cases have been decided to be within the exceptions to the general rule: Where the wager is upon the event of a boxing match. *Cotton v. Thurland*, 5 Term Rep. 405. Upon the sex of a third person. *Da Costa v. Jones*, Cowp. 729; and see the instances put by Lord *Mansfield*, p. 735. Upon the result of an election of public officers. *Allen v. Hearn*, 1 Term Rep. 56. *Bunn v. Riker*, 4 Johns. 426. *Lansing v. Lansing*, 8 Johns. 454. Respecting the amount of any branch of the public revenue. *Atherfold v. Beard*, 2 Term Rep. 610. *Shirley v. Sankey & al.* 2 Bos. & Pull. 130. Insurance of lottery tickets not expressly prohibited by statute. *Mount and Wardell v. Waite*, 7 Johns. 434. Where the tendency of the wager is to induce a public officer to violate his duty. *Per Lord Mansfield*, in *Jones v. Randall*, Cowp. 39, 40. Or where it is a cover for usury. *Ibid.*

But the rest of the Court now concurred with the Lord Chief Justice in the propriety of his refusal to try a cause of this description. And his Lordship added, that courts of justice were constituted for the purpose of deciding really existing questions of right between parties: and were not bound to answer whatever impertinent questions persons thought proper to ask them in the form of an action on a wager. That though there was nothing immoral in the subject of this wager, yet he considered it as an extremely impudent attempt to compel the Court to give an opinion upon an abstract question of law not arising out of pre-existing circumstances in which the parties had an interest. (1) *The Court*, however, refused to grant, on the application of *Garrow*, the defendant's counsel, a rule for judgment as in case of a nonsuit, there having been no default of the plaintiff in not proceeding to trial. And *Le Blanc*, J. said, that if by any other proceeding in court it appeared that in truth no such wager had really been made, the Court would know how to deal with the case.

Finley v. Jowle.

12 East, 248. May 12, 1810.

The stat. 20 G. 2. c. 19. s. 4, enabling two magistrates, "upon application of complaint made upon oath by any master against such apprentice" as is described in the act, touching any misdemeanor in such service, to hear and determine the same, and to commit or discharge the apprentice, extends to a complaint in writing preferred by the master and verified by the oath of another person.

THE stat. 20 Geo. 3. c. 19, for the regulation of certain servants and apprentices, enacts (s. 4,) that it shall be lawful for two or more justices of the peace "upon application or complaint made, upon oath, by any master or mistress against any such apprentice, touching any misdemeanor, &c. in such service," to hear and determine the same, and punish the offender by commitment to the house of correction, there to be corrected, and held to hard labour not exceeding one calendar month; or otherwise to discharge such apprentice. The plaintiff was an apprentice within the description of the act, against whom his master, the defendant, had preferred a complaint in writing before two magistrates of the county of *York*; which complaint was verified by the oath of a witness who spoke to the fact, but not by the oath of the master himself: and the magistrates having discharged the defendant of his apprentice, the latter brought this action upon the indentures against his master, who justified

(1) In *Coza v. Phillips*, Rep. temp. Hardw. 237. Lord Hardwicke, C. held a fictitious action to be a contempt of court, and committed the parties and their common attorney. In *Brewster v. Kitchen*, Comb. 425, which was a feigned issue, Lord Chief Justice Holt said, if he had not thought it had been directed out of chancery, he would not have tried it; and his Lordship added, "Do you bring *fob actions* to learn the opinion of the court?" *Corbet's case*, 1 Co. 83, was a fictitious action, but was not known to be so, until after the decision; and then Lord Chief Justice Anderson is said to have expressed great resentment, Comb. 425. Rep. temp. Hardw. 239, n. In *Cutler v. Goodwin*, cited by Strange, arguendo, Rep. temp. Hardw. 238, the Court of King's Bench set aside a judgment which they had rendered upon a writ of error, on discovering that the suit had been settled by the parties on the morning when it stood for argument, but the attorneys wishing to know the Court's opinion of the case, let the argument go on. In the late case of *Fletcher v. Peck*, before the Supreme Court of the United States, which involved principles of the highest importance, Judge Johnson, at the close of his opinion, said: "I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the *rights*, but not on the *speculations* of parties. My confidence, however, in the respectable gentlemen who have been engaged for the parties [*Martin* for the plaintiff in error, and *J. Q. Adams* and *Harper* on the first argument, and *Harper* and *Story* on the second, for the defendant] has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this Court." 6 Cranch 147, 8.

under the magistrates' discharge: and upon the special matter appearing at the trial, it was objected that the magistrates had no jurisdiction by the words of the act, the complaint not having been verified upon the oath of the master. But *Thompson, B.* before whom the cause was tried at *York*, over-ruled the objection, and a verdict passed for the defendant.

Cockell, Serjt. now renewed the objection, upon a motion for a new trial, and drew the attention of the Court to the particular wording of the clause.

Lord ELLENBOROUGH, C. J. The words of the act must be understood with reference to the subject matter. The application or complaint must be made to the magistrates *by the master or mistress*, because they alone have an interest in preferring it: and it must be verified *upon oath*, but it need not be upon the oath of the master or mistress, who may know nothing of the fact themselves: the complaint may be well founded upon some cause which happened in their absence. But it is sufficient that the master makes the complaint, and verifies it by the oath of the person who knows the fact; otherwise unless the fault were committed in the presence of the master, he would be without the remedy intended to be given by the legislature.

Per Curiam,

Rule refused.

Bettison and Another v. Sir Robert Howe Bromley, Bart.

12 East, 250. May 15, 1810.

The wife of an acting executor taking no beneficial interest under the will is a competent attesting witness to prove the execution of it within the description of a *credible witness* in the statute of frauds, 29 Car. 2. c. 3. s. 5.

THIS was an issue directed by the Master of the Rolls, to try whether a paper writing dated 28th April 1807, and purporting to be the will of the late Sir *Geo. Pauncefote, Bart.*, was executed by Sir *George* in the manner required by law to pass real estate. The plaintiffs maintained the affirmative, and the defendant the negative: and at the trial before Lord *Ellenborough, C. J.* at *Westminster*, a verdict was found for the plaintiffs with nominal damages, subject to the opinion of the Court on this case.

The testator was of sound mind; the will was attested by three witnesses, and the execution of it in every respect regular, supposing the witnesses were competent: but an objection was made to the competency of *Susan Smith*, one of the attesting witnesses, on the ground that she was the wife of *Jeremiah Smith*, whom the testator had named one of his executors in the will, and who, with the other executors, had proved the will and acted. *Jeremiah Smith* was not a creditor of the testator, either at the time of the execution of the will, or of the testator's decease: and he had no interest but what (if any) appeared on the face of the will. A copy of the will accompanied the case; but *Jeremiah Smith* appeared to take no beneficial interest under it. The question reserved was, whether *Susan Smith* were a competent witness to prove the execution of the will? If she were, the verdict was to stand: if not, a verdict was to be entered for the defendant.

Dampier, for the plaintiffs, maintained the competency of the witness, whose husband took no interest, either by way of legacy or *residuum*, under the will. All that he took as executor was a burthensome office, which could not make him a less credible witness in support of the will. He cited 1 Mod. 107, Anon., where, on a trial at bar, *Ld. C. J. Hale* said, that an executor might be a witness in a cause concerning the estate, if he had no interest in the surplussage; and that he had known it so adjudged. *Lowe v. Jolliffe*, 1 Blac. Rep. 365, in which an executor in trust^(a) who had acted under the will

(a) He had also a legacy under the will, but this he had released, in order to be a witness.

was permitted to prove the testator's sanity. And Lord *Mansfield* there referred to *Holt v. Tyrrell*, 1 Barnard. Rep. K. B. 12. S. C. in 1727, where on a trial at bar a trustee was held to be a witness without releasing. So in *Goss v. Tracy*, 1 P. Wms. 290, it was declared that a grantee, being only a bare trustee was a good witness to prove the execution of the deed to himself. Lastly, in *Goodtitle v. Welford*, Dougl. 139, an executor who had acted, who was also devisee of a reversionary interest in copyhold under the will, having surrendered that interest to the use of the heir, who, however, had refused to accept the surrender, was held a competent witness to prove the testator's sanity, being considered as an executor taking no beneficial interest; and though in *Hudson v. Kersey*, (a) Ld. Camden, when Chief Justice of C. B., differed from the rest of the Court, and from the doctrine of Ld. *Mansfield* in *Wyndham v. Chetwynd*, 1 Burr. 414, 1 Blac. R. 95, as to the construction of the word *credible* in the stat. of frauds, 29 Car. 2. c. 3. s. 5, requiring the attestation of three credible witnesses to a will of lands; yet that does not affect this case where the executor took no beneficial interest. Neither can this case be affected by the stat. 25 Geo. 2. c. 6, even supposing the appointment of an executor could be considered as an appointment within that statute, which it seems not to be. [Lord *Ellenborough*, C. J. An executor could not be a witness if he were suing or sued as a party in a cause, because he would be interested in the costs.(b)] The decree in Chancery would not be evidence to affect any question on the proof of the will in the Commons.

Littledale, contra, said, that the only interest in the witness that he could suggest was, that if a suit were instituted in the Commons by Sir *Robert Bromley* against the executors to make probate of the will, the decree in this case would be evidence against him. But

Le Blanc, J. said, that the only question here was, whether this were a good will of land: and whatever the decision might be, it would not affect any question concerning the probate in the Commons.

And all the Court agreed upon the principal point, that the will was well proved in this case. Lord *Ellenborough*, C. J. said, that the point had been decided so long ago as Lord *Hale's* time, that an executor, having no interest in the surplus, was a good witness to prove the will in a cause concerning the estate: and this had been followed by other decisions to the same effect. Here the executor took no interest under the will, but only a burdensome office. The other Judges concurring,

Postea to the Plaintiffs.

Tenny, on the Demise of Seth Agar, v. Benjamin Preston Agar and Another.

12 East, 253. May 15, 1810.

Under a devise of lands to the testator's son and his heirs for ever; as to part of the lands upon condition that he should pay to the testator's daughter 12l. a-year till she came of age, and then pay her 300l.; and in default of payment, that she should enter upon and enjoy the said part to her and her heirs forever: and in case his son and daughter both died without leaving any child or issue, he devised the reversion and inheritance of all the lands to another: held that the devise over was not an executory devise, but a remainder limited after successive estates tail of the son and also of the daughter by implication; the intent being apparent that the devise over should not take effect till after the failure of the issue of the son and daughter, and that it should then take effect; and this being the only construction which would give effect to such intent consistently with the whole of the will taken together.

IN ejectment for lands in the county of *York* a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case.

(a) E. 5 G. 3, in C. B. 4 Burn's Eccl. L. 86, 4th ed. [Cited by Hosmer, arguendo, in *Cornwell v. Isham*, 1 Day 35, and inserted at large in a note p. 41 to 88 from a manuscript copy furnished by that gentleman.]

(b) Vide *Man v. Ward*, 2 Atk. 229.

John Agar, being seised in fee of the premises in question, in 1737, devised to his only son *John Agar*, and his right heirs for ever, a certain house, buildings, lands, &c. in the lordship of *Holtby*; and also 9 other closes in the possession of a certain tenant in the same lordship; and then the will proceeded, "which last-mentioned 9 closes I hereby give to the said *John Agar* and his heirs for ever, upon this condition only, that he shall yearly, by half-yearly payments at *Michaelmas* and *Lady-day*, pay to my daughter *Elizabeth Agar*, his only sister, the full and just sum of 12*l.* a year, limited to her, until she shall attain the age of 21 years, and after that age to pay her 300*l.* in lieu thereof, and in full of her portion, and for default of payment of any part so limited and bequeathed to her, she shall enter into the said 9 closes, or any part thereof in the name of the whole, and shall enjoy them all to her and her heirs for ever in case of non-payment or non-performance as afore limited, but not otherwise. And in case my said son and daughter both happen to die without having any child or issue, lawfully begotten, or to be begotten, then and in such case only, I give and devise the reversion and inheritance of all my said buildings, lands, and hereditaments whatever, in *Holtby* aforesaid, to my cousin, *Richard Agar*, and to his right heirs for ever." And the testator made his son and daughter joint executor and executrix. The testator died in 1737, leaving his son and daughter, and *Richard Agar* him surviving. And thereupon *John Agar* the son entered upon and enjoyed the premises until his death in 1807, having duly performed the conditions in the will contained. In *Trinity* 18 Geo. 3, *John Agar* duly suffered a recovery of all the premises, in which he and his sister *Elizabeth* were the vouchees: and declared the uses thereof to himself in fee: and afterwards, by his will duly executed, devised the same to the defendants in fee, who are now in possession thereof. *Elizabeth Agar* died in the life time of her brother; and neither of them had any issue. *Seth Agar* is the heir at law of *Richard Agar* the devisee in fee named in the will of *John Agar* the father; which *Richard Agar* was the heir at law of *John Agar* the father next after his said son and daughter. The question reserved was, Whether *Seth Agar* were entitled to recover? If he were, the verdict was to stand; if not, a verdict was to be entered for the defendants: and the real question was, Whether the devise over to *Richard Agar* were an executory devise, after an estate in fee to *John Agar*, and consequently not barrable by the recovery: or whether such devise over being limited to take effect in case the son and daughter died without leaving issue, operated as a restriction upon the prior limitations to the son and daughter and their heirs respectively, so as to give to *John Agar* an estate tail only, and to raise by implication an estate tail in *Elizabeth*: in which case the recovery would bar the devise over.

Holroyd, for the plaintiff, contended that the first express devise to the son in fee, and also the devise of the nine closes to him in fee on condition, and on his non-performance of that condition, the devise over to the daughter in fee, (a) were not restrained to estates tail by the subsequent devise over being "in case the son and daughter died without leaving any child or issue: but that such subsequent devise over to *Richard Agar* was an executory devise, and not too remote; and therefore not barrable by the recovery suffered by the son and daughter. The limitation over to *R. A.* is not simply upon the death of *John*, the son, without leaving issue, but also in default of *Elizabeth* leaving issue, to whom no estate was before given except upon the breach of condition by her brother *John*; and therefore no estate tail can be raised in her by implication; (b) neither can it operate to cut down to an estate tail the prior devise to the son in fee; for the devise over is upon an event which does not affect the estate given to him, namely upon the death of the daughter as well as the son without leaving issue; and therefore the devisee of the son would

(a) This is a good limitation over. *Hainsworth v. Pretty*, Cro. Eliz. 919.

(b) *Gardner v. Sheldon*, Vaugh. 279. 1 Eq. Cas. Abr. 197.

take during the continuance of issue of the daughter. It is clear, that the testator first meant to give the son a fee; and the fee being given by express words to one who was heir at law, the intent to disinherit him, either in whole or in part, ought, as is said in *Widd's* case, 6 Rep. 16, b., and in *Goodright v. Goodridge*, Willes, 374, to be clear and manifest; otherwise the Court will not restrain the legal and proper meaning of the words. And here there is no necessary intendment as there was in the latter of those cases, where the devise over to the younger son was if the eldest died without *heirs*; who could not die without *heirs* while his younger brother, or any of his descendants, were living; and therefore the testator must have meant *heirs of the body*. The death of the son and daughter, without leaving issue, only marks the time, as was said in *Gardner v. Sheldon*, when the land should come to the devisee over. In some cases (a) where the devise over has been to the heir at law after the death of another, such as the testator's wife, that has been held to give an estate for life by implication to the person on whose death only the heir was to take: but that rule would not apply to the devisee over in this case, who would only have been heir at law after the death of the son and daughter and their descendants, and therefore, for this purpose, is no more than a stranger: and it is clear, that no such implication can arise where the devise over is to a stranger after the death of another without issue. (b) The devise over must be either an executory devise as to *all* or to *none* of the prior estates given: and if not an executory devise, it must be a remainder after an estate tail: but as burthens were imposed upon the son in respect of part of the property devised to him, if he were only to take an estate tail, he might be a loser. An annuity is to be paid to the sister till she comes of age, and then a gross sum. [Lord *Ellenborough*, C. J. The 12*l.* to be paid to her annually is nothing more than interest at 4*l.* per cent. for the principal sum of 300*l.* to be paid to her when she comes of age. *Bayley*, J. If she got the estate itself, she would have that out of which the payment was to be made.] To give the sister an estate tail by implication would be to give her the property in one event, when the testator has declared that she should only have it in another event. The devise over being upon the event of the son and daughter dying without leaving issue; in order to give effect to these words, it is not necessary to imply an estate tail in the son; for coupling them with the estate in fee before expressly devised to him, he would still take a fee determinable on the contingency of himself and his sister dying without leaving issue; the remainder over, therefore, would be a contingent remainder, and as such would be destroyed by the recovery. The devise over is of the *reversion* immediately upon the happening of the event, which word *reversion* was held in *Bailis v. Gale*, 2 Ves. 48, 51, to pass the whole estate: but if the son and daughter took estates tail, it would only pass a future interest liable to be defeated at any time by the act of the tenants in tail. The devise over is after a dying without *leaving issue*; and there has been no case deciding that those words, even as applied to *freehold* estate, extend to an indefinite failure of issue: especially, where such a construction, by giving an estate tail to the first taker, would enable him immediately to defeat the devises over, contrary to the intent of the testator. In *Forth v. Chapman*, 1 P. Wms. 663, a dying without leaving issue was held to be confined in the case of a term to the time of the death: and though a distinction was there taken between the devise of a term and of a freehold; and in *Walter v. Drew*, Com. Rep. 372, a devise, that if *William* the testator's eldest son die "and *leave* no issue of his body," then the lands of inheritance should go to the younger son, was held to give an estate tail by necessary implication to *William*, who was heir at law; yet that went upon the ground that the testator's intent would otherwise be defeated: and in

(a) Vide 13 H. 7. 17 pl. 22, and Willes, 373.

(b) He referred to 6 Craine's Dig. tit. Devise, 181, as collecting the cases on this subject.

Porter v. Bradley, (a) Lord *Kenyon*, upon a review of all the authorities, thought there was no ground for making a distinction between the devise of freehold and chattel interests, and that those words should be construed to mean a dying without leaving issue at the time of the death; though in that case, he also relied upon the additional words "leaving no issue *behind him*." It does not appear, however, how the words "*behind him*" can carry the sense of the word *leaving* farther; as the word *leave* applied to the subject matter necessarily means *leave behind*, or *leave surviving*; for if the issue do not survive, the party dying cannot be said to *leave* issue: at least in cases where a different construction is not necessary to give effect to the manifest intention of the testator, as in *Waller v. Drew*. And this has since been acted upon in *Roe v. Jeffery*, 7 Term Rep. 559: and Lord C. J. *Wilmot's* reasoning in delivering the opinion of the Judges to the house of Lords in *Keilly v. Fowler* (b) strongly supports the same conclusion upon the effect of the word *leaving*. And here it will best effectuate the whole intent of the will to confine the words to a dying without leaving issue at the time of the death.

Richardson, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. We have heard a laborious and ingenious argument, which has endeavoured to cloud an intention as distinctly and plainly expressed as a testator could have done, and which, if not expressed in terms, is plainly to be inferred from the whole of the will. Nothing can be clearer than that *Richard Agar* was not intended to take any thing until the issue of the testator's son and of his daughter were all extinct: and then the question is, whether upon the words of the will an estate tail can be raised in them. The words first used would certainly carry a fee, "to *John Agar* and his heirs for ever," &c. unless by the subsequent words it appears that he meant to give them a less estate: but it is not necessary to cite cases, such as *Porter v. Bradley*, to shew that such word may receive a narrower construction, if by subsequent words it manifestly appear that the testator so intended. Here, then, the testator proceeds to annex a condition to the devise of the nine closes to his son, that he should pay to his daughter till she came of age 12*l.* a-year; which is at the rate of 4 per cent. upon the 300*l.* which he was to pay her when of age: and provides, that in default of payment she should enter into the nine closes and enjoy them to her and her heirs for ever: and then follow the material words, which shew an intention to narrow into estates tail the estates in fee before given to the son and to the daughter. "And in case "my said son and daughter both happen to die, without leaving any child or "issue, &c. then, and in such case only, I devise the reversion, &c. to my "cousin *Rd. Agar*" in fee. The estate therefore to *Richard Agar* was only to commence after the extinction of the lines of issue of his own son and daughter: and that intent can only be effected by giving to the son and daughter successive estates tail. And it is unnecessary to wander beyond the case in judgment before us in search of the intent of other testators in other cases, when the intent of this testator speaks so plainly in the will in question. The consequence is, that the son, being tenant in tail, was entitled to suffer the recovery stated, which has barred the remainder to *Richard Agar*.

GROSE, J. Though the word *heirs*, *prima facie*, carries the fee, yet it has been long settled, that it may be restrained by other words shewing such an intent to mean *heirs of the body*; and the words of the devise over, just mentioned by my Lord, shew that it was intended to be so restrained in this case: that would give the son an estate tail, and then the recovery suffered by him barred the remainder.

(a) 3 Term Rep. 143; but see *Daintry v. Daintry*, 6 Term Rep. 314, and what was said by *Lawrence, J.* in *Doe v. Cooke*, 7 East, 271.

(b) *Wilmot's* Rep. 298. See from p. 309, to 314. See upon the same subject, but with varying application according to the apparent intent, *Wood v. Baron*, 1 East, 259. *Bigge v. Bensley*, 1 Bro. Ch. Cas. 190, and *Doe v. Ellis*, 9 East, 386.

LE BLANC, J. The plaintiff must make out that *John Agar*, the son, took a fee with an executory devise over in fee to *Rd. Agar*; for if *John* took an estate tail, or if the limitation over were a contingent remainder, and not an executory devise, *Richard* was barred by the recovery suffered. Now, the estate is first limited to *John* and his heirs for ever; and if the will stopped there, he would of course take the fee: but after providing, that in case of failure of payment by the son of the sums mentioned to the daughter, she should enter and enjoy the nine closes to her and her heirs for ever, the will proceeds "and in case my son and daughter both happen to die without leaving any child or issue, &c.;" then he devises the reversion and inheritance to *Richard* in fee. Upon these words the plaintiff's counsel is driven to contend, that the intention of the testator was, that the son should take such an estate, that supposing the daughter to have lived and had issue, and the son to have died without having any issue, he could have devised the estate away from the daughter and her issue to a stranger, who would have been entitled to hold so long as any issue of the daughter continued in being. But to be driven to argue for such a construction of the intention of the testator in this will, as necessary to give the son a fee, shews that the testator did not intend to give him a fee. On the contrary, his intent appears clearly to have been, that the estate should not go over till failure of issue of his son and daughter; and that would give the son and daughter estates tail in succession. And it is a known rule of law in the construction of wills, that if a devise over can take effect as a remainder, it shall not be taken to be an executory devise. There is no case where the words "die without leaving issue," simply have been adjudged to mean "without leaving issue at the time of the death:" in *Porter v. Bradley* there were also the words *behind him*.

BAYLEY, J. The true construction of this will, and such as will best answer the apparent intention of the testator, is, that *John Agar*, the son, should take an estate tail only, with remainder in tail by implication to his sister, with remainder in fee to *Richard Agar*. That makes all the estates legal estates, and the devises over estates in remainder; and it is a settled rule, that no devise over shall be construed to be an executory devise, which can take effect as a remainder. The testator first devises his estate to his son and his heirs for ever: that would give him a fee: but afterwards he gives it over upon a dying without leaving issue of his son and daughter; and that will narrow the former devise to an estate tail, unless it appeared clearly to have been the testator's intent to look to a dying without leaving issue at the time of the son's death, and not to an indefinite failure of issue: and to shew, that the word *leaving* is relied upon; but it appears that the testator looked not merely to his son dying without issue, but to his daughter also dying without issue, before the devise over was to take effect; which latter could only be for the sake of benefiting his daughter and her issue; and the only way in which that can be done is by giving her an estate tail. It is argued, indeed, that he merely meant by that to extend the estate given to the son, so as to enable him to dispose of it so long as any issue of his own or of his sister's continued: but that is not the natural way of accounting for the introduction of those words. Suppose *John Agar*, the son, had died leaving issue, which issue had died immediately after; and then the daughter had died without issue; yet according to the plaintiff's construction, *Richard Agar* would take nothing, because the event would not have happened on which he contends that the devise over was to take effect; and yet it is plain that the testator meant the devise over to take effect in such an event. Therefore, to effectuate his intention the son and daughter must take estates tail, with remainder over to *Richard Agar*. The words dying without issue, or without leaving issue, are to a certain extent equivocal; but they may be explained by other parts of the will: and here there appears to be a clear intent to give an estate tail to the son, with a remainder in tail to the daughter; and a remainder over in fee to *Richard Agar*.

Postea to the Defendants.

Amhurst v. Skynner.

12 East, 263. May 15, 1810.

An annuity granted by one who was mortgagor in fee in possession of lands, on which it was secured, of greater annual value than the interest of the mortgage and the annuity, is within the exception of the 8th section of the annuity act, 17 G. 3. c. 26, as a grant of an annuity by one who was *seised in fee simple*; and therefore no memorial of it need be inrolled: the *seisin in fee* there excepted extending in parity of reason to *equitable* as well as *legal* estates. And though a replication alleging that the grantor was, at the time of the annuity granted, *seised in fee simple* in possession of the premises on which the annuity was charged, would, abstracted from the subject matter, by the mere force of the words *seised in fee simple*, be considered as alleging a *legal seisin* yet, with reference to the subject matter, and to the plea, to which it was an answer, which alleged that the grant was made after the annuity act, and that no memorial of it was inrolled according to that act; it shall be taken to mean such an estate as is deemed to be a *seisin in fee*, within the construction of those words in the annuity act.

IN replevin, the defendant avowed the taking of growing crops as a distress for the arrears of an annuity of 50*l.* granted by the plaintiff to the defendant, by indenture dated 5th of *May* 1804; and issuing out of and charged upon the lands mentioned in the declaration and other lands, for three lives still existing. The plaintiff pleaded, 1st, *non est factum*. 2ndly, That the said indenture was made, and the annuity granted, after the act of the 17 Geo. 3. c. 26, for registering the grants of life annuities, and that no memorial was inrolled within 20 days after the execution of the indenture, according to the direction of that act. 3dly, That the plaintiff was not, at the time of making the indenture, and of the grant of the annuity, *seised in fee simple* or in fee tail in possession of the premises on which the annuity was charged and secured, or of any part thereof, which was or were of equal or greater annual value than the annuity: and that no memorial of the indenture was inrolled according to the act. There was a 4th plea in substance the same as the third. Replication to the 2d plea, that the plaintiff was at the time of making the indenture and of the grant of the annuity *seised in fee simple* in possession of the premises upon which the annuity was charged and secured, and which were then of greater annual value than the annuity. And the like replications to the 3d and 4th pleas. Rejoinder to the replication to the 2d plea, that the plaintiff was not *seised in fee simple* in possession of the said premises, &c. in manner and form as alleged in that plea: on all which issues were joined; and at the trial before Lord *Ellenborough*, C. J. in *Kent*, a verdict was found for the defendant on the *non est factum*, and also on the other issues, subject to the opinion of the Court on this case.

The plaintiff, long before the grant of the annuity in question, was *seised in fee simple* in possession of the premises on which the annuity was secured, and on which the distress was taken; and being so *seised*, by indentures of lease and release of the 7th and 8th of *May* 1793, and of the 19th and 20th of *Jan.* 1796, between the plaintiff and *W. Wilkins*, conveyed the whole of the premises to *Wilkins*, his heirs and assigns, by way of mortgage in fee, subject to a proviso for redemption thereof on payment of the several sums of 6000*l.* and 5500*l.*, with interest, at certain days therein mentioned long before the granting of the annuity in question. By indentures of lease and release of the 3d and 4th of *March* 1802, the release being of three parts, between *Wm. Crisp*, *Wm. Randall* and *Thomas Wilders*, (the executors and devisees in fee in trust of *Wm. Wilkins* then deceased) of the first part; the plaintiff, of the second part; and *Wm. Walter*, of the third part; after reciting that *Walter* had advanced 14,000*l.* to the plaintiff, out of which the plaintiff had paid 4240*l.* to *Crisp*, *Randall*, and *Wilders*, they, *Crisp*, *Randall*, and *Wilders*, by the direction of the plaintiff, and the plaintiff for himself, conveyed a part of the premises to *Walter*, his heirs and assigns, by way of mortgage in fee, sub-

ject to a proviso for redemption upon the transfer by the plaintiff of 20,511*l.* 11*s.* 11*d.* 3 *per cent. cons.* on the 4th of *March* 1803, to *Walter*, and payment of interest in the mean time on the 14,000*l.* The mortgage deeds contained the usual proviso for quiet enjoyment. No stock had been transferred pursuant to the proviso, and the principal sums due upon the mortgages, together with a considerable portion of the interest thereon, were unpaid at the time of the grant of the annuity; and the legal estate *in fee simple* in the premises then was in *Crisp*, *Randall*, and *Wilders*, and in *Walter*, respectively, by virtue of their several mortgages, subject to the plaintiff's equity of redemption as mortgagor in fee simple. On the 5th of *May* 1804, the plaintiff, being entitled to such equity of redemption, granted the annuity in question by the deed stated in the pleadings, but no memorial thereof was enrolled pursuant to the stat. 17 G. 3. c. 26. The lands on which the annuity were secured were, at the time of the grant, of greater annual value than the annuity and the interest payable on the above mortgages; and the plaintiff, at the time of such grant, was in the actual possession of a part of the premises of greater annual value than the annuity. If the defendant were entitled to recover, the verdict for him on all the issues was to stand; if not, a verdict was to be entered for the plaintiff on the two last issues:

Barnewall, for the plaintiff, contended, first, that one who had mortgaged in fee before the grant of an annuity could not be said to be *seised in fee* within the 8th clause of the annuity act 17 G. 3. c. 26, which excepts out of the operation of the act annuities secured on lands of equal or greater value whereof the grantor was *seised in fee simple* or *fee tail* in possession at the time of the grant. The term *seised* does not apply to one who has a mere equitable estate; the trustee of the legal estate only is *seised*. In *Halsey v. Hales*, 7 Term Rep. 194, the father who was tenant for life, with the ultimate reversion in fee, joined with his son, who had an intermediate remainder in tail, in making an appointment (the power of doing which was reserved to them by the deed to lead the uses of a prior recovery suffered) to the grantee of an annuity for a term of 99 years to secure an annuity for their joint lives; which was held to be within the exception in question: but there the father and son jointly had the entire dominion over the whole fee. The parties there, as Lord *Kenyon* observed, did not want the protection of the act: "they had the controul over the whole estate, and were not in the situation of persons who are induced from the imbecility of their title to grant an annuity to a disadvantage." But that is not the situation of a mortgagor: he has not the controul over his whole estate, but is frequently a necessitous man, who wants the protection of the act as much as any other. The evil meant to be remedied was the secrecy of such transactions with persons who having incumbered properties or partial interests only to dispose of, could not deal with annuitants upon equal terms; the Court, therefore, will construe the act so as to further the remedy, and enlarge the enacting clauses rather than the exception. A mortgagor holds possession of his estate at the pleasure of the mortgagee, who may, at any time, enter, and hold the estate; and during that time the annuity cannot be paid; a risk of which the grantee may avail himself to demand higher terms on account of the possible inconvenience and loss. The excepting clause, in requiring that the grantor should be *seised in possession*, must have intended such a possession as he was entitled to hold against every other person: but a mortgagor, though in possession in fact, has in law only a reversionary interest. [Lord *Ellenborough*, C. J. The words in *possession* seem to have been there used in contradistinction to persons *seised in fee simple* or *fee tail in reversion*. This question was decided by Lord *Thurlow* in *Shrapnel v. Vernon*, 2 Bro. Ch. Cas. 268, who considered equitable estates to be within the excepting clause; and I am not aware that that case has been since overruled: it seems rather to have been confirmed by Lord *Kenyon* in *Halsey v. Hales*.] He suggested that a case was

now depending in Chancery, in which *Shrapnel v. Vernon* would be brought under revision. Then, 2dly, the allegation in the pleadings that the plaintiff was at the time of granting the annuity *seised in fee, &c.* must be taken to mean that he was seised of the *legal* estate in fee, &c.; whereas the proof is only of an *equitable* seisin, which does not support the allegation: the true nature of his estate ought to have been shewn.

Laws, contra. The two questions made resolve themselves into one, whether an equitable seisin in fee be within the exception of the annuity act. The act does not say, "*legally* seised in fee," &c., nor does it use the common legal words descriptive of a fee, as seised *in his demesne as of fee*, but merely "*seised in fee*;" and the issue is in the same general words, and not in the technical terms. It does not say "*granted* out of the lands," but "*secured* upon the lands;" and no doubt this annuity is *secured* upon the lands, apart from any question upon the annuity act. It is *secured* in equity. There is no reason for fettering equitable seisins in fee more than legal seisins. The largest properties are often subject to slight charges, which puts the legal estate out of the owner of the inheritance. The case of *Shrapnel v. Vernon* is expressly in point; and that was recognised in *Halsey v. Hales*, which was a mere power of appointment in the father and son, neither of whom had a legal seisin. Many annuities have been granted on the faith of these decisions.

Barnewall, in reply, said, that *Halsey v. Hales* went entirely on the ground that the father and son had a complete power over the fee simple, and therefore the case did not come within the reason of the enacting clauses; but this case is within the mischief meant to be remedied by the act. The construction put upon the act in *Shrapnel v. Vernon*, as applied to the case of a mortgagor in fee, has never been acted upon at law.

LORD ELLENBOROUGH, C. J. Two points have been made; first, whether the grantor of this annuity had such a seisin of an estate in fee at the time of the grant as is within the exception in the last clause of the annuity act, so as to render it unnecessary to enrol a memorial of the annuity? He had before conveyed this estate by way of mortgage in fee subject to a proviso for redemption, and the equity of redemption remained in him. And the case of *Shrapnel v. Vernon* establishes, that there is no difference between legal and equitable estates in the construction of this clause of the act. If that case were well decided, it makes an end of this question. Now, upon the only occasion pointed out where it has been drawn under consideration, which was before this court in *Halsey v. Hale*, it seems to be affirmed by the judgment of Lord Kenyon. That then is an authority sufficient to govern this case: and after so many years have elapsed since, and when many other annuitants may have acted upon the faith of it, we ought to see very clearly that it was a wrong construction of the act before we overturn it. But it is now too late to reconsider the point on general reasoning, as if it were *res integra*. Lord Kenyon in the latter case considered the exception as referring to persons having ready marketable estates to sell, over which they had the controul, and that equitable estates were equally saleable with legal estates of the same description mentioned in the clause. And though I cannot but agree with Lord Thurlow in *Shrapnel v. Vernon*, that it would have been as well if the act had required annuities of all descriptions to be enrolled, whatever was the nature of the estates on which they were secured; yet this case falls within the construction which has been put upon the excepting clause. It is found, that this estate was of an annual value more than sufficient to pay the annuity and the interest of the mortgage. Then, with respect to the other objection, I agree with the plaintiffs counsel, that when it is said in pleading, that a party was *seised in fee*, I should understand by that a *legal* seisin in fee: that is the obvious and proper sense of the words: but when those words are introduced, as they are, in these pleadings with reference to the enrolment of a memorial according to the directions of the annuity act, I think I must construe them *secundum subjectam ma-*

teriam, as connected with the act of parliament to which they refer, and that those words must have the same construction in the pleadings as they have in the annuity act where they also occur. There is then an allegation of a seisin in fee, with reference to the obligation imposed by the annuity act to enrol a memorial, and not of a seisin in fee at common law. However, as it is suggested that the same question upon the construction of the act is now depending in a case in Chancery, should the propriety of the decisions in *Shrapnel v. Vernon*, and *Halsey v. Hales*, be called in question in that court, so as to shake their authority, we shall have an opportunity of reconsidering our judgment in the course of the term, by only giving judgment *nisi* at present.

GROSE, J. The true question raised by the pleadings is, whether the grantor of this annuity were seised in fee simple in possession within the meaning of the annuity act, at the time of the grant? and considering what the object of the act was, and the general words used, and the decisions which have put a construction upon those words, I must consider it as an allegation of a seisin in fee with reference to the meaning of those words in the annuity act, which has been decided to include an equitable seisin in fee. And not being prepared to over-rule those decisions, I must consider such a seisin to be sufficient to take the case out of the act.

LE BLANC, J. The first question is upon the allegation in the pleadings. The second plea objects to the grant of the annuity as not having been registered according to the directions of the act: the replication is in answer to that, and alleges that the grantor was seised in fee simple in possession of the premises at the time of the grant: and that brings it to the question whether he were so seised within the meaning of the annuity act; and is the same as if the allegation had been that he was so seised within the meaning of that act. Then the second question arises, whether a party seised of an equitable estate in fee be within the exception of the 8th clause? And that was expressly decided in the affirmative by Lord *Thurlow* in *Shrapnel v. Vernon*; and when it came under consideration again in this Court, in *Halsey v. Hales*, Lord *Kenyon* adopted that decision, and held that a legal seisin in fee was not necessary to bring the case within the exception. When, therefore, a construction has been put upon a modern act of parliament, within eleven years after the passing of it, and persons have acted upon the faith of it, and when that decision has been recognized ten years afterwards, we must now consider ourselves bound by it, and that a party, who was seised of an equitable estate in fee at the time of granting the annuity, was seised *in fee* within the meaning of the annuity act.

BAYLEY, J. At the time when the annuity act passed, it was considered that persons having only life estates were under great disadvantage in going into the market to raise money by the grant of annuities, and it was to benefit and protect persons of that description that the act was passed: and therefore an exception was made of persons who were seised of estates in fee simple or fee tail in possession. Now, as all persons having such estates, whether in equity or at law, were considered to have estates which they could carry to market, and dispose of at a fair value, and that it was optional in them to raise money by way of annuity, or otherwise, they were alike considered as not within the reason of the law: and within a few years after the act passed, we find a decision by Lord *Thurlow*, that an equitable seisin in fee was sufficient to bring the case within the exception. If that decision had been deemed wrong, an opportunity of rectifying it would probably soon have occurred; but on the contrary, in the only instance which can be found, where that decision ever came in question, it was recognized and acted upon in this court: the question, therefore, must be considered as decided.

Postea to the defendant.(a)

(a) The same point was once before decided in this Court, in a case of *Cumming v. Sir Wm. Twysden*, in M. 29 Geo. 3. *Erskine* had obtained a rule calling on the plaintiff

Hudson and seven Others v. Mucklow.

12 East, 273. May 18, 1810.

The several king's waiters in the port of London hold separate offices by different patents; and though the fees are, in the first instance, paid by the merchant in one entire sum to a common receiver for all; yet the aliquot shares of each are separate, and each is entitled to call for his share when in fact the sum so received is capable of being divided. These shares are now fixed by the statute 38 G. 3. c. 86, at nineteen, and as the patentees die the emoluments of each office are to be carried to a superannuation fund for the benefit of aged and disabled officers of the customs, and are not to be applied to the benefit of the surviving patent king's waiters, which before that act had been practiced.

THIS was an action for money had and received, brought by the plaintiffs, to try their right to certain fees of office, in which they recovered a verdict for 2145*l.* 19*s.* 3*d.* subject to the opinion of the Court upon the following case.

The plaintiffs are the surviving king's waiters in the port of London. The defendant is clerk of the rates in the port of London as the king's waiters' fees. The origin of king's waiters cannot be traced, but they have existed under that denomination certainly as early as the reign of James I. The number at the time of passing the act of tonnage and poundage, 12 Car. 2. c. 4, was eighteen; afterwards they were nineteen: how their number was increased is not known. The order of the House of Commons annexed to and established by st. 12 Car. 2. c. 4, mentions the king's waiters and their fees in the following terms—To the king's majesty's waiters in the port of London, being in number eighteen.

	s.	d.
For every whole fee warrant for goods imported by freemen of London	1	0
For every half fee warrant for ditto do. - - -	0	6
For every whole fee warrant for goods imported by persons not such freemen - - -	1	0
For every half fee warrant for ditto ditto - - -	0	6
For every alien's whole fee warrant for goods imported - - -	1	6
For every half fee warrant for ditto - - -	0	9
For every return on coast cocquets - - -	0	6
For every foreign certificate, coastwise - - -	1	0

The vacancies were filled up, as the patentees dropped off, by fresh patents granted from time to time, and the number kept up to nineteen down to the year 1785; since which time no patents have been granted. Each person has a separate grant, by letters patent, all in the same form: which is as follows:

"George the third, &c. Know ye, that we of our special grace, certain knowledge, and mere motion, have constituted and appointed, and by these presents do constitute and appoint our well beloved Robert Smith, Esq. to the office of *one of our waiters* in the port of London, and in all and singular the ports, places, and creeks thereto belonging or adjoining, in the room and place of Samuel Clarke, Esq. deceased: to have, hold, exercise and en-

to shew cause why the judgment on the annuity bond should not be set aside for want of a memorial inrolled according to the annuity act. The answer given was, that Sir Wm. Twyden was tenant in tail at the time of the premises on which the annuity was secured, and therefore within the exception of the act: but it appeared that his father before the settlement on the defendant in tail had mortgaged the premises in fee, and the settlement was made subject to that mortgage; so that at the time of the grant the defendant had only an equity of redemption, which it was contended was not within the excepting clause. But this objection was over-ruled by the Court: and Lord Kenyon, C. J. said, he had no doubt that a person who had a real equity of redemption sufficient to answer the annuity was never intended to come within the general provisions of the act.

"joy the said office to him the said *Robert Smith*, during our pleasure, together with all and singular the wages, fees, profits, perquisites, advantages, and emoluments whatsoever, to the said office or place in any manner belonging or relating, and in *as ample manner and form* as the said *Samuel Clarke* or any other person, or persons, lately exercising the said office hath or have had or received, or ought to have had and received, by reason thereof. In witness," &c.

By warrant from the lords commissioners of the treasury, the emoluments are a salary to each of 52*l.* paid by the public, and the above-mentioned fees, which are paid by the merchants. *These fees, whatever was the existing number of patentees, were received from the merchants entire*, and till 1797 were always divided, monthly, among the king's waiters for the time being, that is, from the earliest times down to 1785, into nineteen shares, and in some cases of vacancy into eighteen, each taking one; and from that year until *Sept. 1797* into eighteen, seventeen, sixteen, fifteen, or fourteen shares, according to the actual number of king's waiters. And the money found by the verdict, arising from such fees received by the defendant as is hereafter mentioned, is claimed by the present plaintiffs, the surviving patentees, as received by the defendant to their use, since they were such survivors. The duties of the king's waiters have, for these last sixty years at least, been performed partly by deputies, one appointed by each patentee; the payment of which deputies was and is derived from other sources; and partly by acting king's waiters appointed by the Treasury in the place of the deputies of those patentees whose patents were prohibited to be renewed by the stat. 38 Geo. 3. c. 86. On the 4th of *August 1797*, the commissioners of the customs made the following board-minute: "The clerk of rates being reported by the bench officers to be the collector of the fees payable to the respective patent king's waiters, he is to take especial care that the fees received for the vacant offices of that description are in future paid into the hands of the collector inwards, who is to be furnished by the clerk of the rates with a list of the vacancies now existing in the office of the patent king's waiters; and such fees are to be paid over by the collector inwards to the receiver-general conformably to the directions of the lords of the treasury. And the clerk of the rates is, in case of future vacancies of patent king's waiters, immediately to state the same to the board, to the end that the patent fees may in like manner be paid into the hands of the collector inwards, and be by him paid over to the receiver general." At the next monthly meeting of the patentees, 4th *Sept. 1797*, the then clerk of the rates and receiver of these fees communicated this minute to them. There were then five vacancies; and the collector instead of dividing the fees into fourteen parts, and paying one fourteenth to each patentee, divided the fees into nineteen parts, giving each patentee one-nineteenth, and retained the five-nineteenths, in his own hands. The patentees received each one-nineteenth, but under repeated declarations of their non-acquiescence. The present defendant has acted in the same way since he came into office in 1799; dividing the fees by nineteen, giving one-nineteenth to each existing patentee, and retaining the other money in his hands, which is now, with the assent of all parties, to be paid into the court of Exchequer; it being claimed on behalf of the superannuation fund, by his majesty's attorney-general. The stat. 38 G. 3. c. 86. s. 1. 2. 4. 10. 13, which received the royal assent 28th *June 1798*, the stat. 40 G. 3. c. 82, and 47 G. 3. st. 1. c. 51. s. 9, bear materially on the present question. On the 17th *Nov. 1797*, Mr. *Syms*, the then clerk of the rates and receiver of these fees, paid that part of the retained fees then in his hands to the collector inwards, which he had not done before. The patentees remonstrated against this; but he continued to do so while he remained in office, and as long as he received the fees. The question was, whether the plaintiffs were entitled to recover? if they were, the verdict was to stand; if not, a nonsuit was to be entered.

Dampier, for the plaintiffs, contended, that the office was *one*, though executed by as many patentees as the king thought proper to grant it to: and the fees were entire when paid by the merchant, though afterwards divisible into shares according to the existing number of the patentees at different periods. The shrievalty of *Middlesex* is but one office, though executed by two persons. As vacancies happened before the year 1785, the proportions of the remaining patentees were increased till the vacancies were filled up by fresh grants: and from that time till 1797, as vacancies happened which were not filled up, the proportions of the remaining patentees continued to increase. The patents, under which the present possessors hold, grant to them respectively to hold the office, together with all fees, advantages, &c. to the same belonging *in as ample manner and form* as their predecessors: but if the *jus accrescendi* be taken from them, they cannot be said to hold the office with the same advantages as their predecessors. Such being the nature of this office, the only question is, whether the rights of the existing patentees were altered by the stat. 38 G. 3. c. 86? The first section abolishes several offices in the customs, not including this. The second section, which includes the king's nineteen waiters in the port of *London*, with other offices, being offices in part useful, enacts, that none of them shall, after the passing of the act, be granted to any person, except as after mentioned; that such of them as were then vacant should be abolished, save as thereafter provided; and that such as should thereafter become vacant should be abolished, save as thereafter mentioned. Section 3, provides, that the officers before mentioned should not be compelled to any other attendance on the duty of their several offices during the existing grants than heretofore. Sect. 4, enables the commissioners of the customs, with the approbation of the treasury, to provide proper persons to execute during pleasure the duties of the vacant offices, and of such as shall become vacant, which shall appear to them to be necessary and useful. Sect. 13, reciting that a superannuation fund had been long established under the commissioners of the customs, for the benefit of aged and disabled officers, and that sums had been received as fees of various offices during their vacancy, and that it would promote the good of the service if such sums were to be applied in augmentation of the said fund, enacts, that the fees of *offices so abolished and vacant as aforesaid* shall be applied in augmentation of the fund as any four or more of the commissioners shall direct. But this statute, he contended, left the question untouched; for so long as any one patentee was alive, the office was neither abolished nor vacant, and therefore the provisions of the act for appropriating the fees to the superannuation fund did not apply.

Taddy, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. It would be quite contrary to the plain object of the act, which was to raise a superannuation fund out of the vacant offices, and as they should become vacant, to say, that the increase of fees, upon vacancies happening in the former number of nineteen king's waiters, should be applied to the benefit of the remaining patentees, instead of being carried to that fund. There may be some little obscurity in the wording of the act, but the meaning of it is obvious. The offices were distinct, and were granted by distinct patents to each officer, although they had one common duty to perform. The fees, indeed, were paid, in the first instance, into the hands of a common receiver, because from the smallness of the sums they could not be divided amongst all the nineteen officers; but the right of each to his aliquot part of the same, and each was entitled to a division in fact, when the sums received were in fact capable of being divided.

GROSE, J. The patent itself speaks most plainly that these were separate offices; for the king appoints "to the office of *one of our waiters* in the port of *London*; and it would be a direct violation of the declared intention of the legislature to hold that the profits of the vacant offices should not go to the superannuation fund, but to the other remaining officers.

LE BLANC, J. It is not necessary to consider what the office of king's waiter in the port of *London* was before the late act of parliament; for that act has distinctly considered these as separate officers: it separates the office if it were one before, and it separates the emoluments if before they were entire. The duties of the officers are also separated; for it provides, that they shall not be compelled to any other attendance on the duty of their several offices, during the continuance of the existing grants, than they had before given; that was with a view to the vacancies as they happened not being filled up; but the performance of the necessary duties was to be provided for in another manner: and as each office became vacant, the emoluments of it were to go to the superannuation fund.

BAYLEY, J. The vacancies were directed not to be filled up as they happened, for the benefit of the public, and not of the remaining officers: and the meaning of the legislature was, that as vacancies occurred, they were to be considered, with respect to the emoluments, as if they had been filled up by persons who were to receive the emoluments in trust for the public. I say, for the benefit of the public; because if the fees were to be applied to the increase of the profits of the other officers, the public would be deprived of these means of providing for their superannuated officers, and would be obliged to resort to other means for the same purpose.

Judgment of nonsuit entered.

The King v. The Justices of Staffordshire.

12 East, 280. 1810.

It seems, that no society is within the intent and meaning of the Friendly Society act 33 Geo. 3. c. 54, so as to require the justices in sessions to allow and confirm their rules, &c. in the manner therein provided for, if it appear that the general objects of such society are not confined to the charitable relief and maintenance of its old, sick, and infirm members, their widows and children.

CLIFFORD applied for a *mandamus* to the defendants to annul and make void all such rules, orders, and regulations, hereafter mentioned, as should be repugnant to the act of the 33 G. 3. c. 54, for the encouragement and relief of friendly societies, and to allow and confirm all such of the said rules, &c. as should be conformable to the true intent and meaning of the said act. This was moved upon an affidavit stating, that at the *October sessions* 1809, the rules and regulations hereafter mentioned of a certain society therein described, called by the name of "the Benevolent Society of Roman Catholic Secular Clergy Priests, established for their mutual relief and assistance in sickness, infirmity, old age, and so forth, incapacitating them to attend to the duties of their state of life," were exhibited to the said justices in sessions and subjected to their review, in order that the same might be signed by, and a duplicate thereof on parchment deposited with, and filed by, the clerk of the peace at such sessions. That the justices adjourned the consideration of the matter to the next sessions, when application was again made to them to allow and confirm the said rules and regulations, or such of them as were conformable to the statute made in that behalf, and were not otherwise contrary to law: in order that the same might be then signed, deposited, and filed as aforesaid; but the majority of the justices rejected the application altogether.

The rules referred to were *inter alia*, 1st, That the society shall consist only of Roman Catholic secular clergy priests who reside within the counties of *Stafford, Salop, Derby, Worcester, Warwick, and Oxford*. 2d, That all Roman Catholic secular clergy priests now officiating with the full powers of their order, in any of those counties, are, and all such persons as shall be received by the existing superior Roman Catholic clergymen to officiate in like

manner, in any of the said counties, may become members on application to the society, and by contributing to the common stock not less than 5 guineas on admission. The 3d and 4th regulated the appointment of officers among themselves for managing the affairs of the society. The 5th and 6th regulated the management of their funds by an administrator and his assistants. And by the 7th the administrator was prohibited from making payment to any of the members without the consent of the general meeting, or of the existing superior Roman Catholic clergyman of the above counties. By the 8th, it was provided that the said superior, being a Roman Catholic secular clergyman, should during his life have a tenth of the yearly income of the society, if he required it. The 9th, 10th, and 11th respected the management of the funds and accounts. And by the 12th, any member of this society incapacitated from attending to the duties of his state of life by infirmity, sickness, old age, and so forth, was entitled to receive, during such incapacity, such sum as should be voted to him by a majority of the members present at a general meeting, for his comfortable and decent support: but if there appeared cause, from misconduct or other reason, to the members present, they might refuse relief; provided that the existing superior and a majority of the members present agreed in such their vote: and the members so voting should not be liable to account for their vote, or motion, to any but to God. By the 13th, the society and fund were to continue so long as any twelve members were so disposed; and if any member proposed a dissolution of the society, or a division of the fund, he was to be expelled.

The Court afterwards, upon hearing counsel, discharged the rule in this term. I was not present at the time; but I understood that the Court were of opinion that the case was not within the meaning of the act of parliament; the object of the society not being confined to the charitable relief and maintenance of its old, sick, and infirm members.

Brown and Irish v. Vigne.

12 East, 283. May 18, 1810.

A ship was insured from *London* to any port or ports in the river *Plate* until her arrival at her last port of discharge in that river: and the master intending to discharge her cargo at *Buenos Ayres*, passed *Maldonado*; but hearing that *Buenos Ayres* was then in the hands of the enemy, he went to *Monte Video* with intent to make a complete discharge there, if the market were favourable; but after discharging a part, and not finding the market there so favourable as he expected, he had not abandoned his original intention of going to *Buenos Ayres*, if it should afterwards be practicable; but while he was still discharging part of his cargo at *Monte Video*, a loss happened by a peril of the sea: held that as *Buenos Ayres*, to which other port only in the *Plate* he had contemplated to go, was at the time of his arrival in the *Plate* (and in fact continued up to the time of the loss) in the hands of the enemy, so that he could not legally go there, *Monte Video* must be taken to the ship's last port of discharge, and that on her arrival there, the policy was discharged.

THIS was an action upon a policy of insurance brought to recover against an underwriter a salvage loss of 24l. 3s. 2d. per cent.: and at the trial before Lord *Ellenborough*, C. J. at *Guiddhall*, a verdict was found for the plaintiffs, subject to the opinion of the Court upon this case.

The ship *Ann*, valued at 1500l. was insured at and from *London* to any port or ports in the river *Plate*, with or without letters of mark, until her arrival at her last port of discharge in the river *Plate*. The plaintiffs were owners of the ship *Ann*, of which the plaintiff *Irish* was master, which, in *Nov.* 1806, sailed from the port of *London* upon the voyage insured, and on the 13th of *Feb.* 1807, arrived in the river *Plate*, and was on that day spoken to by his majesty's ship the *Unicorn*, the captain of which informed the master of the

Ann that *Buenos Ayres* had been retaken from the *British*, and was then in possession of the *Spaniards*. In consequence of this information, the master of the *Ann* put into the port of *Monte Video*, which was then in possession of the *British*. On the 20th of *Feb.* the *Ann* was removed to the place of delivery and there moored in safety: and on the 21st, part of the cargo, consisting of iron, spirits, and porter, was discharged: and between that day and the 6th of *March* following, other parts of the cargo were landed; and on the latter day, while she was so moored, the *Harriet* transport, in a gale of wind, drove athwart the house of the *Ann*, and on the 8th of the same month, the *Ocean* transport also, in a gale of wind, ran foul of the *Ann*: by which accidents she sustained damage. The captain afterwards discharged the remainder of the cargo; and having done so, a survey was held upon the *Ann*, in consequence of which the ship and materials were afterwards sold, and a loss sustained by the plaintiffs; which, if they were entitled to recover, was agreed to be 24l. 3s. 2d. per cent. upon the defendant's subscription. When the *Ann* sailed from *England* the captain intended to proceed to *Buenos Ayres*. When he afterwards put into *Monte Video*, he intended, provided he could find a favourable market there, to dispose of his cargo at that place, and to finish the voyage; but not finding so favourable a market at *Monte Video* as he expected, he had not at the time of the loss abandoned his intention of proceeding to *Buenos Ayres*, provided it should afterwards be practicable. *Buenos Ayres* was recaptured by the *Spaniards* in *Aug.* 1806, and has from that time to the present remained in their possession. The *British* armament under the command of General *Whitlock* sailed from *Monte Video* in *June* 1807, for the purpose of attacking *Buenos Ayres*, but the attack failed. Open war was waged between his majesty and the king of *Spain*, from 1805, till *Aug.* 1808. The question was, whether the voyage insured under the above facts were or were not terminated at the time of the accident which occasioned the loss?

Richardson, for the plaintiffs, contended, that as the master had not abandoned his original intention to proceed to *Buenos Ayres*, the voyage outwards was not ended, and the underwriters were still upon the policy, which was from port to port until the ship's arrival at her last port of discharge in the river *Plate*. [Lord *Ellenborough*, C. J. Does not the last port of discharge mean the last practicable port? The master could not have gone into *Buenos Ayres*, which was then an enemy's port; and was he at liberty to protract the voyage for that purpose till peace was restored? You would read the policy as if it were, until her arrival at her wished-for port. *Bayley*, J. Must not any port or ports be understood to be confined to friendly ports?] While there is a possibility of the obstruction being removed within a reasonable time, the risk of the underwriters continues. The case which comes nearest to the present is *Blackenhagen v. The London Assurance Company*, 1 Campb. 454, 564. There the ship, being bound under convoy from *London* to *Reval*, on the 5th of *Nov.* learnt in the course of her voyage that an embargo was laid on all *British* ships in the ports of *Russia*, in consequence of which the convoy with the fleet put back first into *Copenhagen* roads, and then off *Gottenburgh*; waiting, as it seems, to see if the embargo would be taken off; and on the 30th of *Nov.*, the convoy and fleet sailed for *England*, and was last seen on the 3d of *Dec.* in a heavy gale of wind. Lord *Ellenborough*, C. J. nonsuited the plaintiff in the first action on the policy: considering the returning to *England* as an abandonment of the voyage. Then another action was brought in *C. B.*, in which the jury to whom the question of abandonment was left by the Lord Chief Justice of *C. B.* found a verdict for the plaintiff; which that Court afterwards set aside: but on the second trial, the jury having found the fact that the voyage was not abandoned, the Court of *C. B.* refused to set aside the verdict. But even upon the first trial before Lord *Ellenborough*, his Lordship said, that if the ship, being unable to get to *Reval*, had lingered in that quarter, or had necessarily returned with an intention of ul-

mately completing the original voyage, a question of nicety would have arisen. (a) [Lord *Ellenborough*, C. J. There may be causes for a ship putting back for a time, without any intention of abandoning her voyage; as the approach of an enemy, or a temporary embargo: or as in a case which occurred before Lord *Kenyon*, where a ship, bound to a port in the *Baltic*, found it on her approach blocked up by ice; on which she put back, but afterwards on a thaw sailed again; and Lord *Kenyon* held, that she was still under the policy. (b) But here the port of destination was in a state of open hostility at the time; which cannot be considered as a mere temporary obstruction.] The voyage here insured was a coasting voyage from port to port in the river *Plate*: and therefore greater delay in the voyage was contemplated than had actually occurred before the loss took place: and the underwriters wish to avail themselves of the intention of the master to go to *Buenos Ayres*, in order to put an end to the voyage, by the event which had happened there, before the master himself had contemplated to put an end to it. Would the capture of the destined port by an enemy while the ship is proceeding on her voyage, put an end to it, and discharge the underwriters? [*Le Blanc* and *Bayley*, Justices, agreed that it would not, until the event were known to the ship.] It has indeed been considered, that after the port of destination has been shut, by order of the enemy, against ships of the nation to which the assured belongs, he cannot abandon and recover as for a total loss. (c)

Carr, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. The policy is upon the ship until her arrival at her last port of discharge in the river *Plate*: there are three known ports in the river *Plate*; *Moldonado*, *Monte Video*, and *Buenos Ayres*; and we may suppose the insurance to have been to these ports by name until her arrival at the last of them. Now, the ship had passed by *Moldonado*, and had arrived at *Monte Video*; and she could not legally go to *Buenos Ayres*, which was then in the hands of an enemy. If then the voyage did not end at *Monte Video*, as the last port of discharge, as soon as it was ascertained that she could not proceed to *Buenos Ayres*, when was it to end? It would never end till a peace was restored which would enable the ship to proceed to *Buenos Ayres*, if the master thought it proper to wait for that event. (1)

GROSE, J. agreed.

LE BLANC, J. The Court must look in this case to the time when the vessel arrived in the river *Plate*: and then the master being informed that *Buenos Ayres* was in the hands of the enemy, and that she could not go there as he had intended, put into the port of *Monte Video*, and began to discharge her cargo there: and he never contemplated going to any other port than these two: *Monte Video*, therefore, must be considered as her last port of discharge.

BAYLEY, J. It is said, that the insurance was to any port or ports in the river *Plate*; but that must be understood to any friendly port. Now, after having passed *Moldonado*, and gone to *Monte Video*, there was no other friendly port in the river *Plate* to which the ship could have gone.

Postea to the defendant.

(a) According to the report of the same case by Mr. *Park*, p. 226, of the 6th edit. Lord *Ellenborough*, C. J. said, that "though a ship from necessity might be allowed to take a circuitous course, yet the ultimate point of destination must ever be the same. That such a necessity might perhaps even justify a return to *England*, if it could be proved satisfactorily that it was the intention of the parties to seize the first favorable opportunity of returning to *Reval*."

(b) If this be the same case, mentioned by his Lordship on the trial of *Blackenhagen v. The London Assurance Company*, as is mentioned in Mr. *Campbell's* Report, p. 455, it appears that the ship, when prevented from reaching her destined port by the ice, "took shelter for the winter in a place as near to it as she could safely go, and prosecuted her voyage the ensuing season."

(c) Vide *Hadkinson v. Robinson*, 5 Bos. & Pull. 388.

(1) Vide *Parkin v. Turno*, 2 Campb. 59. *Park* 618, 6th edit. [See 4 Campb. 94. *Richardson v. London Ass. Co.—W.*]

Doe, on the several Demises of William, Elizabeth, and John,
Usher, v. Samuel Jessep.

12 East, 298. May 18, 1810.

Under a devise to *A.* (a natural son) then under age, and the heirs of his body; and "if he die before 21, and without issue," then over to other relations, and ultimately to the testator's own right heirs: held that *A.* having attained 21, the limitations over did not take effect; as, by the natural sense of the word "and," they were made to depend upon the happening of both events, i. e. the son's dying before 21, and without issue. And this construction was not varied by a codicil made after the son attained 21, by which the testator confirmed every part of his will so far as his affairs were consistent.

IN ejectment to recover possession of a freehold estate at *Brentford*, in the parish of *Ealing*, in *Middlesex*, the plaintiff declared on the joint demises of the three lessors of the plaintiff, and also on their separate demises, which were laid on the 1st of Jan. 1810. A verdict was found at the sittings for the defendants, subject to the opinion of the Court upon the following case:

John Jessep, being seised in fee of the premises in question, by his will, dated 20th of April 1779, devised all his freehold and copyhold messuages, lands, &c. in the parish of *Ealing* (the copyhold being surrendered to the use of his will) unto *S. Clarke*, *Wm. Usher*, and *D. Goldwin*, their heirs and assigns, "in trust to and for my natural son *John Jessep*, an infant of the age of 15 years, whom I had by *Mary Clarke*, and the heirs of his body, lawfully issuing for ever. And my will further is, that if the said *John Jessep* shall happen to die before he attains his age of 21 years, and without issue lawfully to be begotten, then I devise all the aforesaid freehold and copyhold messuages, lands, &c. unto the said *S. C.*, *W. U.*, and *D. G.*, and their heirs and assigns, upon further trust, and for the uses hereinafter mentioned, viz. that they my said trustees shall and do permit and suffer my father *John Jessep* and the said *Mary Clarke* to receive the rents, issues and profits of all my aforesaid messuages, &c. and premises, equally to be divided between them, share and share alike, for and during the term of their natural lives, and the life of the longest liver of them: and that upon the death of either of them, the share of him or her so dying my will is shall go and be received by the survivor during his or her life; and that from and immediately after the decease of my said father and the said *Mary Clarke*, then upon further trust to and for the use and behoof of *William Usher*, *Elizabeth Usher*, and *John Usher*, the children of the aforesaid *William Usher* and *Elizabeth* his wife equally to be divided between them or amongst them, if more than one share, share and share alike, as tenants in common and not as joint tenants, and the heirs of their respective bodies issuing; and in case any of them shall happen to die without issue, then as to the part or share, parts or shares of such child or children so dying, or whose issue shall fail, to the use of the survivors or survivor, and others and other of them, and the heirs of their respective bodies: and if there shall be failure of issue of all the said children but one, or if there shall be but one child, then to the use of such remainder or only child, and the heirs of his or her body issuing; and for default of such issue, to the use and behoof of my own right heirs for ever." The will then proceeded to dispose of the testator's personal property, and amongst other things contained a bequest of the dividends of 1000*l.* stock to *Mary Clarke* for life; and after her decease, the principal to be paid or transferred to the said *John Jessep* at his age of 21 years; with a gift over to lessors of the plaintiff, if he should not attain 21, to be transferred to them also at 21: and, after some other legacies, the residue of the personal estate was bequeathed to the said *John Jessep*; and if he should happen to die before he attained his age of 21 years, to *Elizabeth Usher*, the mother of the lessors of

the plaintiff: and the trustees were appointed executors. The deviser by a codicil, dated 20th Nov. 1796, devised certain copyhold estates purchased since making the will to *Mary Clarke* for life; remainder to the said *John Jessep* in fee: and appointed him executor, instead of the persons named in the will: and concluded thus—"I do hereby by this my codicil confirm every other part and parts of my said will, so far as my affairs are consistent; I do desire that this my codicil may be added to my said will." The will and codicil were respectively executed so as to pass real estates; and at the time of the execution of the codicil, *John Jessep*, the natural son of the deviser, and the devisee named in his will, had attained his age of 21 years. The deviser died, leaving his natural son *John Jessep*, his father *John Jessep*, and *Mary Clarke*, him surviving. *John Jessep* the father, and *Mary Clarke*, both died before *John Jessep* the natural son and devisee, who died in 1807, without issue, having attained 21 before the making of the codicil, and without having suffered a recovery of the freehold property devised by the will. The lessors of the plaintiff are the devisees in remainder named in the will: and the defendant is the heir at law of the deviser; and upon the death of the natural son entered into and is now possessed of the premises. If the plaintiff were not entitled to recover, the verdict was to stand; but if he were, the present verdict was to be set aside, and a verdict entered for the plaintiff.

Gaseke, for the plaintiff, stated the principal question to be, whether upon the construction of the will, the limitation to the lessors of the plaintiff was to take effect upon the death of the testator's natural son without issue at any time, or only in the event of his death under the age of 21? and he contended for the former. But if that were against him, supposing the case had stood alone upon the will; yet as the codicil was made after the son had attained 21, in which the testator confirmed the will so far as his affairs were consistent; that is, so far as the circumstances which had since occurred were consistent with the provisions of the will; he contended, that the testator must have intended that the devise over to the lessors of the plaintiff should take effect, if the son died at any time without issue. The Courts have in many cases read *and as or*, and *or as and*, according as the one or the other construction would best effectuate the intention of the testator. [Lord *Ellenborough*, C. J. I should suppose the natural intention of the testator was, that if the son attained 21, he should have the power of disposing of the estate; and that if he died before 21, leaving issue, the issue should take. *Le Blanc*, J. The construction contended for, on the part of the plaintiff, would be against all the cases where the Court have read *or as and* in order to avoid the estate going over from the issue, in case the first taker died before 21 leaving issue.] Admitting that the plaintiff's construction would have that effect; yet, as Lord *Holt* said in *Helliard v. Jennings*,^(a) it may have been the intention of the testator to restrain the marriage of his son before he was of age. At any rate, the case of *Brownsword v. Edwards*, 2 Ves. 243, is directly in point. That was a devise to trustees and their heirs to receive the rents until *John Brownsword* should attain 21; and if he should live to attain 21 or have issue, then to him and the heirs of his body: but if he should die before 21 and without issue, then the devise was in like manner to *Sarah Brownsword* an infant; with the devises over to other collateral branches of the testator's family; and for want of such issue to his own right heirs. *John* and *Sarah* were the testator's children by a second wife, the sister of his first: *John* attained 21, and afterwards died without issue: and Lord *Hardwicke* construed the word *and as or*, and decreed that the remainder should take effect. But if this were otherwise, upon the construction of the will alone, and the remainder over was only to take effect in case the sons both died before 21 and without issue; yet the reasonable construction of the codicil which confirms the will as far as his affairs (i. e.

(a) 1 *Ld. Ray.* 506, but see 8. C. 1 *Freem.* 509.

events) were consistent with it, being made after one of the events was gone by, must be to confirm the remainder over upon the happening of the other event.

LORD ELLENBOROUGH, C. J. The cases certainly run very near, the only distinction seems to be that the limitation over in *Brownword v. Edwards* was in favour of a daughter, who, without such a construction as was there put on the word *and*, would have been left without any provision: and here the limitation over is to other relatives. But is there not a rule of common sense as strong as any case can be, that words in a will are to be construed according to their natural sense, unless some obvious inconvenience or incongruity would result from so construing them. Now, here the testator has used the copulative word *and*, and has devised his estate over in case his son died before 21 *and* without issue; that is, if both those events happened: why then should we read *and* as *or*, and give the estate over upon the happening of one only of the events, when no inconvenience will ensue by construing the word used in its natural sense? Then, as to the codicil, the testator confirmed his will so far as his affairs were consistent with it; that is, so far as his affairs remained in the same state as when he made his will: but the affairs were altered in the mean time in this respect; for the son had attained 21, and therefore one of the events could no longer take place, upon the happening of which the limitation over was to take effect: the codicil, therefore, does not apply to that part of the will.

GROSE, J. agreed.

LE BLANC, J. This is so far distinguishable from *Brownword v. Edwards*, that there the word *and* was construed *or*, to prevent the working of an injury to the issue: here *and* is required to be construed *or* in order to work the very injury, to avoid which, in other cases, the Courts have construed *or* to be *and*.⁽¹⁾ Then reading it in the natural sense of the word, the son having attained 21, the limitation over, which was only to take effect if he died before 21 *and* without issue, was defeated.

BAYLEY, J. If the son had died under 21, leaving issue, the construction contended for by the plaintiff's counsel would have left the testator intestate as to such issue, which was clearly against his intention.

Postea to the Defendant.

Champneys v. Hamlin.

12 East, 284. May 18, 1810.

The stat. 48 G. 3. c. 149, schd. 2, requiring an office copy of the declaration to be written in the usual and accustomed manner, on which the duty of 4d. per sheet is imposed; and it not having been the practice to write such copies on both sides of the stamped sheet of paper; held that an office copy so written and delivered to a prisoner was irregular, and entitled him to be discharged out of custody.

READER obtained a rule on the plaintiff to shew cause why the defendant should not be discharged out of custody for an irregularity in the proceeding against him, in regard to the stamps; and notice of it was directed by the Court to be given to the solicitor of the stamp office. The defendant was in custody, and the copy of the declaration delivered to him was upon two four-penny stamped sheets, which taken together did not contain a greater number of words than would have been covered by the two stamps: but on the back of

(1) Vide *Price v. Hunt*, Pollaxf. 645. *Sowell v. Garret*, Moore 422, pl. 590. *Barker v. Suretees*, 2 Stra. 1175. *Walsh v. Peterson*, 3 Atk. 193. S. C. 9 Mod. 444. *Framlingham v. Brand*, 3 Atk. 390. S. C. 1 Wils. 140. *Fairfield v. Morgan*, 2 New Rep. 38. *Denn v. Wilkins v. Kemys & al.* 9 East, 366. *Brewer & ux. v. Opie*, 1 Call. 212. *Hauer's lease*, v. *Shute*, 2 Binn. 532.

one of the stamped sheets, the front of which had been used for the common money counts, was written a count on a promissory note, which altogether made a greater number of words on that sheet than the single stamp would cover, if the stamp were reckoned according to the number of words allowed in other cases. And this was now insisted upon as an objection by the *Attorney-General*, on behalf of the stamp office, who referred to the statute 48 Geo. 3. c. 149, schedule, part 2, which first states that the duties on law proceedings are to be paid for and in respect of every sheet of paper, &c. upon which the several matters therein charged shall be respectively written or printed; except where the duties are imposed according to the number of words therein contained, or are expressly charged in any other manner. And that all the instruments, matters, and things, therein charged with a duty in respect of every sheet, &c. shall respectively be written in such and the same manner and form as the like instruments, matters, or things, have been heretofore accustomed to be, or are now usually written or printed. Then follows the alphabetical list of the different articles required to be stamped, with the value of the stamp: amongst others, "Declaration in any court of law, 4d."—"Copy (i. e. office "copy) of any declaration, plea, &c. or other pleading whatsoever, in any "court of law, 4d." And he now produced an affidavit negativing that this office copy of the declaration was written in the usual and accustomed manner; and stating that it was the first known instance of such a copy written upon both sides of the paper. He observed, that if this mode of using a stamped sheet were permitted, it would also cover words written across the original lines, and in every direction upon the paper. That the stamp being imposed upon each separate sheet, it was no answer to the objection that one of the sheets was overloaded with words written in an unusual manner, to shew that the rest of the declaration was written upon another stamped sheet, which might have contained a greater number of words.

And of this opinion was the *Court* (after hearing *Park* against the rule.) They said, that if the copy of the declaration were not written upon the stamped sheet in the usual and accustomed manner practised before the making of the act, the party did not bring himself within the provision referred to; and the defendant was entitled to be discharged out of custody for the non-delivery to him of a proper copy of the declaration in due time.

Rule absolute.

Shiffner v. Gordon and Murphy.

12 East, 296. May 22, 1810.

As the king cannot licence the importation of enemy's property, the produce of a foreign country, into this realm in neutral vessels, contrary to the navigation laws, a licence in fact granted for such purpose will not legalize an insurance upon the property so imported. And if a policy be made upon the supposed efficacy of such a licence, for the purpose of covering the importation of *British* as well as *enemy's* property in that manner, (the former of which is legalized by the stat. 43 G. 3. c. 153. s. 15, 16 and 45 G. 3. c. 34,) the underwriters cannot at any rate recover the premiums for more than the amount of that *British* interest insured; the assured not resuming their claim to that extent.

THIS action was brought to recover 328l. 6s. 11d. as the balance due to the plaintiff from the defendants for premiums of insurance upon certain policies on goods, which he had underwritten for them. The declaration contained a count for money due for premiums, and also the usual money counts; and at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, a verdict was found for the plaintiff for 328l. 6s. 11d., subject to the opinion of the Court upon the following case.

The plaintiff being an underwriter, and the defendants extensively engaged in the *Spanish* trade, between the latter end of 1804, and the middle of 1807, the plaintiff underwrote many policies effected by the defendants, the account of all which was settled in *October* 1807, when the plaintiff paid to the defendants a balance of 66*l.* 0*s.* 6*d.* Other policies were afterwards underwritten by the plaintiff for the defendants in 1807 and 1808, and on a balance of the accounts there remained due to the plaintiff 328*l.* 8*s.* 11*d.*, for which this action was brought. This balance consisted of the following sums, viz. 93*l.* 4*s.* 2*d.* undisputed premiums, and 235*l.* 2*s.* 9*d.* disputed premiums; the latter sum being upon the seven following policies; viz.

Ship <i>Liberty</i> , from <i>Cadiz</i> to <i>Vera Cruz</i> ,	5th August 1807.
<i>Herald</i> , <i>Vera Cruz</i> to <i>London</i> to touch at the <i>Havannah</i> ,	2d October 1807.
<i>Neutrality</i> , <i>Vera Cruz</i> to <i>Great-Britain</i> , with liberty to touch at the <i>Havannah</i> ,	12th Nov. 1807.
<i>Monticello</i> , <i>Cadiz</i> to <i>South America</i> ,	18th Nov. 1807.
<i>Jupiter</i> , <i>Cadiz</i> to <i>Vera Cruz</i> ,	16th Jan. 1808.
<i>Conception</i> , <i>Cadiz</i> to <i>Vera Cruz</i> ,	17th Nov. 1807.
<i>Statira</i> , <i>Vera Cruz</i> to <i>England</i> , with liberty to touch at the <i>Havannah</i> ,	6th Jan. 1808.

All the above seven ships were neutral, being either *Americans* or *Danes*; and *Spain* and *England* were at war when the several voyages insured commenced and ended. The cargoes on board the said ships belonged partly to the defendants, and partly to their correspondents resident in *Old* and *New Spain*; the object of the voyages being to bring dollars, indigo, and other produce of *Spanish South America*, to *England*; and such produce was brought accordingly. At the times when the plaintiff subscribed these policies it was represented to him by the defendant's agents, who effected the insurances on their account, that his majesty's licences had been granted for the said ships upon the voyages then about to be insured, and that such licences would cover hostile as well as *British* property; and upon the faith of such representation the policies were underwritten; and, in fact, his majesty's licences for all the seven ships had been procured. The policies were in the common form, and did not contain any warranty for licences. The several licences were in this form: "George the Third, &c. To all commanders of our ships of war, &c.—Whereas we were graciously pleased by our royal licence, dated the 6th of June last, to permit Messrs. *Gordon* and *Murphy*, Messrs. *Read*, *Irvin* and company, and other *British* merchants, or their agents, or bearers of their bills of lading, on board one neutral vessel, the name of which they are unable to set forth, to export and convey from any port or ports of *Spain*, or from any of the *Canary Islands*, directly or circuitously to some *Spanish* port in *South America*, a cargo consisting of manufactured goods, with an assortment of quick-silver, paper, and cards of *Spanish* manufacture, wines, brandies, and all other innocent articles, as might be specified in their bills of lading; and in return for the said goods so to be exported, to convey and import by the said vessel, from any of the *Spanish* ports in *South America* directly or circuitously, to any of our colonies, islands, or plantations in the *West Indies*, or in *Europe*, or to any port of our United Kingdom, such quantity of the produce of the *Spanish* colonies and bullion as might be specified in their bills of lading, and being their property or that of other *British* subjects, or the property of the subjects of any state at present in amity with us, and not being the property of our enemies; and that the said vessel should proceed on her intended voyage without molestation by any of our ships of war or privateers, either on account of the existing war, or of any other hostilities which might hereafter take place: and whereas it hath been represented to us, that the *Danish* ship *Neutrality*, Ha-

for Eliesin, master, took the benefit of our said licence on a voyage from *Barcelona to Vera Cruz* and the *Havannah*, and to return to a port of our United Kingdom, and that the said voyage and adventure was undertaken after a communication with the lords commissioners of our treasury, and for the purpose of procuring a quantity of dollars, which were and still are necessary to our public service; and in the course of such communication it was fully understood, that the cargo to be sent or brought back on board such vessel might be in part or in the whole *Spanish* property: and whereas by the terms of the said licence it has been required, that the said cargo shall be *British* or neutral property: We taking into our consideration the premises, and the urgency of the public service in this behalf, are graciously pleased to grant our royal licence and protection for the said cargo and bullion, going or returning on board the said vessel, notwithstanding any thing contained in our order of the 7th of *Jan.* last to the contrary, and notwithstanding the said cargo and bullion may appear to be, and be, *Spanish* property. Provided, nevertheless, that the said vessel, in her return voyage from the *Spanish* colonies, shall proceed directly or circuitously to any of our colonial islands, plantations or settlements in the *West Indies*, or in *Europe* or to *Gibraltar*, or to any part of the United Kingdom, notwithstanding she may appear by her clearances to be destined to some other country; and upon condition that security shall be given by the said Messrs. *Gordon and Murphy*, to the satisfaction of the lords commissioners of our treasury, that in as far as may depend upon their *bona fide* endeavours, the quantity of dollars agreed upon shall within twelve months from the date hereof be brought from the *Spanish* colonies. Provided also, that the licence hereby granted shall remain in force eighteen months from the date hereof. And we do hereby in all other respects confirm our licence hereinbefore recited: and we further direct and strictly enjoin the commanders of our ships of war and privateers not to molest or interrupt the said ship in the prosecution of her said voyage." Dated *St. James's* 22d of *Jan.* 1807, and countersigned "*Spencer*." The ship *Neutrality* was taken by a *British* privateer, and whilst in her possession was lost by the perils of the sea: and the plaintiff had resisted the payment of the loss upon certain legal objections, which the Court had decided in his favour; though he had paid the defendants' losses on other ships in similar voyages. The defendants paid no money into court. And the question was, whether the plaintiff were entitled to recover the 828*l.* 6*s.* 11*d.* being the full amount of his demand, including the premiums upon the seven policies: or such part of the premiums only as was sufficient to cover the interest of the defendants in the several cargoes thereby insured, besides the sum of 93*l.* 4*s.* 2*d.*, for which it was not disputed that the plaintiff was entitled to a verdict. If the Court were of opinion that the plaintiff was entitled to recover only such part of the premiums as would be sufficient to cover the interest of the defendants in the cargoes insured by the seven policies, beyond the sum of 93*l.* 4*s.* 2*d.*, then the amount of such interest was to be ascertained by an arbitrator, and the verdict was to be reduced accordingly.

There was another cause of *Vaughan v. Gordon and Murphy*, the circumstances of which were in substance the same.

Carr, for the plaintiff, contended that he was entitled to recover the whole. It was objected at the trial, that the policies were altogether void on the face of them; some of them professing to cover voyages to and from the enemy's country, and others of them to cover importations of *West India* produce into this country in neutral ships. As to the trading with the enemy, the objection is removed by the king's licence, as settled in *Potts v. Bell*, 8 Term Rep. 548, and *Vandyck v. Whitmore*, 1 East, 475. But it may be admitted, that so far as the king's licence exceeds what is warranted by the navigation laws, it is not valid. With respect, however, to *neutral* and *British* property, it appears from the stat. 43 Geo. 3. c. 153. s. 15 & 16, and 45 Geo. 3. c. 34. s. 1, that the legislature meant to relax the former strictness of the navigation code, and to

authorize the king to grant licences of this description for the importation of such property from neutral or hostile countries. But the contract is equally good, though it do not notice such licence, if in fact it be granted. For in *Timson v. Merac*, 9 East, 35, a contract of guaranty by British subjects here; that a house in France would ship goods from thence in a neutral ship to be imported into this country, was held to be legal, and covered by such a licence which was afterwards granted to British merchants to import such goods on their own account: and the same objection might have been raised in almost every case of such licences which has been brought into controversy; but it does not appear to have been taken either at the bar, or by the bench. It existed equally in *Vandyck v. Whitmore*, 1 East, 475; *Vanhartals v. Holhed*, ib. 487, n., and *Kensington v. Inghis*, (a) as in this case. Besides, the defendants' counsel will not now dispute that the policies were valid upon the face of them at the time they were subscribed. [Fuller, contra, being called upon by Lord Ellenborough, C. J. to state whether he meant to admit their validity in form, said, that he was not instructed to dispute it; that the licences were in fact granted before the policies were effected. But he meant to insist, that the licences were only good to the extent of the king's power to grant them under the recent statutes, and only covered the goods of the subject to be imported, but not the goods of an enemy. On which his Lordship said, that upon this admission they would take the policies to be *prima facie* valid.] It will then be objected, that the policies, (b) though not void on the face of them, were voidable, and avoided by means of the assured's shipping on board hostile property as well as their own, which hostile property could not be imported in neutral vessels from South America, nor covered by an insurance. But as the contract was avoided by their own subsequent illegal act, they ought not to be permitted to avail themselves of it to withhold the premiums. He said, that he should not contend, that the late acts extended so far as to enable the king to licence the importation of enemies' property; the Court having in a former case, (c) arising out of the same transaction, intimated their opinion against it; though that point was not expressly decided; the Court having determined that case against the assured upon the ground of their noncompliance with the terms of the licence, by which alone the adventure could be legalized. [Bayley, J. The assured agree to allow the whole premiums on the insurance from Old to New Spain: they only resist their liability to pay the premiums which covered the importation of enemies' property in neutral vessels; and if the underwriters were not bound upon the policies home, in respect of the Spanish property thereby insured, how can they claim the premium paid for the insurance of that property?] The underwriters did not know that enemies' property was put on board, and the assured having done this upon their own risk and responsibility, and thereby avoided the policies, the Court cannot apportion the premium.

Fuller, contra, observed that there were two classes of voyages insured, the one from Old Spain to South America, the other from South America to

(a) 8 East 273. In this last case, the objection upon the breach of the colonial and navigation laws was taken on the part of the plaintiff in error in the course of the argument in this court; but the Court held, that he was precluded from insisting upon it, inasmuch as that objection arose, if at all, out of the evidence, and he was confined to the objections taken to the evidence at the trial, and stated on the face of the bill of exceptions. Vide ib. 280, 1.

(b) This objection, it was said, applied only to three of the ships, the *Neutrality*, *Statira*, and *Herald*, where the policies were upon the homeward bound voyage.

(c) This was the case of *Gordon v. Vaughan*, in this court, E. 49 G. 3, which ultimately went off on the ground suggested in the argument. The licence was to cover the voyage out and home, and contained a condition that the licensee should export a certain proportion of British manufactures for the voyage out: but it appeared, that the greatest part of the outfit was made up of Spanish goods, and only a very small quantity merely nominal, of British manufactures; which was deemed to be colourable, and in fraud of the licence.

England. That he did not mean to deny the king's authority to licence the former; it being part of his prerogative to dispense with the *jus belli* in whole or in part: but by the navigation laws the king could not sanction the importation into this country of enemies' property, the produce of *South America*, in neutral ships. So much of the premiums, therefore, as covered that property must be deducted as for short interest. The amount of the interest insured on the home voyage is divisible into that part which covered the property of *British* subjects, and that which covered the enemies' property; considering that both parties acted innocently, though ignorantly; confiding in the supposed goodness of the licenses to cover the whole: and therefore this does not fall within that class of cases(a) where the assured intending to insure an illegal voyage have been held not entitled to recover back the premium when paid on the one hand, nor the underwriter to sue for it on the other. He was then stopped.

Lord ELLENBOROUGH, C. J. It is a settled rule, that where a contract which is illegal remains to be executed, the Court will not assist either party in an action to recover for the non-execution of it. It is a very dangerous question for the plaintiff to stir in this case, if we are pushed to decide upon it, whether this were not one entire mixed cargo of *British* and enemies' property in each ship respectively covered by the several policies, on which the premium was not divisible: but as the defendants' counsel has consented to waive the question, and to admit the plaintiff's right to recover so much of the premiums as covered the *British* risk, it is unnecessary to say more upon it. There can be no doubt in this case that part of the cargo of the several ships which was to have been imported into this country, being forbidden by the navigation laws, and which therefore, the king's licence did not extend to cover, the underwriters upon the policies never run any risk, at least as to that part; and therefore there is no pretence to say, that the plaintiff can recover the premiums for it.

The other Judges concurring, it was settled that the plaintiff should recover the amount of the premiums on the *British* part of the insurance, when ascertained, on the three ships insured on the homeward-bound voyage, and the whole of the premiums on the four outward-bound voyages.

Doe, on the several Demises of Sir Robert H. Bromley, Bart. and Others, v. Bettison and Others.

12 East, 305. May 22, 1810.

Under a power to lease for 21 years *reserving the best rent*, so as the lease should not contain any clause whereby authority should be given to the lessee to commit waste, or whereby he should be exempted from punishment for committing waste, and so as such lease should contain such other conditions, covenants and restrictions, as were generally inserted according to the usage of the counties where the premises were: held that a lease was good, though the lessor thereby took the repairs of the mansion house (excepting the glass windows) on himself, and covenanted, that if he did not repair it within three months after notice, the tenant might, and deduct the charges out of the rent reserved to the lessor: and though the lessor covenanted, in consideration of a large sum to be laid out by the lessee in the repair of the premises in the first instance, to renew during his (the lessor's) life at the request of the lessee, his executors, &c. on the same terms: because this covenant only bound the lessor himself, and if the best rent were not reserved upon such renewal, the lease would be void against the remainder-man.

The sufficiency of the rent must be governed by the consideration on whom the *onus* of repair is thrown.

IN ejectment brought to recover possession of a mansion house, called *Ow-*

(a) *Morck v. Abell*, 3 Bos. & Pull. 38. *Vandyck v. Hewitt*, 1 East, 96. *Lovry v. Bourdieu*, Dougl. 168, 465. *Andree v. Fletcher*, 3 Term Rep. 266, and *Lubbock v. Potts*, 7 East, 456, were cited.

thorpe Hall, with the appurtenances, and also two dwelling houses, &c. and 411 acres of land, in the county of *Nottingham*, the defendants at the trial before *Le Blanc, J.* at *Nottingham*, obtained a verdict, subject to the opinion of this Court on the following case.

The late *Sir George Bromley* was tenant for life, without impeachment of waste, of the premises, under his marriage settlement dated in *May 1779*; with a power of leasing by indenture (*inter alia*) the premises to any person, for any term of years not exceeding 21, absolute, to take effect in possession and not in reversion, so as there was reserved in every such lease the best and most improved yearly rent that could be reasonably gotten for the same, without any fine, &c.; and so as there was contained in every such lease a condition of re-entry for non-payment of the rent reserved; and so as in every such lease there was not contained any clause whereby any power or authority should be given to any lessee to commit waste or whereby any lessee should be exempted from punishment for committing waste; and so as there was inserted in every such lease such other conditions, covenants, and restrictions as are generally inserted in leases, according to the usage of the counties where the said premises so to be leased are situated; and so as the respective lessees executed counterparts of their respective leases.

By indenture of the 25th of *March 1801*, *Sir George Bromley* demised the premises in question to *J. Renshaw*, for 21 years, to commence from the 10th of *Oct.* preceding, at the annual rent of 230*l.* payable to *Sir George*, his heirs and assigns, and after him to those to whom the premises should descend or belong; with a proviso for re-entry by *Sir George*, his heirs and assigns, or such other person, &c. if the rent were in arrear for 20 days. There was also a clause against assigning the premises except to the lessee's wife and children by will, without consent in writing of the lessor, &c. The lease also contained a covenant by the lessee for payment of rent and taxes, &c. and to keep the dwelling-houses (except the mansion-house,) and all other out-buildings, and the gates, &c. on the lands, in tenantable repair during the term: the lessor, &c. allowing rough wood for such repairs; and that the lessee should keep in repair the glass of the windows in the mansion house, and should pay for the carriage of materials necessary for the repair of such mansion, not exceeding 12 miles distance. And *Sir George* covenanted for himself, his heirs and executors, &c., during the term, to keep in repair the mansion-house (except the glass in the windows and the carriage of materials for repairs;) and that in case of repairs wanted on the roof of the mansion-house, if *Sir George*, his heirs and assigns, did not repair the same within 3 calendar months after notice in writing of the defect, it should be lawful for *J. Renshaw*, his executors and administrators, to repair the same, and deduct and withhold the charges thereof out of the rent reserved and made payable to the said *Sir Geo. B.*, his heirs and assigns. The lease also, after reciting that the demised premises were greatly out of repair when the lessee first entered, so that it would cost him at least 1000*l.* to put the same in repair, and that it was agreed that he should expend that sum accordingly in the repairs: and that, in consideration thereof, *Sir George Bromley* should every year thenceforward, during his life, at the request and charge of *J. Renshaw*, his executors, &c. execute to him and them a new lease of the premises, for 21 years, to commence on the 10th of *Oct.* preceding, upon the same rents, conditions, covenants, and provisoes, as in this lease: and reciting that *Sir George Bromley* was fully satisfied, by the estimate and opinions of skilful persons, that the lessee had expended 1000*l.* and upwards in the repairs; witnessed, that in consideration of the premises, *Sir George* covenanted, at all times during his life, at the request and charge of *J. Renshaw*, his executors and administrators, to renew the lease for 21 years from the 10th of *Oct.* &c. upon and subject to the same rents, covenants, clauses, conditions, and provisoes as in the present lease contained.

The case then found, that the rent reserved was the full value of the premises at the time of the demise, and was the best and most approved yearly rent that could be reasonably gotten for the same; that the lease contained such conditions, covenants, and restrictions as are generally inserted in leases, according to the usage of the county of *Nottingham*: that a counterpart of the lease was executed: and that there had been no breach of any of the covenants contained in it. That there is a large farm-house with out-buildings, and two dwelling houses or cottages on the premises, besides the capital mansion-house, called *Owthorpe Hall*, which was described to be very large, and that only a part of it was occupied by the lessee. If the plaintiff were entitled to recover, the verdict was to be entered for him: otherwise, the verdict for the defendants was to stand.

Copley, for the plaintiff, took three objections to the lease as not authorised by the power: first, that it contained a clause by which in effect the lessee is exempted from punishment for permissive waste in the mansion-house. 2dly, That the lessee is exempted from the payment of rent to the extent of the money laid out by him in the repair of the roof, upon default of such repairs made by the lessor tenant for life. 3dly, That there is a covenant by the tenant for life for renewal, which is prejudicial to the remainder-man, and avoids the lease. As to the first, the power must be taken to refer to *permissive* as well as *commissive* waste, by analogy to the statute of *Marlebridge* as explained by Lord *Coke's* comment, 2 Inst. 145, on the word *faciant* in that statute, and in the statute of Gloucester, c. 5. [*Bayley, J.* The restriction on the power of leasing here is only that the lease shall not contain any clause whereby any power shall be *given* to the lessee to commit waste, or exempting him from punishment for committing it.] The power must be construed strictly according to the legal sense of the words: and if any part of the demised premises are to be repaired by the lessor, so far it operates to give an exemption to the lessee from the punishment of permissive waste. [*Le Blanc, J.* Does not the argument come at last to the quantum or sufficiency of the rent reserved? If the tenant be to keep the premises in repair, the rent is so much less; if the landlord be to repair, the rent is the greater. It was a question for the jury at the trial, whether, taking into consideration the repairs to be made by the landlord, the rent reserved were the fair rent.] 2dly, At any rate, the covenant enabling the lessee to deduct the charges which he should incur, by reason of the non-repair by the landlord, out of the rent, amounts to a cesser of the rent *pro tanto*, and is an unusual covenant contrary to the power. As in *Doe v. Sandham*, 1 Term Rep. 709, a power to lease, reserving the usual covenants, was held not to warrant a lease containing a proviso, that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease. [*Bayley, J.* That was found in fact by the jury to be an unusual covenant.] 3dly, The covenant for the renewal avoids the lease: it operates indirectly upon the interest of the remainder-man, though it only binds the tenant for life directly. The lessee would not of course apply for a renewal, unless it was for his benefit; and the remainder-man loses one of the checks which in general operates in his favour on the tenant for life to reserve the best rent: for the tenant for life may, for fear of an action on the covenant, be induced to renew at less than the best rent at the time when such renewal is applied for; and the difficulty upon the remainder-man of proving that a better might then have been had is enhanced in a greater degree when other uncertain computations are to be taken into the account, than if the question were confined to the mere amount of the gross rent reserved.

Reader, contra, was stopped by the Court.

Lord ELLENBOROUGH, C. J. The third is the only objection on which any argument could be raised. As to the first, the power stipulates against any clause in the lease whereby any authority shall be *given* to the lessee to com-

mit waste, &c.: and the answer to that objection is, that no such power or authority is given to the lessee: nor is he thereby exempted from the punishment for committing waste: for the burthen of repair in the mansion house is thrown by the lease on the landlord; and it was incumbent on the plaintiff's counsel to have shewn that, according to the terms of the power, no such burthen could have been thrown on the landlord; but that is not prohibited, and therefore the argument falls to the ground. Next, the covenant provides, that if repair should be wanted on the roof of the mansion, which the landlord took upon himself, and he did not repair it, the tenant might make the repair, and deduct the charge out of the rent reserved to the lessor. What objection can there be to provide for setting off the one demand against the other? Then as to the covenant for renewal; it is said, that it has a tendency to induce the lessor to run the question on the quantum of rent reserved very closely; for if he renewed at the end of twenty years from the first granting of the lease, the remainder-man might have a lease, fixed on him for 21 years from that time, reserving less than the best rent which could then have been reserved: but the answer is, that if the fact were so, the lease would be void, and the remainder-man might bring his ejectment and recover the premises.

Per Curiam,

Postea to the Defendant.

Barlow v. M'Intosh.

12 East, 311. May 22, 1810.

Where an assured, a *British* merchant, in an action on a policy of insurance on goods bound to an enemy's port in *Holland*, seeks to protect the adventure under the king's licence to trade with the enemy it is not sufficient to give in evidence at the trial, and to prove his possession in fact before the voyage commenced of a *general* licence, dated three months before, licensing *six neutral vessels* under certain neutral flags to pass unmolested to or from any port of *Holland*, from or to any port of this kingdom, with certain goods (including the goods insured :) which licence was directed to *R. S. and other British merchants*; with a condition annexed, that they should cause the licence to be delivered up to them or their agents when the ship should enter any port of this kingdom; without also giving probable evidence to account for his possession of the licence, and to shew that this user of it was lawful; as by shewing from whom and when he received it, and thereby connecting his own particular adventure with such general licence.

THIS was an action on a valued policy of insurance on coffee, on board the ship *Fortwyn*, at and from *London* to any port between *Dunkirk* and the *Weser*, at 30 guineas per cent. The interest was alleged to be in *F. W. Schmaling*, and the loss was averred to be by seizure and detention. At the trial before *Ld. Ellenborough*, C. J. at *Guildhall*, the defendant's subscription to the policy, the shipment of the goods insured, and the interest and loss, as alleged, were proved; but the plaintiff was nonsuited, on an objection taken to the licence under which the voyage was prosecuted: and a rule nisi having been obtained for setting aside the nonsuit, it was afterwards agreed, upon the suggestion of the Court, to state the facts in the form of a case, which now came on to be argued.

The *Fortwyn*, on board of which the coffee was loaded, was a neutral vessel sailing under a *Kniphausen* flag; and having departed from *London* on the 1st Nov. 1807, was seized by the *Dutch* government in the river *Maas* on the 6th of the same month, while proceeding to *Rotterdam*, her port of destination. The captain of the *Fortwyn* produced at the trial an original licence which he received from *Mr. Schmaling*, a merchant in *London*, the shipper of the goods in question, previous to her sailing on the voyage insured; and which licence was on board the ship during the whole voyage, and at the time

of the seizure of the cargo in the river *Maas*. The licence was in the form following.

" *G. R.*

" *George* the Third, &c. To all commanders of our ships of war, &c. Our will and pleasure is, that you permit six neutral vessels to navigate freely " and without molestation, under *Hambro, Bremen, Oldenburgh, Rastocher, Danish, Prussian, American, Pappenburgh*, or *Kniphausen* flags, from or to " any port of *Holland*, with liberty to touch at *Tonninghen*, or some other " neutral port, to or from any port of our United Kingdom into which neutral " vessels may be allowed to enter from *Holland*: and to import, &c. [here followed a long list of articles importable;] and also to export [here followed another list of articles exportable, including coffee,] and all other articles " not prohibited by law to be exported, as may be specified in their bills of " lading. This our licence to remain in force for six months from the date " hereof, and no longer, and to be revocable at any time during the said period at our pleasure: but in case of its not being so revoked, the said vessel, " master, and crew, to have liberty to depart unmolested to any port not " blockaded. Provided also, that *Richard Smith and other British merchants*, " to whom we may grant this licence, do cause the same to be delivered up to " them or their agents whenever the ship or vessel shall enter any of our ports, " and in default thereof, the said ship or vessel to lose the protection thereby " granted. Given at our court at *St. James's*, 22d day of *July* 1807, in the " 47th year of our reign. By his majesty's command, *Hawkesbury.*"

" *Richard Smith et al.* licence.

No other evidence was given to connect *Mr. Schmaling* with *Richard Smith* in the licence mentioned, or to shew that he was one of the merchants for whom the licence was intended, or to explain by what means he became possessed of it. If the plaintiff were entitled to recover, the nonsuit was to be set aside, and judgment entered for the plaintiff, (but without costs:) or otherwise, the nonsuit was to stand.

Puller, for the plaintiff, contended that the possession of the licence by a *British* merchant, as *Mr. Schmaling*, was *prima facie* evidence that he was legally entitled to hold and use it: the licence being in terms granted "to *Richard Smith and other British merchants*;" subject, as such *prima facie* evidence must necessarily be, to be rebutted by shewing that *Mr. Schmaling* unlawfully obtained the possession, or made an unlawful use of it. The general form of the licences, which neither specify the name of the ship or of the shipper of the goods, was introduced for the very purpose of concealing both from the knowledge of the enemy; and the practice has been to take them out in the names of certain known ship-brokers, who have notoriously no interest in either; but the *British* merchants really interested in the adventures are designated under the general term of "*other British merchants.*" Provided, therefore, they are retained in the hands of any *British* merchants, the policy of government is answered, and it must be a matter of indifference by whom individually they are used, if used properly. It might be difficult in many instances to prove the connexion between the general broker, whose name is used *pro forma*, and the particular merchant for whom the licence is taken out; the communication between them may have been personal, and the broker may have died in the mean time. The inconvenience, if any, in these cases, arises from the very nature of the thing, and its professed object of concealing the individuality of the transaction; and that must necessarily lie in the generality of the evidence founded upon the mere fact of the possession of the licence. He referred to *Defflis v. Parry*, 3 Bos. & Pull. 3, and *Timson v. Merac*, 9 East, 35, as cases which turned on the generality of these trading licences, which had received a liberal construction in furtherance of the trading interests of the country meant to be facilitated by them.

But the Court observed, that in the latter of these cases the licence was granted in the name of *Merac* and Co. who were sued upon their guaranty of the contract for the importation of the goods under the licence; and in the other case the importers of the goods under the licence were proved to have acted in connexion with the persons to whom the licence was granted: and therefore those transactions were quite in the regular course. *Le Blanc*, J. further observed, that the licence in this case did not appear by any evidence to have been in the shipper's hands till above three months after the date of it, when it was given by him to the captain.

And Lord ELLENBOROUGH, C. J. said, that previous to the time when the licence was proved to have been in the possession of *Schmaling*, and to have been by him delivered to the captain, it might have served for three voyages to *Holland*. It might have dropped out of the pocket of the person entitled to it, and been found by the present possessor of it. The possibility of such facts existing, consistently with the evidence given at the trial, called upon the shipper of the goods, who endeavours to avail himself of it, to connect himself by other evidence than the mere possession with the particular licence: otherwise in the absence of all proof of such connexion, there was a natural suspicion, a preponderance of probability, that the licence had been used before to cover an antecedent voyage, and against the lawful use of it upon the voyage in question. The state of the commercial world may make it expedient to grant licences in this very general form; but this generality subjects the practice to abuse. If the party who produces and seeks to avail himself of it be required to shew when and how he obtained the possession of it, that will be a salutary check upon the abuse of it. I did not require the assured at the trial to shew that he was the person who obtained the licence from the privy council office: I am aware of the difficulties which may exist in disclosing the names of the real parties to the adventure, and the adventure itself: but he might have shewn, that he obtained possession of it lawfully from the person by whom it was taken out. But if it be sufficient for a party at any time to stand upon his mere possession of such a general licence, there can be no check whatever upon any indefinite abuse of them. [*Fuller* having afterwards mentioned from recollection a case of *Horseman v. Bristow*, which was tried before his Lordship; in which the possession of a similar licence by the party claiming the benefit of it was deemed sufficient: and having suggested, that it was a question in all cases for the jury to decide, whether the party obtained the possession of the licence lawfully:] his Lordship added, that he had no recollection of the case alluded to, nor did he recognize any such decision. It might have passed upon admissions, when his attention would not be called to it. That if the question of possession were presented under different circumstances which served to explain and shew it to be lawful, the case did not apply to the present: If the circumstances were alike, the attention of the Court being now first called to the question, it must be considered as *sub judice*. As to its being a question for the jury, whether the mere fact of possession shewed a lawful possession of the licence: it makes part of the title of the party claiming to be licenced to shew how he obtained possession of a licence which in the terms of it is general: it makes part of the plaintiff's case against the underwriter to connect himself with the property insured, and to shew that it was lawfully insured: If he obtained possession of it properly, he can have no difficulty in shewing from whom and when he obtained it. The plaintiff will not be concluded by this nonsuit from bringing forward his claim again upon better evidence, if he have a fair case. Probable evidence of a lawful possession will exclude any unfavourable presumption from the circumstance of standing upon the mere possession of such an instrument wholly unaccounted for.

LE BLANC, J. This general licence is merely intended to protect the ship

from the seizure of *British* cruisers, and to suffer her to pass: but when any individual seeks to cover his own interests under it, he must connect himself with it by some probable evidence.

BAYLEY, J. A general licence must be applied by evidence to the particular case in judgment.

Per Curiam,

Judgment of nonsuit.

Scarlett was to have argued for the defendant, and observed shortly, that it could never have been the intention of the Crown, in granting these general licences, to enable the persons on whose application they were issued, to grant them out to whom they pleased.

Jacaud and Gordon v. French, Borrowes and Canning.

12 East, 317. May 22, 1810.

A. being partner with *B.* in one mercantile house, and with *C.* in another; the house of *A.* and *B.* indorse a bill of exchange to the house of *A.* and *C.*; after which *B.*, acting for the house of *A.* & *B.*, receives securities to a large amount from the drawer of the bill, upon an agreement by *B.*, that the bill should be taken up and liquidated by *B.*'s house and if not paid by the acceptors when due, should be returned to the drawer; Held that the securities being paid and the money received by *B.* in satisfaction of the bill, *A.* was bound by this act of his partner *B.*, whether in fact known to him or not at the time, not only in respect of his partnership interest in the house of *A.* and *B.* but also individually in other respects: and therefore that he could not in conjunction with *C.*, his partner in the other house, maintain an action as indorsees and holders of the bill against the acceptors, after such satisfaction received through the medium of and by agreement with *B.* in discharge of the same.

THE plaintiffs declared in *assumpsit* for the amount of a bill of exchange, dated *Dublin* 7th April 1806, drawn by *Farrell* and Co. upon, and accepted by, the defendants in *London*, for 1000*l.* sterling, payable 45 days after date, to the order of *Farrell* and Co., and indorsed by them to *Blair* and *Jacaud* of *Dublin*, and by *Blair* and *Jacaud* indorsed to the plaintiffs. At the trial before Lord *Ellenborough*, C. J. in *London*, a verdict was found for the plaintiffs for 1198*l.* 10*s.* subject to the opinion of the Court on the following case.

The plaintiff *Jacaud* was a partner in business with *Blair* in *Dublin*, in April 1806, and for some time before, and until after the time of providing for the payment of the bill in question by *Farrell* and Co. The business was carried on in the firm of *Blair* and *Jacaud*, and was a distinct firm from that of the plaintiff's carried on under the names of *Jacaud* and *Gordon* in *London*. The firm of *Jacaud* and *Gordon* shipped goods, effected insurances, and accepted bills for, and transacted other the affairs of the firm of *Blair* and *Jacaud*, and the firm of *Blair* and *Jacaud* from time to time made remittances to the firm of *Jacaud* and *Gordon* of *London*, to cover or answer their advances and acceptances. On the 7th of April 1806, *Blair* took or bought from *Farrell* of *Dublin* the said bill of exchange, and on the same day the house of *Blair* and *Jacaud* indorsed the bill, and remitted it to the plaintiffs on account of *Blair* and *Jacaud*; at which time the plaintiffs were under acceptances for *Blair* and *Jacaud* to the amount of about 3000*l.* On the 15th, 16th, and 23d days of May 1806, before the said bill fell due, *Farrell* lodged with and paid to the house of *Blair* and *Jacaud* two notes of one *R. O'Conner* for 695*l.* Irish currency, and also the acceptances and notes of *Farrell* and Co. for 880*l.* Irish, for the express and specified purpose of liquidating and providing in the first place thereout for the due payment of the said bill of exchange, and to take up and satisfy the same, and for in part liquidating another bill drawn by *Farrell* and Co. on the defendant's house for 1000*l.*, also purchased by the house of *Blair* and *Jacaud* from *Farrell* and Co. It was agreed & understood between *Blair*, on the part of the house of *Blair* & *Jacaud* & *Farrell* & Co., that in case

the said bill should not be paid when due, it should be returned and delivered up to Farrell and Co. Immediately on the said notes and bills being so paid by *Farrell and Co.* to the firm of *Blair and Jacaud* (viz.) on the 15th, 16th, and 23d of *May* 1806, such notes and bills were entered in the usual way in the books of account of the house of *Blair and Jacaud*, and were immediately accredited therein to the account of *Farrell and Co.*; which books were at the time under *Jacaud's* care in the house where he resided, and he was in the constant habit of inspecting the same. The house of *Blair and Jacaud* applied to their own use the notes and acceptances so received from *Farrell and Co.*, and did not remit the same, or any part thereof, to the house of *Jacaud and Gordon*, nor did they take up the bill of exchange now sued upon, or provide for the same, or give any notice to the house of *Jacaud and Gordon* of the deposit or payment so made by *Farrell and Co.* On the 15th of *May* 1806, the day on which *Farrell and Co.* made the first payment as aforesaid to the firm of *Blair and Jacaud*, the firm of *Blair and Jacaud*, sent a letter to the firm of *Jacaud and Gordon* in *London*, dated—*Dublin*, 15th of *May* 1806—in which they say, “In consequence of a communication had this day with the drawers of the bills on Messrs. *Bogle, French*, and *Co.*, we intend remitting Messrs. *Andre* and Son to-morrow, against the 1000*l.* falling due on *Monday*, and we will then let the bill remain in their hands, to the end that they may conform to whatever is determined on for the liquidation of those gentlemen's affairs. We thought it proper to make this communication to you: it will be done to-morrow: and in a day or two, you shall be apprized of what is intended regarding the other 1000*l.*, that is, whether it will be done in the same way, or by some other house appointed for the purpose, &c. This arrangement of paying *Bogle, French*, and *Co.*'s bill we suppose will be very acceptable to Mr. *Andre*; as, besides being remitted against the bill, it will be remaining in his hands; and though a dead letter, will be a certain security.” The house of *Blair and Jacaud*, on the 27th of *May* 1806, wrote from *Dublin* to the house of *Jacaud and Gordon* in *London* another letter, in which they state—“As yet we have not received any abstract from Messrs. *Andre* and Son, who, not knowing paid Messrs. *Thompson's* bills due last month, are now more than covered for the payment of this month. Since our last we remitted them 650*l.* and it being now ascertained that Messrs. *French* and *Co.* will pay in full, and at no distant period, we have requested Messrs. *Andre* to draw on us for 1000*l.* holding Messrs. *Farrell* and *Co.*'s acceptance, to the end that we would not have that sum locked up at this moment which we do not foresee they can have any objection to; and if the other 1000*l.* is not returned, we have to beg of you to see Mr. *Canning* himself, who will arrange with another house in *London*, on account of the drawers of said bill, to have it returned. This we understand is arranged between Mr. *Canning* and the drawers; and a Mr. *Metcalfe* of the *London* house, whom we have not seen, but who left this for *London* yesterday, has had conversations with the drawers on the same subject.” These letters were in the hand writing of *Blair*. When the letter of the 15th of *May*, 1806, was written by the firm of *Blair and Jacaud*, that firm had received from *Farrell* and *Co.* part of the acceptance and notes before mentioned to have been handed to the firm of *Blair and Jacaud*; and when the letter of the 27th of *May*, 1806, was sent by the firm of *Blair and Jacaud*, the whole of the acceptances and notes so lodged by *Farrell* and *Co.* were received by the firm of *Blair and Jacaud* to be applied in payment of the bill now sued upon, and in part payment of the other bill of exchange in the hands of *Andre* and Son. The reason why *Blair* and the firm of *Blair and Jacaud* concealed the fact of the lodgment and receipt of the said bills and notes by *Farrell* and *Co.* proceeded from the firm of *Blair and Jacaud* being then under pecuniary difficulties, but which difficulties, *Blair* and the firm of *Blair and Jacaud*, being confident they should surmount, that firm was induced to conceal the fact, and thereby enable itself to apply the notes and accept-

ances to the object of extricating itself from such its then difficulties. The defendant *Canning*, in answer to a letter written to him by the plaintiff *Gordon*, on the 8th of June 1808, requesting payment to the amount of the bill in question, wrote to the plaintiff *Gordon* as follows: "*London, 8th June, 1808. Mr. Canning presents his compliments to Mr. Gordon, and in reply to his note of this date shall be happy to see him on the subject of it in the presence of Mr. French, either on Friday or Saturday next, if it is agreeable to call in Broadstreet; but Mr. Canning does not think that the state of the affairs of the late firm of Bogle, French, and Co. will admit of a payment of the bill alluded to being made within the period mentioned in Mr. Gordon's note.*" If, under the circumstances, the Court were of opinion that the plaintiffs were entitled to recover, the verdict was to stand: if not, a nonsuit was to be entered.

Richardson, for the plaintiffs, argued that the bill of exchange in question, (which having been drawn by *Farrell* and Co. to their own order, and by them indorsed to the house of *Blair* and *Jacaud* of *Dublin*, was by the latter indorsed to the plaintiffs *Jacaud* and *Gordon* of *London*, the same *Jacaud* being a partner in both houses,) was not satisfied against the plaintiffs, the *bona fide* holders now and at the time of the transaction, by the agreement made and executed between *Farrell* and Co. the drawers and the house of *Blair* and *Jacaud* in *Dublin*, in satisfaction of that bill: and this, notwithstanding that *Jacaud*, the partner of and co-plaintiff with *Gordon*, was also the partner of *Blair*, by whom the agreement with *Farrell* and Co. was in fact made: it in no way appearing that *Jacaud*, whatever opportunity of information he might have had, did in fact know of that arrangement; and no communication of such an arrangement having ever been made to the plaintiffs' house of *Jacaud* and *Gordon*, or their consent to it obtained. And though it must be admitted, that the acts of, or notice to, one partner, will, with regard to third persons, bind another, though unknown to that other; yet that is only so far as the partnership concerns are affected, and does not extend to bind the ignorant partner in other concerns dehors that partnership, and much less ought it to be carried to the extent of binding other innocent persons who may happen to be engaged with the partner so impliedly bound in disconnected concerns. [Lord *Ellenborough*, C. J. It would not be so for criminal purposes: but for all civil purposes must not *Blair's* knowledge and acts be taken to be *Jacaud's* knowledge and acts?] The one firm has an interest as well as a name essentially distinct from the other, though the same individual is one of the partners in both. And though that circumstance might prevent the one firm from maintaining an action at law, or setting off a debt against the other, yet that proceeds upon mere technical rules peculiar to the laws of this country. But with respect to payments and dealings with third persons, there is no such technical rule, nor any case, which precludes the Court from considering the two firms so composed, such as they really are, entirely distinct in interest and in name.

LORD ELLENBOROUGH, C. J. It is impossible to sever the individuality of the person, (1) *Jacaud* being a partner with *Blair*, must be considered as having together with *Blair*, received money from the drawers to take up this very bill. How then can he, because he is also a partner with *Gordon* in another house, be permitted to contravene his own act, and sue upon this bill which has been already satisfied as to him. If *A.* and *B.*, partners, receive money

(1) [An act of Assembly of Pennsylvania, passed April 14, 1838, allows an action to be sustained between distinct firms constituted in part of the same members, some of them standing on each side of the record, as both plaintiff and defendant. Yet in *Tassey v. Church*, 6 W. & S. 465, it was held, that in such case, after judgment, a levy cannot be made upon the separate property of an individual member of the defendant firm. See also an important limitation upon the operation of the act, as laid down in *McFadden v. Hunt*, 5 W. & S. 468.—W.]

to apply to a particular purpose, *A.* and *C.* in another partnership could never be permitted to contravene the receipt of it for that purpose, and apply it to another. His Lordship asked whether this point had not lately come before the court in a former case? (a)

GROSE, J. agreed that the action could not be maintained.

LE BLANC, J. referred to *Bolton v. Puller*, 1 Bos. & Pull. 539.

BAYLEY, J. *Jacand* is not to be considered as a *bona fide* holder of this bill, because he has in effect, by the act of his partner *Blair*, received money for the purpose of taking it up, which ought to have been so applied.

Postea to the Defendants.

Tindall was to have argued for the defendants.

The King v. Sir A. Macdonald, and Others, Devisees in Trust under the Will of the late Duke of Bridgewater.

12 East, 324. May 23, 1810.

An act of parliament having empowered the Duke of *Bridgewater* to erect a lock upon the *Rochdale* canal, and to receive at such lock certain rates or tolls upon goods in vessels navigated from that canal into his own, as a compensation for the profits arising to him from certain wharfs at *Manchester*, which were sacrificed for the public benefit in that navigation: held that a poor's rate on his trustees, occupiers of the "*Rochdale canal lock, tunnel, dues, or rates*," (which *dues* or rates are only other names for the lock rated therewith) is good, though the trustees were found not to be inhabitants of the township for which the rate was made. Though the Sessions find that certain persons in the township were possessed of visible stocks in trade there, and were personally liable to be rated in respect thereof, if by law such property were liable to be rated; yet if they also state that they were not satisfied, from the evidence offered before them, that there was any surplus profit on such stocks, by which they could amend a rate which omitted them, that concludes the question.

THIS was an appeal against a poor's rate made for the township of *Manchester*, which was confirmed by the Sessions on appeal, subject to the opinion of this Court on the following case.

(a) *Que. sed vide Swan and Others v. Steels and Others*, 7 East, 210.

The property in respect of which the appeal was made was described in the assessment as follows.

	Premises.	Assessment.			Poor's Rate,		
		£	s.	d.	£	s.	d.
Sir Archibald Macdonald (and others,) Trustees of the late Duke of Bridge- water.	Rochdale Canal, Lock, Tunnel, Dues or Rates,	562	10	0	140	12	6
	Warehouse and Wharf Bottom of Castle Field,	525	0	0	131	5	0
	Staffordshire Warehouse,	262	10	0	65	12	6
	Warehouse on Manchester Side of Knott Mill,	375	0	0	93	15	0
	Coal Wharf from Staffordshire Warehouse to Knott Mill.	90	0	0	22	10	0
	Wharf adjoining Knott Mill.	45	0	0	11	5	0
		1860	0	0	465	0	0

The appellants were not, at the time of making the assessment, *inhabitants of Manchester*, but were then and still are entitled to, and in the receipt of, the tonnage, in respect of vessels passing through the lock built upon the *Rochdale* canal, under an act of the 34th Geo. 3, the 2d section of which, reciting that "Whereas *Francis Duke of Bridgewater* hath expended a considerable sum "in making wharfs, for the convenience of the public, adjoining or near to his "canal at *Manchester*, and when the proposed junction is made with his canal, "the profits arising from those wharfs will be considerably diminished; never- "theless he consents to such junction on being authorised to build a lock upon "the *Rochdale* canal near the junction, and to collect certain rates hereinafter "mentioned, as a compensation for such diminution in the profits of his wharf- "age;" authorizes the Duke, his heirs, and assigns, at "his and their own "expence, to build a proper lock upon the said *Rochdale* canal, at or near "*Castle Field*, &c. and all necessary works thereto belonging; and to take at "the said lock for his and their own benefit (as a compensation for the "diminution in the profits of his wharfage as aforesaid,) the following rates, "viz." [and then it gives certain rates per ton for goods carried and navigated from the *Rochdale* canal into the canal belonging to the Duke, and *vice versa*; "which rates shall be payable and paid at or near the said lock to the said "duke, his heirs, and assigns, and shall be collected by such person as the said "duke, &c. shall by writing, &c. appoint to receive the same." The lock was built in pursuance of the act. The tonnage amounts to as much as it is charged at in the assessment. The appellants, at the time of making the assessment, were and still are in the occupation of the lock, and of the several warehouses and wharfs mentioned therein; and the same are of the value assessed. The case then set forth the names of several individuals on whom notices of appeal were served, who were at the time of making the assessment, and still are, *inhabitants of Manchester*, and were then, and still are respec-

tively-possessed of visible stocks in trade in that township; and were then personally liable to be assessed to the relief of the poor in respect thereof, if by law such property be liable to be rated in such assessment: but that neither of those individuals were rated in respect of their said stocks in trade or other personal property; neither were any inhabitants of *Manchester*, or other persons rated, in respect of their personal property in the township, although personal property was immemorially rated in that township down to the year 1796, and occasionally collected up to that time; but this merely at nominal sums, having no relation to the actual value of the property; and from thence rated (but not collected) down to the year 1807: from which latter period personal property had not at all been rated in the township. The proprietors of the *Rochdale* canal company are not rated for their locks upon the said canal situated within the township, or for the tonnage, tolls, duties, or rates, arising from such locks, or otherwise from the said canal within *Manchester*; this being provided for by the stat. 47 Geo. 3, entitled "An act to alter and amend the several acts for making and maintaining the *Rochdale* canal navigation." The case also stated the names of other persons, who, at the time of making the assessment, were and still are, owners of annual chief or ground rents; one to the amount of 100*l.* and 50*l.*, another of 222*l.* 7*s.* 6*d.*, another of 72*l.* 1*s.* 1*d.* and another of 10*l.* issuing and payable from lands and buildings in *Manchester*, in the possession of their several tenants; which owners of quit or ground rents were then, and still are, inhabitants of the township, but are not rated in respect of such rents; nor is any person assessed in respect of rents issuing out of lands and tenements in the township: but the counsel for the appellants made no point upon the subject of the quit rents. In addition to the proof already given, the appellants gave further evidence of the amount of the clear surplus of stock in trade or other personal property, in the instances of the several persons contained in the notice of appeal; and called two witnesses to give this proof in cases of two of the persons named: but the Justices not being satisfied, from the evidence offered, that there was any sum of surplus by which they could amend the rate, by adding the names of the persons in respect of whom such further evidence was given, confirmed the rate.

Park, Dampier, Scarlett, and Yates, in support of the rate, said, that it could not be questioned but that the Duke of *Bridgewater's* trustees were properly rateable for the several descriptions of property for which they were assessed. It will not be disputed that they are liable for the wharfs and warehouses: and they are equally within the principle of all the cases, including those recently decided, liable to be rated for the *Rochdale* canal lock, which is in its nature real property, yielding profit within the township; rates leviable there by virtue of the act having been given to the Duke in lieu of the profits arising from certain wharfs which he before enjoyed; and the case finding that the trustees are occupiers of that lock. Then, as to the objection founded on the omission to rate the several persons stated in the case for their stock in trade, it is not sufficient that property is local and visible within the township in order to be rated, if it do not yield profit? and there being no evidence brought by the appellants which satisfied the justices that there was any clear surplus by which they could amend the rate in the case of any individual, according to power given in such cases by the stat. 41 Geo. 3. c. 23. s. 6, they were bound by *The King v. Dursley*, 6 Term Rep. 53, to disallow the objection. As to quit rents, they have been held not to be rateable.^(a)

The Attorney-General, Topping, and J. Williams, contra, contended, first, that this was in effect a rate upon the *dues* or *rates* payable at the lock, and not a rate upon the lock itself: but it is sufficient to raise the objection, that

(a) *Rez v. Vandewall*, 2 Burr. 991. This exemption was said by Lord Kenyon, in *Rez v. Alberbury*, 1 East, 535, to go upon the objection of its being a double rating of the same property, in the hands of the landlord, as well as of the tenant.

they are all coupled together, if part of the subject matter be not rateable : and the Court having recently decided, that tolls in themselves are not rateable, the trustees, who are found not to have been inhabitants of the township at the time, cannot be rated for them. Upon the ground of the omission to rate the visible stock in trade of the inhabitants of *Manchester*, they argued shortly upon the unreasonableness of the conclusion drawn by the sessions. The only evidence which can be given of the surplus profit made by the tradesman, from the possession of his stock in trade, must in its nature be general, arising from the nature and appearance of his dealings.

LORD ELLENBOROUGH, C. J. : The Court will not involve themselves in any contradiction to the cases which have been decided, by discharging the rule for quashing the order of sessions in this case. First, as to the omission of rating stock in trade in *Manchester*. In order to include particular individuals in the rate; a case must be made out in evidence against those individuals : here there was an attempt to do it by the appellants, but they failed in satisfying the Court below upon the facts. We have no concern with the conclusion of facts which the Justices have drawn as they state to us : and I do not say that I should have come to the same conclusion : but the Justices have only found that certain persons, inhabitants of *Manchester*, were possessed at the time of visible stocks in trade within the township, and were personally liable to be assessed to the poor's rate in respect thereof, if by law such property be liable to be rated. Now visible property in the place, such as stock in trade, merely as being *visible*, is not liable to be rated, but to make it rateable it must also be *productive* : but the Justices have found that it was not productive, or what is the same in effect, that it was not proved to be so to their satisfaction. That finding concludes the question. And then the remaining question stands on the rateability of the property of the trustees. The case states that they are the occupiers of *the lock* and of the several wharfs and warehouses mentioned in the rate ; and it is not disputed that the property rated yields profit : but it is objected that they are rated for *rates* or *dues*, that is, for the tolls payable at the lock under the act of parliament ; and that the Court have held tolls not to be rateable. But the Court have only said, that tolls are not rateable *per se*, but only when connected and rated conjunctively with real and substantial property, situated in the parish, which, as yielding profit there by means of the tolls, is the proper subject of rating within the act of Elizabeth. Now here the lock itself is rated, which is something real and substantial, locally situated in the township, and producing profit ; and the addition of the *dues* or *rates* is merely giving other names for the same thing. These dues or rates are given by the act of parliament as a compensation to the Duke of *Bridgewater* for the loss of his profits of certain wharfs adjoining to his canal at *Manchester* ; which wharfs were before clearly rateable in respect of those profits : the rates, therefore, made payable at the lock were substituted as a compensation for and in lieu of the wharfage before enjoyed : they are the substituted medium of profit arising, as the act describes it, from those wharfs. The Court, therefore, by this decision, will not break in upon that which they have recently decided, the tolls *per se*, and when not mixed with a rate upon other property, which, as having substance and locality within the parish, is properly rateable there, are not liable to be rated.

The other Judges concurring,

The Rate and Order of Sessions confirmed.

The King v. John Nicholson.

12 East, 330. May 23, 1810.

The lessee and occupier of an ancient and exclusive ferry, not being an *inhabitant resident* within the township in which one of the *termini* of the ferry is situated, is not liable to be rated there for any share of the tolls of such ferry: for supposing a ferry to be real property, it is not such real property as is mentioned in the stat. 43 Eliz. c. 2, the occupancy of which subjects the party to the relief of the poor of the place. And all the cases where parties have been held rateable in respect of the occupancy or receipt of tolls (apart from the question of inhabitancy) have been where they at the same time occupied real visible property connected with such tolls in the place where they were rated.

JOHN Nicholson appealed to the Sessions against a rate made for the relief of the poor of the township of *Monkwearmouth-shore*, in the county of *Durham*, whereby, as lessee of an ancient ferry, from and between *Sunderland* near the sea, in the said county, and *Monkwearmouth-shore*, he was rated for the tolls of the same. The Sessions confirmed the rate, subject to the opinion of this Court on the following case:

The appellant *Nicholson* is an inhabitant of and lives in *Sunderland*, which town lies close to the sea, at the mouth of the river *Wear*, which divides the parish of *Sunderland* from the township of *Monkwearmouth-shore*, on the north side of the river, maintaining each their own poor. There is an ancient ferry for horses, goods, and passengers, which crosses the river from *Sunderland* to *Monkwearmouth-shore*, and from *Monkwearmouth-shore* to *Sunderland*. This ferry, until 1795, was leased by the *Ettrick* family under the Bishop of *Durham*, when it was purchased by, and now belongs to the commissioners of *Wearmouth* bridge: and the ferry and the tolls thereof are at present let by them on a lease for three years from *Martinmas* 1808 to the appellant, at the yearly rent of 350*l*. There are two large boats, which keep plying all the day to and from *Sunderland* and *Monkwearmouth-shore*, and which are rowed by two in each boat, and the fare or toll paid for a person passing in the ferry is a halfpenny each way; and of late years, for convenience it has been accustomed to collect the money of the passengers as they enter the boat on either side, of the river, instead of when they go out, as it used to be done formerly; and one boat puts off from one side of the water when they see the other put off from the opposite side. There is a small boat also goes to and from *Sunderland* and *Monkwearmouth-shore* during the night; and the inhabitants of *Monkwearmouth-shore*, who are customed as after mentioned, pay the same toll or fare of a halfpenny as persons not customed do, if they go over in this night boat. The respective boats when not used have always been locked up on the *Sunderland* side of the water, close to the place where the passengers get in on that side. Previous to the year 1710, a dispute having arisen between *Anthony Ettrick, Esq.* the then lessee under the bishop of this ferry, and *Sir William Williamson, Bart.* respecting the ferry landings on his estate in the township of *Monkwearmouth-shore*, and the ferry dues to be paid by his tenants in *Monkwearmouth-shore* for passing the ferry, it was referred to arbitration: and by an award dated 25th *March* 1710, two places were set out by the arbitrators for the ferry landings in *Monkwearmouth-shore*; and the one of them, which is called the *High Landing* in the award, is the place where the ferry now lands, and has for a great many years past. And the ferry dues to be paid by his lessees and tenants in *Monkwearmouth-shore* were also fixed by the arbitrators; namely, a cottage 2*s.* 6*d.* and a dwelling-house 5*s.* for one year's passage of the lessee's tenants or inhabitants of each cottage or house; and the ferry was to land from thenceforth in no other place in *Monkwearmouth-shore* but the two places set out by the arbitrators. The ferry dues settled and as-

certained by that award for the passage in the ferry boats of the lessees, tenants, and the inhabitants of the cottages and dwelling-houses situate in *Monkwearmouth-shore*, have been paid ever since to the tenant or occupier of the ferry for the time, and are reserved and confirmed to the same lessees, tenants, and inhabitants, in the act passed for the erection of *Wearmouth bridge* in 1792, and amount to from 80*l.* to 100*l.* a year. The ferry has always until the year 1802, when it was let to one *Thomas Wandless*, who lived in *Monkwearmouth-shore*, been let to persons living in *Sunderland*, and been rated to the poor of *Sunderland* for the whole of the tolls or ferry dues: and it has at different times been also rated to the poor of *Monkwearmouth-shore*: but nothing was ever paid to that township until *Wandless* took the ferry; when the parish of *Sunderland* having raised his rate, in consequence of his having given an additional rent, he objected to pay, on the ground that part of the tolls of the ferry arose and became due in the township of *Monkwearmouth-shore*, and were liable to be rated to that township; and the township of *Monkwearmouth-shore* having rated him for a part, he appealed against the *Sunderland* rate, on the ground before mentioned, to the sessions at *Durham* in July 1805, when the point was abandoned by the respondents, and *Wandless's* rate to *Sunderland* was amended, and reduced to half of the tolls of the ferry; and the ferry has since been continued to be rated to *Monkwearmouth-shore* for one half of the tolls or ferry dues, including one half of the custom money, and for the other half thereof, including the remaining half of the custom money, to *Sunderland*. The number of passengers from *Sunderland* to *Monkwearmouth-shore* are about the same as from *Monkwearmouth-shore* to *Sunderland*. The place where the ferry lands in *Monkwearmouth-shore* is of little or no value of itself, in case it was not used for the ferry landing. No question arose in this case as to the *quantum*, for it was admitted that the appellant was properly rated in the township of *Monkwearmouth-shore* as to *quantum*, in case he is rateable there at all for any part of the tolls or fees arising or received from or in respect of the ferry boats. The Sessions being of opinion that he was rateable for a moiety of all such tolls or fares, including one moiety of the custom money aforesaid, confirmed the rate.

This case was now argued by *Hobroyd*; in support of the order of sessions establishing the rateability of the appellant for the profits of the ferry, and by *Hullock* against it: and as the case of *Williams v. Jones*, next reported, which was argued in the last term, and stood over for consideration till the argument in this case had been heard; involved the same general question, I have collected together in this place all the leading arguments and authorities adduced by the respective counsel for and against the rateability of this species of property.

In affirmance of the rate, it was urged that a ferry was real property: an incorporeal hereditament within the parish: local in its very nature, and having locality assigned to it by law: demandable in a *precipe quod reddet*, (a) in

(a) No authority was cited for this. *Quære* what of reality is in fact to be rendered upon the demand of a ferry in such a writ? In *Saville's Rep.* 11; it is indeed said to have been holden in the Exchequer-chamber, *an.* 23 Eliz. that a ferry is in respect of the landing place, and not of the water, and that the land on both sides ought to belong to the owner of the ferry. And it is not conceivable how any ferry could have originated by private authority without the assent of the owners of the land on each side: except perhaps where the landing on both sides was in a common highway, where the licence of the crown would be presumed. In *Juzon v. Thornhill*, *Cro. Car.* 132. [S. C. 1 Rol. Abr. 464.] the king's licence to the plaintiff to fix locks on the river *Ouse*, which is a common public river, for the easier navigation of it, taking reasonable toll, was only sustained because the locks were upon the plaintiff's own land. Yet it does not follow, that the owner of the ferry should have the property of the soil on either side; for the land owners upon a public river may have granted to the licensee of the king (where the dominion of the banks was not in the king himself) liberty to land passengers, &c. from his ferry boat, and to moor the boat to the shore. So ancient gates upon the highways are intended to have been by licence of the king. [*James v. Haywood*, *Cro. Car.* 166,]

counting upon which it must be claimed as situated in such a parish, &c. : an assize (a) clearly lies for it : the owner may prescribe for it, and have a seisin in fee of it. Considered as a franchise, it is a seal franchise, the exercise of which is necessarily confined to a certain place. One of the landing places is within the township, to which the defendant is rated, and a moiety of the tolls becomes due and is collected there. There is no distinction in principle between the tolls of a ferry and those of a market or canal : the former were held rateable in the case of the corporation of *Wickham*, 3 Keb. 540, and 1 Freem. 419, confirmed in *Atkins v. Davis* : (b) and in the *Staffordshire and Worcestershire* canal case, Term Rep. 340, the proprietors, who were empowered by act of parliament to take so much per mile per ton, for all goods carried along the canal, were not only held rateable for their lands, wharfs, &c. and other real property in the occupation of their servants, but also for the tolls which became due in the several parishes on the line of the canal where the different voyages ended ; though for their own convenience the Company were authorized to collect the tolls where they pleased, and did in fact collect them in other parishes. Part of the rate there was specifically on the tolls and duties arising from the navigation on the canal, due at *Lower Mitton* ; the case was argued as a rate on tolls contra-distinguished from land, &c. and decided on the ground of the tolls, as such, being rateable in the parish where they became due, as arising and becoming visible property there. The like decision upon the same principle had before been made in the *King v. Page*, 4 Term Rep. 543. [Lord *Ellenborough*, C. J. In those cases the question did not turn so much on the rateability of the property, considered merely as tolls, as on the proper place where they were to be rated ; for in all these cases the tolls were in respect of the land and soil of the canal which was vested in the proprietors. In general, the rate has been imposed on some real property in the parish out of which the tolls arose, as on the sluice in *The King v. Cardington*, Cowp. 581, and in the *Salter's* Load sluice case, 4 Term Rep. 730. *Bayley*, J. All the cases of tolls held rateable have been where the tolls arose out of the use of land.] Yet in *Atkins v. Davis*, (c) *Buller*, J., speaking of the case of *The King v. Cardington*, said, that *Palmer*, who was there rated in respect of the tolls, had no property either in the soil or in the water, but had merely a power of erecting sluices and taking tolls. Neither was the soil of the *Aire* and *Calder* rivers vested in the undertakers of the navigation,

or the right to have such gates may have been reserved when the land was first granted by the owner for the purpose of a highway. In *Le Termes de la Ley*, 338, a ferry is explained to be "A liberty by prescription of the king's grant to have a boat for passage upon a great stream for carriage of horses and men for reasonable toll." And in *Curwen v. Salkeld*, 3 East, 538—544, 5, Lord *Ellenborough*, C. J. said, "If the lord of a manor have a grant of a market within a certain place, though he have at one time appointed it in one situation, he may certainly remove it afterwards to another within the place named in his grant, &c. The right of removal is incident to his grant, if he be not tied down to a particular spot by the terms of it."

(a) This seems to be by force of the stat. West. 2, 13 ed. 1. c. 25. Before that statute the writ of assize of *novel disseisin de libero tenemento* lay only to things of which a *precipue quod reddit* lay at common law. [There was however, another writ of assize at common law, for common of pasture ; though it was doubted whether before that statute an assize lay of other commons, for which the proper remedy was by a *Quod permittat*.] 8 Rep. 46, 47, 2 Inst. 409—12. But that statute extended the remedy by assize to various, perhaps to all cases of profits appender in a place certain in which the party had a freehold or interest for term of life ; amongst other profits, those of toll and passage are named in the statute ; and *passagium*, says Lord *Coke*, "is properly a ferry for the passage of men and cattle over a water, for which the owner has a toll : for if a man have passage in the vessel of another to the church or elsewhere, it is not any profit, but an easement, whereof no assize lies, as is adjudged in 31 Ed. 3. Ass. 44," &c.

(b) Cald. 328. 333. 338. See vide *ib.* 332.

(c) Cald. 826, and vide *ibid.* 335, S. P. by *Willis*, J. That was the case of the *London Bridge* water works, rated in discharge of damages recovered under the riot act, which speaks of ability in general, and does not specify, like the stat. 43 Eliz. any particular taxable objects.

yet in their case, 2 Term Rep. 660, the tolls and duties of the navigation, which they were authorized to collect by act of parliament, were held rateable (apart from lands, wharfs, &c. in their own occupation,) in the two parishes where the collection was made in respect of the whole line of the navigation, which ran through several intervening parishes. So in the case of the *Leeds and Liverpool* canal, 5 East, 325, the company were rated specifically for their *tolls* of the navigation as well as for their warehouse and land. [Lord *Ellenborough*, C. J. The undertakers of the *Aire and Calder* navigation had, I believe, real property in the parishes where the tolls were collected; and the rate was upon the tolls conjoined with that property, which property was rendered so much more productive by reason of the tolls collected there. So in the *Leeds and Liverpool* case, it was a conjunctive rating. The tolls were held rateable for the canal within the parish. But is there any case of rating tolls where the owners had no land or visible property in the parish?] In every case where *tolls* have been rated as well as land, the order of sessions confirming both conjunctively ought to have been quashed instead of being confirmed, if the Court had not considered that both were rateable. [Lord *Ellenborough*, C. J. The great difficulty is to bring the case within the words of the stat. 43 Eliz. c. 2, conferring the authority. The party rated must be either an inhabitant of the parish, or he must be an occupier of one or other of the descriptions of property mentioned in the statute: and within which does this appellant come? The case states him to be in fact an inhabitant of another place.] He may be considered as an occupier of land in respect of the use which he has of the water which covers the land, and is part of the realty. The word *lands* is used in the statute as the *nomen generalissimum* for every species of real property, incorporeal as well as corporeal: "all land, and all real property, are rateable to the poor," said Lord *Mansfield* in *Rex v. Gardner*, Cowp. 84. At all events, he may be considered as an *inhabitant* of the township within Lord *Coke's*, 2 Inst. 702, extended signification of that word in his construction of the statute of bridges, as comprehending all who have lands and tenements in possession, though living in a foreign county. In like manner, the stat. 43 Eliz. may be taken to include every person occupying any species of property, or exercising any local franchise producing profit to him within the township; for this forms part of his ability there. A lessee of tithes, though he do not reside within the parish, is certainly rateable. This is not the case of a mere easement, but the party has an interest in the place. The tolls of a lighthouse were held in a late case (a) not to be rateable, because neither the ships in respect of which the tolls became due were within the parish, nor were the tolls received there: that case, therefore, does not conclude the present.

Against the rateability of *tolls*, it was contended, that the question was one of strict construction upon the words of the stat. 43 Eliz. c. 2, by which alone the power of rating to the relief of the poor was given. The statute directs the necessary sums to be gathered out of the parish according to its ability by taxation of every *inhabitant*, &c. and of every *occupier* of *lands*, &c. and no man can be rated except as an inhabitant or occupier. (b) Here the case negatives that the appellant was an *inhabitant* of this township; and the only question which can be made is, whether he were an *occupier* of *lands*. [Lord *Ellenborough*, C. J. asked whether the counsel were aware of any case where the word *inhabitant* in the statute of Elizabeth had been held to mean any other than *resident*: and was answered, that there was no such case: that the question was raised in the *Liverpool* and *Hull* cases. (c)] In every case where a rate in respect of personal property has been established, the party rated has

(a) *Rex v. Tynemouth*, ante, 46.

(b) By Lord *Mansfield*, in *Rex v. Gardner*, Cowp. 83.

(c) H. 38 G. 3. B. R. vide 8 East, 455, n. and 457, n. and vide per *Lawrence, J.* in *Rex v. Jones*, ib. 462.

appeared to be an actual inhabitant of the place. It is argued, that the word *lands* includes all real property, and that a ferry is real property; but no authority has been cited for that position: no instance has been shewn of an ejectment brought for a ferry, or of a *perceptio quod reddat* lying for it. But however that may be, that is not the criterion for its rateability. The rule was laid down in *The King v. Andover*, Cowp. 565, and has been long established, and lately recognized in *Rex v. St. John Madder-market*, in *Norwich*, (a) that a person is only rateable for his local *visible* property within the parish: the property must be visible and tangible to make it the subject of *occupation*. When, therefore, this is argued to be an incorporeal hereditament, it does not follow, nor is there any authority to shew, that a person is rateable for an incorporeal hereditament in the place where he does not reside. The specific mention of *tithes* in the statute bears against the argument, and shews that without such express mention the owner would not have been rateable for that species of property under the general word *lands*; and *expressio unius est exclusio alterius*. This is a rate on the *tolls* of a ferry, in other words, upon the profits made by the manual labour of working the ferry boat; that is, upon the freight of the boats; and that too in a place where the owner does not reside, and where the boats are not kept. And though if he were an *inhabitant* of the township, the ferry boats of which such profit was made might furnish a local visible criterion of the party's ability, yet in no other character could he be rated for such profit. The right of conveying persons from the one side of the highway to the other is a mere franchise or privilege: the right of landing on the soil of the highway is common to all the king's subjects alike: so far, therefore, from the owner of the ferry having any interest in the soil itself, he has not even the exclusive right to the use of it. Other boats may land there, though they may not carry passengers or cattle for hire. [Ld. Ellenborough, C. J. The owner of the ferry may be said, perhaps, to have a right to make a special use of the highway; but he cannot be said to have the occupation of the highway.] It is merely *toll thorough*, which is taken for passing over the highway, in consideration of repair or other benefit done by the owner of the toll, but without any interest or claim in the soil: and not a *toll traverse*, which originates in the liberty given to pass over the owner's soil. (b) In *Julliffe's* case, 2 Term Rep. 90, the grantee of a wayleave, which is a mere easement, was held not to be rateable for it: and a ferry is no more than a public easement. All the cases of rating in respect of real occupancy have been where the subject-matter was corporeal visible property in the parish, whatever the form of the rate may have been. In the case of the market toll of *Wickham*, (c) the corporation were probably the owners of the soil. In the other cases, (d) where tolls have been rated, the persons have been rated for them conjunctively with tangible real property, out of the use of which they arose, such as sluices, towing-paths, engines, boats, wharfs, warehouses, canals and the like: but in *Rex v. Rebow*, 1 Const's Bott. 115, and *Rex v. Tynemouth*, (e) the *tolls* of a light-house, were held not to be rateable, whatever the light-house itself might have been under different circumstances. Turnpikes are said not to be rateable on account of the application of the tolls to public purposes; but though they were private property, the occupier would only be rateable for the turnpike house, and not for the *tolls eo nomine*. And in the case of the sluice, being fixed to the free-

(a) 6 East, 186, 7, and vide *Rex v. Jones*, 8 East, 461.

(b) Vide *Lord Pelham v. Pickersgill*, 1 Term Rep. 660, where this subject is fully discussed.

(c) 3 Keb. 540, and 1 Freem. 419. Vide *Rex v. Gardner*, Cowp. 79, a corporation may, by its officers or servants, be an inhabitant or occupier within the statute 43 Eliz.

(d) *Rex v. Cardington*, Cowp. 581. *Rex v. Salter's Load Sluice*, 4 Term Rep. 730. *Rex v. Page*, ib. 543. *Rex v. The Mayor &c. of London*, ib. 21. *Rex v. St. Nicholas, Gloucester*, Cald. 262, and *Rex v. Hogg*, 1 Term Rep. 721.

(e) Ante, 46.

hold, it could be no other than real property; capable therefore of occupation,^(a) and the occupier of which had such exclusive possession of it as would have enabled him to maintain trespass.

LORD ELLENBOROUGH, C. J. There was a case of *Williams v. Jones*,^(b) argued in the last term, which in principle is the same as the present, and will be governed by it, unless the Court should hereafter see any special ground on which to distinguish it. The rate is here imposed on the tolls inereely of the ferry: and the question is, Whether the proprietor of the ferry, who is not an inhabitant of the township in which he is rated, be liable to be rated for such tolls received by him there? And this being a question upon the construction of the stat. 43 Eliz. c. 2, it is material to look to the words of it.—By that statute, the parish officers, by consent of two justices of peace, are directed to raise a competent sum for the relief of the poor by taxation of “every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable un-“derwoods in the said parish.” Now, tolls do not come within any one specification of occupancy described by the statute: they are not *lands*, nor houses, &c. If therefore, the owner be taxable for them at all, it must be as an *inhabitant* of the parish out of which they arise: but there is no case in which the word *inhabitant* in that statute has been held to mean any other than a resident within the parish. In the cases which have occurred of rating in respect of personal property, such as *The King v. Liverpool*, and *The King v. Col-lison*, which are mentioned in *The King v. Jones*;^(c) residence was considered necessary to constitute inhabitancy. But we are reminded of cases where tolls arising from navigable canals, to which the tolls of a ferry are assimilated, have been held rateable, without any reference to the question of inhabitancy: and the *Wickham* case is much relied on, where a corporation was held rateable for market tolls, but they were the lords of the soil where the market was held in respect of which they were rated for the tolls. In the case of *The King v. Cardington*, Cowp. 581, the rate was specified upon the sluices, on that which was local and visible property, and producing profit within the parish: and all the cases where tolls have been held to be rateable, when they are examined, will be found to have proceeded on that ground. It was so in the case of the *Staffordshire* and *Worcestershire* canal, 8 Term Rep. 340: the company were there rated for “their basins, towing-paths, and that part of their canal and the locks lying within *Lower Mitton*, and for the *tolls and duties arising therefrom* due at *Lower Mitton*. There could be no doubt that the *basins, towing-paths, canal and locks*, were local visible property there, and the *tolls and duties arising therefrom* classed and connected as they are with the local visible property rated, were considered as resulting from that local and visible property. In all these cases, the tolls have arisen from the use of the canal, which is local and visible, being part of the land itself, lying within the parish where the tolls have been rated. But there is no case where tolls detached altogether from local real property have been held to be rateable *per se*. When, therefore, we are called upon to decide such a question for the first time, I am always disposed to go to the fountain-head, which is the act of the 43 Eliz.; and looking at the words of that act, I do not find any of them which extend to rate any person not being an inhabitant of the place, nor the occupier of any of the specific kinds of property mentioned in the act. And not finding any description in the statute which applies to the case of this appellant, I cannot hold him to be rateable for these tolls.

GROSE, J. declared himself of the same opinion for the reasons given by his lordship, which he thought it unnecessary to repeat.

(a) Reference was made to the stat. 6 & 7 W. 3. c. 16, to prevent exactions of the occupiers of locks and weirs upon the *Thames*.

(b) See the next case, *post*, 344.

(c) Vide 8 East, 451, 5, 7.

LE BLANC, J. The appellant is rated specifically as the lessee of the ferry for *half of the tolls or ferry-dues* in the township of *Monkwearmouth-shore*; and it is found, that he is an inhabitant of and lives in *Sunderland*: and it is not stated, that he is the occupier of any property in *Monkwearmouth-shore*: and that brings it to the simple question, whether a person residing out of the township be rateable there for the tolls of a ferry, which tolls arise and become due to him for carrying passengers and cattle from one shore to the other, one of which lies in the township. The origin of this rateability, if it exist at all, must be sought for in the stat. 43 Eliz., which does not extend in terms to this case. At the same time, if the words of it had received so extended a construction as to include this case in the various decisions which have taken place upon the rating of the proprietors of canal navigations, I should have been disposed to adhere to the settled course of construction. But this point not having been decided in those cases, I cannot, upon reverting to the words of the statute, consider the appellant as coming within any of the descriptions of persons rateable there given. It is contended, that he is an *inhabitant* of the township within the meaning of the act, and that he is also within it as an *occupier of real property*. Now, when the word *inhabitant* is used as well as *occupier*, I must consider that by the former was meant a person who was *resident* in the place; for one might occupy without being resident, and the statute meant to include both: but this appellant is found to have been resident in *Sunderland*, and in that sense is not an inhabitant of *Monkwearmouth-shore*. Then as to his occupation of real property, in the latter township; if the ferry and the tolls be real property, still the appellant is not the occupier of such real property as is mentioned in the act of parliament. But they are compared to the tolls of a canal, which, it is said, have been held to be rateable property within the statute: it will be seen, however, upon examination, that in all those cases the parties claiming the tolls for which they were rated had an interest in some local and visible property within the parish connected with their interest in the tolls; as where they were made payable at their own wharfs or ware-houses, where the goods carried on the canal were received or deposited; or in respect of the line of canal by which they were carried passing through the parish where the tolls were rated. The case of the owner of the packet-boats, *Rex v. Jones*, 8 East, 451, comes very near to that of a person who has an exclusive right of carrying passengers and goods in a ferry-boat; but the packet owner was only held to be rateable for his profits in the parish where he resided, and where the boats were kept, and produced the profit to him; and he was considered not to be rateable in any other place to which the boats sailed where he was not resident. The appellant, therefore, is not rateable for this property within the words of the statute, or the decided cases upon it, either as an inhabitant, or as an occupier.

BAYLEY, J. This person is neither an inhabitant of the township within the meaning of the statute, nor an occupier of any of the species of property mentioned in it: and when we are called upon to put a construction on the act for the first time, we ought to abide by the words of it. In a statute which mentions *inhabitant* as well as *occupier*, inhabitant must mean *resident*, otherwise it would for this purpose mean the same as occupier. But the appellant is said to be an occupier of the tolls, and that *tolls* have been held rateable *eo nomine* in several cases: but in all those cases it will be found, that the persons rated were the occupiers of *lands* within the place, in respect of which the tolls in the whole or in part were payable. In *The King v. Cardington* the party was rated for the *sluice* of which he was the occupier, which sluice was real property. In the case of canal tolls, the proprietors rated were the occupiers of the canals; and canals are real property; they are land applied to a particular purpose, and the tolls are the profits arising from that use of the land, and are given to the proprietors as a compensation for the use of it in that manner. Here the appellant was not an inhabitant of *Monkwear-*

mouth-shore, and he was not an occupier there of any real property, for which he was rateable.

Order of Sessions quashed.

Williams, Executrix of Hugh Williams, v. Jones and Hughes.

12 East, 346. May 23, 1810.

The owner of a ferry residing in a different parish, but taking the profits of the ferry on the spot by his servants and agents, is not rateable for such tolls in the parish where they were so collected, and where one of the *termini* of the ferry was situate, and on which shore the ferry boats were secured by means of a post in the ground: the soil itself at the landing places being the king's common highway; and the owner of the ferry having no property in, or exclusive possession of it.

THE plaintiff brought a writ of error to reverse a judgment given against her testator in the court of *Great Session* of *Anglesey*, in an action of trespass by *Hugh Williams*, the plaintiff's testator, against *Jones* and *Hughes*, for taking his ferry-boat on the 2d of June 1806, at *Beaumaris* in the county of *Anglesey*, and selling the same, and converting the money arising therefrom to their own use. The defendants pleaded *not guilty*, and also two several justifications; the substance of which was, that the supposed trespass was done by them in executing a warrant of distress duly issued after summons, &c. by two justices of the peace for the county of *Anglesey*, against the said *Hugh Williams* for non-payment by him of a rate made for the relief of the poor of the parish of *Llandysilio* in the said county, in which rate, he was assessed as proprietor and occupier of *Porthacwhy* ferry in that parish, in the sum of 10*l.* 13*s.*; and the payment of which was first duly demanded of and refused by him. The plaintiffs below replied, that the defendants of their own wrong, and without the cause by them alleged, committed the trespass complained of; and on issue joined, a special verdict was found, stating in substance;

That *Hugh Williams* was the proprietor of *Porthacwhy* ferry, and of the tolls thereof; the same being an ancient ferry for the conveyance of persons, cattle, and carriages, in boats across an arm of the sea, called the straits of *Menai*, or the river *Menai*, from the county of *Carnarvon* to the county of *Anglesey*, and *vice versa*: and the king's highway from *London* to *Holyhead* leads to and from the said arm of the sea, within the limits of the ferry. For many years past there have been and now are five landing places in the parish of *Llandysilio* in *Anglesey*, used by the ferry boats on landing from the opposite shore; which landing-places have, within four years before the making of the rate in question, been repaired and improved by Mr. *Williams*, the proprietor of the ferry: and for divers years last past, there hath been, and now is, a post fixed in the ground at one of the landing-places, to which post the ferry-boats have been and are usually moored when lying on the *Anglesey* side. The said arm of the sea is open at one end to the bay of *Carnarvon*, and at the other end to the *Irish* sea, and is navigable for all the king's subjects: and they have always of right landed at the several landing-places at their pleasure; and the proprietor of the ferry never had nor hath the sole or exclusive use of the said landing-places, or either of them; but has the sole and exclusive right and privilege of conveying by his boats, persons, cattle, and carriages, for hire, from a part of the said king's highway lying in the parish of *Bangor*, in the county of *Carnarvon*, to another part of the said king's highway, lying in the parish of *Llandysilio* in *Anglesey*, and *vice versa*. During all the time aforesaid, the ferry boats have been worked and navigated by the proprietor's servants, hired and paid by the day; and the tolls and hire due and payable for such conveyance from the county of *Carmarthen* to the county of *Anglesey* have been in fact paid to his servants for the use of the proprietor of the ferry,

sometimes upon the said arm of the sea, a little before the arrival of the boats at the landing-places, and sometimes in the boats at the landing-places, and at other times upon the landing-places in the parish of *Llandysilio*, after the persons paying the same have landed. And the proprietor's servants have from time to time paid over the tolls and hire so received by them to his agent, residing in part of a dwelling-house, whereof *Hugh Williams* is seised in fee, in the parish of *Llandysilio*, of which house one *T. B.* is tenant, and has continually been rated in his own name to the relief of the poor of the said parish of *Llandysilio*, and has paid the rates assessed upon him. And *Hugh Williams*'s agent has never been rated, nor ever paid any poor rates; and such agent has from time to time, monthly, paid over such tolls and hire to another agent of *Hugh Williams* at *Beaumaris*, in *Anglesey*, out of the parish of *Llandysilio*, for the use of *H. Williams*. *H. Williams* never inhabited or dwelt in the parish of *Llandysilio*, and no proprietor of the ferry or tolls, or other person in respect thereof, has at any time been rated for the same to the relief of the poor of the parish of *Llandysilio* before the making of the rate in question. The special verdict then stated, that *Hugh Williams* being such proprietor of the ferry, before the trespass complained of, a rate for the relief of the poor of the parish of *Llandysilio* was duly made, dated the 6th of February 1806, in which he was rated for *Porthacaway Ferry and the tolls thereof*, at the sum of 10*l.* 13*s.*; which rate was afterwards duly allowed by two justices of the peace for the county of *Anglesey*, and duly published in the parish church of *Llandysilio*; and payment was afterwards duly demanded of *Mr. Williams* by the defendants, the parish officers of *Llandysilio*; but he refused to pay the same. And then it stated the complaint of the parish officers to two magistrates of the county; the summons issued to *Mr. Williams* to answer before the magistrates; his default; and the due issuing of the warrant of distress, by virtue of which the defendants distrained one of *Mr. Williams*'s boats for the amount of the rate, &c. But whether upon the whole matter the defendants of their own wrong, and without the cause alleged by them in their justificatory plea, committed the trespass, the jurors prayed the advice of the Court, and found a verdict of guilty, or not guilty, accordingly. The Court below gave judgment for the defendants: and the plaintiff below having in the mean time died, his executrix brought this writ of error.

This case was argued in the last term, by *Abbott* for the plaintiff, and by *Barnes* for the defendants. The general arguments urged by them for and against the rateability of this species of property have, to avoid repetition, been interwoven with those urged by the counsel in the last case, which was decided immediately before this. Some additional observation was made in this case upon the circumstance of the post driven into the soil, to which the ferry boats were sometimes made fast on the *Llandysilio* shore; but the Court considered that this did not essentially vary the present question: for the owner of the ferry was not found to have any property in the soil of the highway: and supposing that he had a right to make such a special use of the highway for the purpose of securing his ferry boats, that did not make him the occupier of the highway; nor gave him any exclusive possession of it; nor could he maintain trespass for any injury done to the soil at the landing-places, which were common to all the king's subjects to land and pass upon. And now, after the judgment in the former case had been delivered,

LORD ELLENBOROUGH, C. J. declared the opinion of the Court, that the decision of this case necessarily followed that of the other, the question in both being substantially the same; and therefore they reversed the judgment of the Court below.

Judgment reversed.

The King v. The Inhabitants of Mitcham.

12 East, 351. May 22, 1810.

A hiring at so much a week for as long time as the master and servant could agree, is only a weekly hiring, under which no settlement can be gained.

REBECCA, the wife of *George Pendry*, was removed with her children, by an order of two justices, from the parish of *Mitcham*, in *Surry*, to the parish of *Burgfield* (called in the order *Birchfield*) in the county of *Berks*. The Sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case.

Joseph Pendry, being settled in *Burgfield*, was hired by *Graves*, the keeper of a toll-gate in the parish of *Egham*, at 3s. a week for as long time as his master and himself could agree, to assist in collecting the tolls; and continued to serve under such hiring for more than a year, during which time he assisted *Graves* in collecting the tolls, and occasionally took care of a horse and some hounds. *Graves* had no horse at the time he so hired *Pendry*, but bought one afterwards. The hounds were kept in premises belonging to the toll-house; and *Pendry* during all that time resided in the toll-house. *Graves* did not hire him as he had before hired a brother of *Pendry*, with whom he expressly contracted as for a yearly servant. *Graves* paid *Pendry* as he wanted money, pounds at a time. *Pendry*, after the hiring, married the pauper *Rebecca*, by whom he had the three children named in the order of removal, and afterwards deserted his wife and children.

Nolan and *Roots*, in support of the order of Sessions, endeavoured to shew, that this was a yearly and not a weekly hiring of the pauper by the turnpike-gate keeper, in the parish of *Egham*; it being for an indefinite period, as long as master and servant agreed, though the quantum of wages was to be ascertained by the number of weeks in which the service was in fact performed. They admitted the general rule, as laid down in *Rez v. Newton Toney*, 2 Term Rep. 453, that a mere hiring at so much a week, without more, would not give a settlement; but here the parties looked to an indefinite period beyond the week, for the hiring was to continue at the rate of 3s. a week till the disagreement of one of the parties was expressed: and in *Rez v. Hampraston*, 5 Term Rep. 205, a hiring at so much a week, with liberty to part at a month's notice, was held to be a general hiring. They also referred to *Rez v. St. Ebbs*, Burr. S. C. 289; where the party was only specifically hired for a quarter of a year, at the rate of 20s. a year, but if he and his master liked each other, *he was to continue on*: and the servant having served for above a year after the quarter, was held to gain a settlement.

LORD ELLENBOROUGH, C. J. That was an indefinite hiring, at the rate of so much a year, determinable at the end of the first quarter. This case is nothing more than a hiring at so much a week, which, where nothing else appears to the contrary, is a weekly hiring within the rule laid down in *The King v. Newton Toney*; and it cannot alter the case by adding that which must necessarily have been understood, that the hiring was to continue as long as the master and servant agreed; that is, from week to week.

LE BLANC, J. The case of *The King v. Hunbury*,^(a) which was subsequent to that of *Hampraston*, confirmed the rule laid down in *The King v. Newton Toney*.

Per Curiam,

Order of Sessions quashed.

(a) 2 East, 423, and vide *Rez v. Pucklechurch*, 5 East, 382.

The King v. The Bishop of Rochester and Others, Trustees
under the Will of the late Lord Crewe.

12 East, 353. May 22, 1810.

Landlords not resident within the parish, having leased lead mines and other minerals, with liberty to the tenants to dig, &c.; reserving a certain annual rent, and also certain proportions of the ore which should be raised, are, at any rate, not assessable to the relief of the poor for such certain rent, no ore being raised; whatever the question might be as to the proportion of ore reserved, when in fact any should be raised.

THE trustees appealed to the Sessions against a poor's rate made for the parish of *Hunstonworth* in the county of *Durham*, in which they, being lessors in the lease after-mentioned, were rated in the sum of 50*l.* being one moiety of the certain rent of 100*l.* reserved by the said lease. The Sessions confirmed the rate, subject to the opinion of this Court on a case, which set forth the lease under which the rent was reserved. This was an indenture of lease, dated the 30th of *May* 1805, and made between the Bishop of *Rochester* and the other trustees appointed by the will of the late Lord *Crewe*, of the one part, and *A. Surtees* and others, of the other part; whereby the trustees demised to the lessees "all the mines, veins, &c. parcels, and wastes of lead ore and other minerals and fossils, and also all the seams of coal then open or discovered, or which should or might during the time therein mentioned be opened or discovered, within, under, or upon the township lands called *Nuckton*, in the parish of *Hunstonworth*, and within certain other lands therein mentioned; together with full liberty and authority for the lessees to dig and search for pits, &c. under any of the said lands, for getting all the lead ore, minerals, and coals, in or upon the said mining grounds:" with other powers for the erection of machinery and other buildings on the mining grounds, and for facilitating the working of the mines as therein mentioned "to hold the demised premises to the lessees for the term of 21 years, yielding and paying therefore, yearly, during the said term, unto the said lessors, their heirs, &c. for and in respect of the said lead ore and other minerals, the clear yearly rent or sum of 100*l.* payable half yearly." There were also reserved, by way of rent, certain proportions of such lead ore as should be gotten from and out of the said mining grounds. There was also a separate rent reserved for the coals, when wrought, and a rent for damages done to the ground-tenants. The lessees were bound to pay all manner of taxes, rates, assessments, and impositions whatsoever, parliamentary or parochial, already or thereafter to be taxed on the demised premises, or on the lead ore, or other minerals, coals, or fossils gotten thereout, or on the lessors or lessees in respect thereof. The case also stated, that no coal mines had been wrought within the grounds mentioned in the lease. That the lessees had other lead mines in the neighbourhood, but had gotten no ore from under the grounds of the lessors mentioned in the lease, and consequently no proportion of lead ore had been rendered or become due to the lessors. The lessors stood rated in 50*l.* being a moiety of the certain rent of 100*l.* reserved by the lease, and which was deemed a fair proportion for that part of the mining ground which is in the parish of *Hunstonworth*; and the lessors, if liable at all, did not object to the fairness of the apportionment. They stand rated in the following form: "*Lord Crewe's* trustees for certain annual rent paid them by *Easterby, Hall, and Co. for the liberty of opening the mines within their lands, spoil of ground, &c. 50*l.*—Rate 8*l.* 15."*

None of the lessors reside or have any dwelling house in the parish of *Hunstonworth*. The lessees were not rated to the relief of the poor in respect of the demised mines.

Nolan and Littledale, in support of the rate, relied principally upon the authority of *Rowls v. Gell*, Cowp. 451, where the owner (lessee under the

crown) of lead mines was held rateable to the poor for the profits of *lot* and *cope*, which were certain duties paid to him by the adventurers, without any risk incurred by himself in the adventure: though they admitted the pressure of the recent decision of the Court in *Williams v. Jones*.^(a) Before that decision they said, that they were prepared to contend, that the words "*lands, houses, &c.*" in the stat. 43 Eliz. c. 2, the occupiers of which were made rateable to the relief of the poor, were only mentioned in the statute by way of example, and that the legislature meant to subject to the same taxation every species of real property. By the resolutions of the judges of assize in 1633, Dalt. Just. ch. 73. p. 235. Q. & R. 19, to the question whether shops, salt-pits, profits of a market, &c. be taxable to the poor as well as *Lands*, coal-mines, &c. expressed in the statute; the answer is, "all things which are *real* and a *yearly revenue* must be taxed to the poor." In *The King v. St. Agnes*, 3 Term Rep. 480, the person entitled to toll-tin and farm-due, being certain proportions of the tin raised by the adventurers, was held rateable for such proportions received by him. It cannot vary the case, that this payment is reserved to the lessors by the name of a rent. Rents are only held not taxable where the whole profit of the land is in the first instance taxable in the hands of the tenants, or actual occupiers; in which case it would be twice taxed, if the landlord were again taxed for his rent: but the ground of the former decisions was, that the adventurers were not taxable for their profits, which were precarious, and therefore the lord or owner, who run no risk, was taxable for what he received in respect of his real profit: but the landlord or owner has always been considered taxable for any profit of the land received immediately by him, for which the tenant or actual occupier was not assessable. This principle appears to be recognized by Lord C. J. *Eyre* in delivering the judgment of the *Exchequer Chamber* in *Ld. Bute v. Grindall*, 2 H. Blac. 265, and by the courts of *K. B.* and *C. P.* in *Eckersall v. Briggs*, 4 Term Rep. 6; *Atkins v. Davis*, Cald. 315, and *Holford v. Copeland*, 3 Bos. & Pul. 129—143. In all these cases, it seems to be taken for granted, that rents and other annual profits of land are rateable, unless where the tenant is assessable for the whole annual value of such land in his occupation; and in none of these cases is any notice taken of the residence of the proprietor in the parish in which the property lies. *Occupier* in the statute of Elizabeth was meant to be used in the popular sense, as *possessor*, that is, of real property: and *inhabitant* has always been considered as extending to include the owners of every species of property in the place, whether lying in grant or in livery. The great distinction as to residence lies between real and personal property, where the owner is rated for his ability generally; which must of course be in the place where he resides; for there only can it be visible: but all local visible property, yielding annual profit, is rateable in its nature; and real property can only be rated in the place where it is situate, and where alone it is visible and produces profit. [*Ld. Ellenborough*, C. J. What is there in this case, which is to be the subject-matter of rating, but a contract, by which the landlords get a certain profit for granting to others a liberty of mining, when perhaps the tenants may never be able to make any profit at all from the land, which may be wholly unproductive? *Bayley*, J. In *Rowlls v. Gell*, and *The King v. St. Agnes*, the property for which the lords were rated was not demised. *Le Blanc*, J. The argument goes the length of contending for the rateability of all rents in the hands of landlords.] It does so, where the subject-matter is not rateable in the hands of the tenants.

Dampier, *Raine*, and *Hullock*, contra. The demise is of all mines, &c. within a certain district, with a licence to dig for ore, &c. and a money rent is reserved in respect of that licence, but nothing has yet been produced by the land, which land is rateable, if at all, in the hands of the tenants for its

annual produce, so far as the subject matter produced is in itself liable to be assessed within the construction of the stat. 43 Eliz. But this is an attempt to rate a money-rent in the hands of the landlords, none of whom reside in the parish, and who not being rateable as *inhabitants*, can only be rated, if at all, as actual occupiers of land within the parish. It must therefore be shewn, that the receipt of rent elsewhere is an actual occupation of the land in respect of which such rent is reserved; which must go the whole length of establishing that landlords are liable to be rated, as well as tenants; and this, even though the land produce no annual profit at all in the hands of the tenant. If this were so, a landlord would by the same rule be rateable for profits of his timber. It has been long settled, that no other mines than *coal* mines, which are expressly mentioned in the statute, are rateable at all; but by the construction now contended for, they would be made rateable in the shape of rent in the hands of the landlords by whom they were leased out. The decision in *Rowls v. Gell*, on which *The King v. St. Agnes* proceeded, was doubted by Lord Kenyon in *Rez v. Parrott*, 5 Term Rep. 596. But this case is at all events distinguishable; for there the profits of the lord arose immediately from a certain proportion of the ores brought to the surface without any expence or risk on his part; but here the ores are demised, and the landlords receive a certain money-rent for their interest in the land during the lease, whether any ores be raised or not; which rent is not the subject-matter of occupation within the parish. Then, there is neither inhabitancy nor occupation, in respect of which the landlords can be rated in this parish.

LORD ELLENBOROUGH, C. J. The trustees can only be rated as inhabitants or as occupiers within the parish. We have so recently (a) put a construction upon the word *inhabitants* in the statute of Elizabeth, as meaning a *resident* within the parish, that it is unnecessary to discuss the matter again; and the fact of such an inhabitancy is negatived by the case. Neither are they *occupiers* of the property for which they are rated; so far from it that they cannot maintain trespass for any injury done to the property which they are supposed to occupy; and even if they were the actual occupiers of coal mines, they would not be rateable for them before they were worked and productive. (b) But this is no more than a contract with tenants for the payment of a certain rent for ores supposed to lie under the surface; and if the tenants should open the ground and raise the ore, reserving a certain proportion of ore to the ground landlords. There is no occupation of any thing within the statute. If hereafter the tenants should open the ground and raise ore, the trustees will then be entitled to certain proportions, and such profits may come within a different rule, as lot and cope; upon which no question at present arises, and therefore it is unnecessary to say any thing.

GROSE, J. was of the same opinion.

LE BLANC, J. If the trustees were rateable at all, it must be as occupiers of the mines or some proportion of them; but here they are rated as for a *rent eo nomine*, for which, if they were rateable, every landlord might by the same rule be rated for his rent.

BAYLEY, J. declared himself of the same opinion.

Order quashed.

(a) *Rez v. Nicholson*, ante 330, and *Williams v. Jones*, ante, 346.

(b) Vide *Rex v. Badworth*, 8 East, 387, where the lessee of a coal mine, which, having ceased to be productive, was no longer worked, was held not liable to be rated for it, although he was still bound by his covenant to pay the rent reserved to his landlord.

The King v. The Inhabitants of Diddlebury.

12 East, 359. May 23, 1810.

The parish in whose favour an order of removal is made, may, by consent, abandon it, without waiting to appeal to the Sessions, and having it quashed there. And after such order cancelled by the removing magistrates, with the consent of both parishes before the time of appeal, another order made by them removing the pauper to a different parish, was held good.

TWO justices, by their order of the 15th of Aug. 1809, removed *Mary Davies*, singlewoman, with child, from *Much Wenlock* to *Diddlebury*, both in the county of *Salop*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case.

Soon after the translation sessions in *July* 1809, two justices by an order removed the said *Mary Davies* from *Much Wenlock* to *Long Stanton* parish in the same county; by virtue of which order, she was conveyed by the parish officers of *Much Wenlock*, and delivered by them, with the order to the parish officers of *Long Stanton*, who received her accordingly, and maintained her there for five weeks, at the expence of *Long Stanton* parish. On the 15th of *Aug.* following, doubts having been entertained whether the order made in *July* preceding could be supported by evidence, a meeting was had between the parish officers of *Much Wenlock*, and the parish officers of *Long Stanton*, who finding the account given by other witnesses was different from that given by the pauper, on whose evidence the first order of removal to *Long Stanton* had been made, and being of opinion that it could not therefore be supported; they mutually agreed to cancel that order; which they accordingly did, with the consent of the magistrates who had made it; and who thereupon made another order, which is the order now appealed against, and which was made before any Sessions had intervened to which any appeal against the first order could be made. There was no appeal against the order of removal to *Long Stanton*.

When this case was called on, *Le Blanc*, J. said, that the point had been expressly decided in the case of *The King v. Llanrbydd*, Burr. S. C. 658; and *Ld. Ellenborough*, C. J. said, that the point was so clear upon principle that it did not want any authority to support it. *The Court*, therefore, thought it unnecessary to hear *The Attorney-General* and *Holroyd* in support of the orders. And after *Peake* and *Puller* had referred to *Chalbury v. Chipping Farrington*, 2 Salk. 488, and urged shortly, that however an order made might be abandoned before execution, it could not afterwards; but being in the nature of a judgment executed, it could only be reversed by appeal;

Lord ELLENBOROUGH, C. J. said, that there are two ways of getting rid of an order, one by consent of the parish in whose favour it is made, to abandon it; the other, by waiting till the time of appeal, and appealing against it to the Sessions, by whom it may be quashed, if not supported. Here the parish in whose favour it was made, finding upon further information that they could not support it, very sensibly determined to abandon it at once by consent, and acted accordingly. And what objection can there be, as *Ld. Mansfield* observed, in the case mentioned, to a party's abandoning a judgment intended for his own benefit? In the case in *Salkeld*, there was no consent of the party in whose favour the order of justices was made to vacate it.

Per Curiam,

Orders confirmed.

The King v. The Inhabitants of Hinckley.

12 East, 361. May 23, 1810.

An indenture binding out a poor apprentice, executed by *W. S., churchwarden, and J. G. overseer* of the poor of a hamlet maintaining its own poor separately from the parish at large, not being impeached by evidence negating its execution by a majority of the churchwardens and overseers of the hamlet, shall be deemed good by intending that there were two overseers for the hamlet as required by stat. 13 and 14 Car. 2. c. 12. s. 21, and only *one churchwarden* by custom in the same place; and therefore the apprentice serving 40 days under it gains a settlement.

UPON an appeal from an order of Justices, removing *Dina*, the wife of *James Adie*, from *Stoke* in *Coventry*, to *Hinckley* in *Leicestershire*, the Sessions confirmed the order, subject to the opinion of this Court upon the following case:

James Adie, the pauper's husband, was, in *April* 1800, put out as a parish apprentice, by the hamlet of *Atterton*, and served more than 40 days in the parish of *Hinckley* under such indenture. The indenture ran thus:—This indenture made the 2d day of *April* 1800, in the 40 G. 3, &c. witnesseth, that *W. Sketchley*, churchwarden of the hamlet of *Atterton* in the parish of *Wetherley*, in the county of *Leicester*, and *J. Geary*, overseer of the poor of the said hamlet, by and with the consent of his majesty's justices, &c. by these presents, do put and place *James Adie*, aged 14 years, a poor child of the said parish, apprentice to *J. Bazley* of the parish of *Hinckley*, in the county of *Leicester*, frame-work knitter, with him to dwell and to serve, &c. until the said apprentice shall accomplish his full age of 21 years according to the statute, &c. and so it proceeded in the common form; concluding with covenants by *Bazley* to the said churchwardens and overseers, and every of them, &c. and their successors, to instruct the apprentice in his trade, and so to provide for the said apprentice that he be not a charge to the said hamlet, &c. In witness, &c. (Signed,) *W. Sketchley, J. Geary, and J. Bazley*; and the consent of the two justices to the indenture was in the usual form. No other evidence was produced, either on the part of the appellants, or of the respondents. And the question was, Whether the indenture of apprenticeship were a valid instrument or not, being made and executed by *one churchwarden and one overseer only*?

The Attorney-General, Reader, and Morice, in support of the order, stated shortly, that there was nothing upon the face of the indenture which shewed that it could not have been executed by a competent authority. There might have been another overseer, and the one overseer and churchwarden who executed the indenture would be a majority of the three, which is all that the statute 43 Eliz. c. 2. s. 5, requires. And they referred to *Rex v. Besland*, 1 Burr. 446, n. 1 Const. 15, and 1 Wils. 128, where an order of appointment of one overseer was held good, upon an intendment that one other at least might have been appointed by another order. Or two might have been appointed for the township, of whom one only might be living at the time of executing the indenture.

Reynolds and Holbeche, contra, after noticing that this was an indenture executed by the officers of a *township*, objected that there could be no *churchwarden* of a *township*; (a) but if the churchwardens of the parish at large

(a) Vide *Rex v. Clifton*, 2 East, 168, where this question was discussed, but not decided. The stat. 17 Geo. 2. c. 38, speaks throughout of *churchwardens and overseers* of the parish, *township*, or place: and s. 15, enacts, that overseers of the poor within every township or place where there are no churchwardens shall execute all the same powers as churchwardens and overseers may do by that or any former statute as to parishes; and 13 & 14 Car. 2. c. 12, as to townships.

were empowered to act with the overseers of each township which maintained its own poor separately, then as the stat. 13 & 14 Car. 2. c. 12. s. 21, expressly directs *two* or more overseers to be appointed for every such township, in neither way of considering the case could one overseer, or one churchwarden, be a majority of the legal number of officers necessary to concur in the act: for *one* overseer could be a majority of *two*, supposing that the churchwardens of the parish at large cannot act with the overseers of townships within it: or if they can, yet as by the 89th canon of 1603, (a) there must be two churchwardens; the one chosen by the minister, and the other by the parishioners, unless there be custom shewn to the contrary; (b) one churchwarden and one overseer cannot be a majority of the four. In *Rez v. Clifton*, 2 East, 168, an appointment of one overseer alone for a township was held to be bad; and a certificate of the settlement of a pauper in the township signed by him alone was, on that account, held invalid. It is true, that the fact of there being more than one overseer for the township was negatived by the case; but the Court proceeded upon the construction of the statute 13 & 14 Car. 2. So in the *King v. St. Margaret, Leicester*, 8 East, 332, where one of two churchwardens of a parish was also appointed sole overseer, a certificate signed by the two was held to be void, and did not prevent a settlement being gained in the certificated parish by an apprentice of the certificated man. In case of the death or removal of an overseer before the expiration of his office, power is given 17 Geo. 2. c. 38. s. 3, to the justices to appoint another in his stead; and therefore the intendment of an original appointment of two, and the death of one, before the indenture was executed, will not help the case. Then if the indenture were void for want of proper parties, no settlement can be gained by serving under it, according to *Rez v. Hamstall Ridware*, 3 Term Rep. 380.

LORD ELLENBOROUGH, C. J. No evidence having been given to impeach the validity of this indenture by showing that it was executed by less than a majority of the proper officers charged with that duty, the validity of it must be tried by itself: and if any intendment can by law be made to support it, we must make that intendment. Now, if there were two existing overseers at the time, and only one churchwarden, the two who executed the indenture, being a majority, would be sufficient to bind the apprentice. Then can there be by law only one churchwarden? That may be regulated by custom, and by custom there may be only one in this place; therefore, the party who impeached the indenture should have given evidence to rebut the intendment which may be made in support of it while unimpeached by evidence.

LE BLANC, J. The indenture was produced on one side, and there was no evidence to impeach it on the other. The question then is, Whether by any intendment of law such an indenture can be good? And it may be good by intendment in the way put by my Lord. Then not being impeached by evidence, it stands good.

The other Judges concurring,

Orders confirmed.

(a) Vide 1 Burn's Eccl. L. 370, tit. *Churchwardens*, art. 3.

(b) I do not find any instance stated in Dr. Burn of a custom to have only *one* churchwarden in a parish; all the cases of exceptions to the canon are as to the right of electing or appointing one of the two or both. There is indeed an instance in *Warner's case*, Cro. Jac. 532, of a custom in the parish of *All Hallows, in London*, for the parishioners to elect annually out of a certain description of persons one to be churchwarden, who was to continue for that and the succeeding year, the same person being called Upper Churchwarden one year, and Under Churchwarden the other: but still there were always two co-existing churchwardens. And Dr. Burn afterwards* cites Gibs. 215, to this purpose, that "although in some places there is but one new churchwarden yearly elected (he who was junior churchwarden before being continued of course,) yet in that case the books of common law, as well as the canon, suppose a new election to be made of *both*." Qu. Whether there be any instance in fact of a custom for one churchwarden only to be appointed by a particular *township* maintaining its own separately from the rent of the parish, to act with the overseers of that township in all its local and separate interests, and with the other churchwardens in all matters of general concern within the parish at large.

* Page 379, art. 11.

The King v. The Justices of Lancashire.

12 East, 366. May 24, 1810.

An application under the highway act, 13 G. 3. c. 78. s. 47, for a rate to reimburse two inhabitants of a parish on whom a fine for the non-repair of a highway had been levied, after a conviction upon an indictment against the parish for non repair, ought to be made within a reasonable time after such levy, before any material change of inhabitants: and this Court refused a *mandamus* to the justices to make such rate after an interval of eight years, though applications had been from time to time made to the magistrates below in the interval, who had declined to make the rate, on the ground that the parish at large had been improperly indicted and convicted, the *onus* of repair being thrown by immemorial custom on an interior district; and though so lately as the year before this application, the magistrates had ordered an account to be taken of the quantum expended upon the repairs out of the money levied.

AN indictment was found at the sessions at *Lancaster*, in the Spring of 1801, against the inhabitants of the parish of *Eccles*, for not repairing a certain road lying in the hamlet of *Higher Irlam* in that parish, which consists of five townships maintaining their own poor separately, and has six churchwardens appointed by the inhabitants, who conduct the business of the parish at large. The affidavit on the part of the prosecutor stated, that on the finding of the indictment the churchwardens met together, and employed an attorney to defend it on behalf of the parish. But the affidavits in answer to the rule stated, that the several townships were divided into different hamlets, and that *Barton-upon-Irwell*, one of the five townships, was divided into twelve hamlets; of which *Eccles*, *Barton*, and *Higher Irlam* were three; and that the several hamlets had immemorially been accustomed to repair each their own highways. That the other four townships did not interfere in the defence of the indictment: but that the churchwardens and overseers of the township of *Barton* undertook the defence of it, and employed the attorney for that purpose. In Oct. 1801, the inhabitants of the parish of *Eccles* were found guilty, and at the beginning of 1802, an estreat was issued against them by order of the sessions for 400*l.* for the repair of the road; which sum was levied on Mr. *Trafford* of the township of *Barton-upon-Irwell*, and on Mr. *Clarke* of the township of *Irlam*, both in the parish of *Eccles*; and the money was paid into the hands of two persons named, to be laid out in the repair, and part was accordingly laid out, and the road repaired, and so certified to the magistrates. Immediately after which, application was made on behalf of Messrs. *Trafford* and *Clarke* to two justices acting for the division, for a rate on the parish of *Eccles* to reimburse them; and similar applications were afterwards made from time to time, but without effect; the magistrates refusing to interfere; on the ground that the verdict had been improperly obtained against the inhabitants of the parish at large; the road in question lying within the hamlet of *Higher Irlam*; which, in common with the other hamlets into which the parish was divided, separately repaired its own highways. After the death of one of the magistrates who had principally opposed the granting of the rate to reimburse, application was again made at the end of 1808, for the rate; and all the circumstances of the case were brought before the Sessions in April 1809, who then ordered an account to be taken of the money which had been expended on the road, and the balance remaining in hand of 148*l.* 17*s.* 10*d.* to be paid over to Messrs. *Trafford* and *Clarke*; but the justices refused to make any order for a rate to reimburse them the 25*l.* 2*s.* 2*d.* which they had paid.

The present application was for a *mandamus* to the justices of the county, commanding them at the next special sessions to be holden within the limit where the parish of *Eccles* lies, pursuant to the general highway act, 13 Geo. 3. c. 78. s. 47, to cause a rate to be made according to the form and manner therein prescribed for the reimbursing *J. Trafford*, Esq. and *S. Clarke*, ad-

ministratrix of *R. Clarke*, the moneys levied on them for the fine imposed upon the inhabitants of the parish for the non-repair of the road.

Park now opposed the rule on two grounds; first, that the parish at large had no concern in the road in question; that the defence of the indictment had been undertaken by the township of *Barten*, who ought to have pleaded, either their own liability, or that of the particular hamlet: but who, by their own default, had suffered a verdict to pass against the parish when a good defence might have been made to it: and therefore the rate to reimburse ought to be made, either against the inhabitants of the township, or of the hamlet, whichever was bound to the repair of the road. And he referred to *The King v. Townshend*, Dougl. 421, where a parish consisting of two districts, which were bound to repair separately, having been convicted for not repairing a road in one of the districts; the other district not having had notice of the indictment: the Court considered it as substantially the conviction of the one district: and a fine having been levied on an inhabitant of the other, they granted a special *mandamus* for a rate to be levied on the district bound to repair the indicted part of the road. 2dly, He resisted the application on the ground of the length of time which had intervened since the levying of the money, during which a great change of the inhabitants must necessarily have taken place.

Scarlett and *Yates*, in support of the rule, said, that the case of *The King v. Townshend* must have proceeded on the ground of fraud: the inhabitants of the innocent district not having had any notice of the indictment: but here there was no pretence to say, that the parish at large had not notice, whether the indictment were properly defended or not. [Lord *Ellenborough*, C. J. When it was known that the roads were repairable separately by the different districts of the parish, it was a fraud in those who undertook to defend the parish against the indictment not to have put in a special plea to that purpose.] The reason why the general issue was pleaded in this case was, that the district disputed the fact of this being a *public* road, and it was not competent for the defendants to plead both the general issue and the special matter. In fact the evidence was much stronger that it was not a highway than that the particular district had been immemorially accustomed to repair all the highways within it, unless evidence had been admitted of the repair by each of the other districts of their own-highways; of which doubts were at that time entertained upon the form of the special plea then commonly used; which was merely that the road in question lay within the particular district, and that such district was immemorially accustomed to repair it. Besides which it was doubted whether such a prescription applied to roads recently made or become public, or was confined to ancient roads.(a) But now another more comprehensive form of plea is in use, better adapted to let in all the evidence bearing upon the case: in which it is alleged that the parish is divided into certain districts, and that each of those districts is immemorially accustomed to repair all the public roads within it.(b) [Lord *Ellenborough*, C. J. said, he remembered a plea of that description to an indictment against a parish(c) in the county of *Cumberland* while he was at the bar.] At any rate, if there be any doubt as to the right of the parties applying to obtain the particular relief prayed for, the justices may return the special matter to the writ. They then observed as to the delay of application; that the indictment was only in 1801, and it was some time after before the money was levied and laid out; after which Mr. *Clarke* died, and application had been made to the justices from time to time, which shewed that the claim was not meant to be abandoned. And as to a

(a) Vide *Rez v. The Mayor &c. of Liverpool*, 3 East, 86, and *Bower's* argument in *Rez v. Sheffield*, 2 Term Rep. 109.

(b) Vide *Rez v. Bridekirk Parishioners*, 11 East, 304, for an instance of such a plea; though that was held bad upon a special objection of another sort.

(c) *Qu. Dalton* was mentioned.

change of inhabitants having intervened, that must always happen in the nature of the thing, even where the greatest possible expedition is used, which is never required in cases of this kind.

LORD ELLENBOROUGH, C. J. This is an application to the discretion of the Court, to shift a burthen from these parties, on whom it has been innocently, perhaps, but certainly negligently, fixed, and to put it upon others who are also innocent of the charge. And though applications of this sort have been entertained; yet that must be understood of such as were recently made after the occasions which gave rise to them. But what perverse justice it would be to grant such an application after an interval of eight years, when a large proportion of the inhabitants must have been changed. Suppose an action of *assumpsit* could have been brought in such a case for the contributory shares of the other inhabitants, the statute of limitations would have run upon it: but if this application be granted, the money must be paid under the rate. The length of time, therefore, which has elapsed, is a sufficient answer to the application, without going more at large into the subject.

GROSE, J. Nothing could be more unjustifiable than to put the defendants to the expence of making a special return to the writ, when the granting it at all would be unjust.

LE BLANC, J. The lateness of the application is a sufficient answer to it: it ought to have been made recently after the occasion: and it is no answer to the objection that the parties waited till the money had been laid out, and all the accounts were made up. Those who were obliged to pay the money in the first instance ought to have applied within reasonable time for reimbursement, and not have waited till a great change had taken place in the body of the inhabitants who were to contribute to it.

BAYLEY, J. agreed.

Rule discharged.

Vincent, one, &c. v. Slaymaker.

12 East, 372. May 24, 1810.

A party in a cause having changed his attorney in the progress of it, a Judge's order was afterwards obtained by the second attorney for the delivery of a bill signed by the first attorney under the stat. 2 G. 2. c. 23. s. 23, which delivery was accordingly made to the second attorney in the cause: held that this was a sufficient delivery *to the party to be charged therewith*, within the words and meaning of that stat. so as to enable the first attorney to bring his action against the client for the amount of such bill.

THIS defendant, in the year 1808, had employed the plaintiff as his attorney in an action brought by him against *Hearn* and another, and in the progress of that cause the now defendant changed his attorney, and employed Messrs. *Rogers*, his present attorneys; and thereupon a Judge's order was obtained, intitled "*Slaymaker against Hearn, and another*;" whereby, "Upon hearing the attorneys or agents on both sides, and by consent, it was ordered that Mr. *Vincent*, the plaintiff's late attorney, should deliver to Messrs. *Rogers*, the plaintiff's then present attorneys, on or before the next day of *Hilary* term, a bill signed of his fees and disbursements in this and all other causes and matters wherein he hath been concerned for the said plaintiff. Dated 8th Dec. 1808." A bill was accordingly signed and delivered by Mr. *Vincent* to Messrs. *Rogers*: And afterwards the present action having been brought to recover the amount of that bill, objection was taken at the trial before Lord *Ellenborough*, C. J. at *Westminster*, that the bill was not proved to have been "delivered to the party to be charged therewith, or left for him at his "dwelling-house or last place of abode," as is expressly required by the stat. 2 G. 2. c. 23. s. 23, one month or more before the action commenced. To

which it was answered, that a delivery to the attorney of the party of any thing within the scope of his authority in the cause is the same as a delivery to the party himself. But his lordship thought, that however the attorney of a party in a cause was for general purposes, connected with the subject-matter of the cause, to be considered the same as the party himself; yet that as the statute expressly required the delivery to be made *to the party to be charged with the demand*, the delivery which had been made to his attorney in this case was not a literal compliance with the act. And he said, that he was fearful to depart in such a case from the letter of the act, not knowing how far implied deliverances might be carried beyond the meaning of the legislature. He therefore directed a nonsuit; which was afterwards moved to be set aside, in order to take the opinion of the Court upon the construction of the statute, whether the delivery of the bill to the client's then attorney under the judge's order were a delivery to the client himself within the meaning of the act.

Garrow and *Park* now shewed cause against the rule, and stood upon the literal words of the statute, which they said was the only guide in matters of regulations of this kind. The legislature meant to prevent the client from being taken by surprize upon the demand of his attorney, and meant to secure to him a *personal* communication of such demand before any action commenced for it. If a communication to an agent would have answered their intention, they would doubtless have expressed it, as well as a delivery at the client's dwelling-house, or last place of abode. But so strict has been the construction of the statute, that in *Hill v. Humphreys*, 2 Bos. & Pull. 343, a delivery at the client's *counting-house*, where it was much more likely to have been seen by him, was held insufficient to satisfy the latter words of it. Here too, the delivery was not made with a view to this action, but made in another cause, between other parties, for another purpose, and upon application to a Judge by the defendant's then attorneys Messrs. *Rogers*; who, they admitted, were his present attorneys: but contended, that that did not vary the question. [*Le Blanc, J.* It was a delivery procured on behalf of the defendant for the purpose of having the plaintiff's bill taxed, in order that the amount might be settled.] It was done upon a change of attorneys, and it did not appear that the taxed bill ever came to the hands of the client. [*Grose, J.* Is it meant to be contended, that the attorney is bound to make a personal delivery of his bill to the client? and yet that would also follow, if the words are to be taken literally.] What is done by his order would be considered as done by him; but the case is different in respect of the person to whom the delivery is to be made where personal notice is required: as in the case of an attachment, personal service on the party is necessary to bring him into contempt; but the service of the rule need not be made in person by the other party.

Topping, Marryat, and Puller, contra, maintained that all the beneficial purposes of the act had been answered by the delivery of the bill made to the defendant's attorneys in this case; and applied the maxim, *qui hæret in litera hæret in cortice*, to the objection taken. If a delivery by the attorney's agent to the client satisfied the words and reason of the statute, so must a delivery to the client's agent having competent authority from him for that purpose. The act does not say, that the delivery shall be made to the client *in person*, but to the client, generally; and the question upon that branch is, Whether a delivery to his attorney, having competent authority to demand and receive such a bill within the general scope of his employment, be not a delivery in law to the client himself. The case cited on the other branch is different; for a *counting-house*, as such, is not in law a *dwelling-house* or *place of abode*. This also differs from the case of process for contempt; for a man is not liable *criminaliter*, but only *civiliter*, for the act of his proper attorney. Then as to the delivery of the bill having been made in another cause and not in

this; there never can be a delivery of it in the very cause, for it must be made before the action brought.

LORD ELLENBOROUGH, C. J. The question here is, Whether the act of parliament has not annexed as a condition to the bringing of this action by an attorney against his client for the recovery of his fees and charges, that his bill shall have been delivered a month before the action brought *to the party (himself) to be charged therewith*, or left at his dwelling-house, or last place of abode? And I believe I am so unfortunate as to differ from my brothers upon the construction of the act, which diminishes my confidence in the opinion I had formed upon it. It strikes me, that the object of requiring such a delivery was, that the bill should be drawn under the client's own vigilant observation: and this was required, not for the purpose of protecting the attorney making the delivery, but the party to whom the delivery was to be made: and that is an answer to the argument drawn from the sufficiency of a delivery made by the attorney's clerk or agent, in respect of which the words of the statute will admit of a larger interpretation than where it speaks of the delivery *to the party* who was meant to be protected. Now here the bill had been delivered under a Judge's order in another cause to the party's attorney in that cause; and for the purposes of that suit the party must be taken to have reposed his confidence in his attorney for all matters arising within the scope of his employment after he was constituted such attorney: but it does not appear, that he had extended his confidence further to all his former business. It sometimes happens, that a person is general attorney for a mercantile house in the city, while another person acts as their particular attorney for a particular purpose; as in an action upon a certain policy: in such a case how could notice to the particular attorney bind his client for general purposes out of the particular suit for which he was retained? The client might only have desired to have his former attorney's bill in the particular cause then in progress, and the new attorney might, without his client's authority or knowledge, have taken out a Judge's order in larger terms, comprehending all former business which the first attorney had conducted for his client; and this is delivered to the new attorney: how is that notice to the client for general purposes not connected with that suit? Every man, it is true, is liable *civiliter* for the acts of his attorney, though not known to him; but that is only to the extent of the attorney's authority. The act meant to guard the client against collusion; for otherwise the two attorneys might collude to avoid the taxation of the bill by these means. I do not therefore consider, that all the beneficial purposes of the act will be secured by letting in such a constructive delivery as was set up in this case.

GROSE, J. I leaned at first to my lord's construction of the act; thinking that if one part of the clause was construed strictly, all the words of it ought to be so construed, and that there must be a personal delivery of the bill to the client: but upon further consideration, I think that all that the legislature meant to require was, that a month at least before the action brought the bill should be delivered by the attorney or his agent, to the client or his agent; so that the client might have reasonable notice of the demand, to have the bill taxed, or advise with others upon it. And if the attorney to whom the bill was delivered under the Judge's order in this case did not communicate it to his client, the client would have his remedy by action against the attorney to recover damages for what he had suffered by the neglect. I think, therefore, that the maxim does apply in this case, *qui hæret in litera hæret in cortice*; and that the legislature, by requiring a delivery of the bill to the party, meant no more than that he should have reasonable notice of its contents; leaving it to the construction of law, as in other cases, what should be deemed a delivery to him for the purpose of notice.

LE BLANC, J. It appears to me, that this delivery of the plaintiff's bill to the attorney of the party at the time is a delivery to the party within the meaning of the act. The strong argument against it is founded on the literal

meaning of the act, requiring that no attorney shall commence any action for the recovery of any fees, &c., until one month or more after he shall have delivered *unto the party to be charged therewith*, or left for him at his dwelling house, or last place of abode, a bill of such fees, &c. But in construing these words we must look to the object of the act, which was not to put an attorney in a more difficult situation than any other person, in respect to the manner in which such delivery should be made, by confining him to make a personal delivery of the bill to his client, or otherwise to leave it at his dwelling house; but the object was to give proper notice of the demand to the client: and as the nature of the business done, and the charges for doing it, could more properly be judged of by the officers of the court than by the party himself, to enable him, before he could be sued for the amount, to have the bill taxed, and to give him an opportunity of putting it into the hands of some professional man for that purpose. Now here the defendant having changed his attorney in the progress of a former action brought by him against other parties, a Judge's order for the delivery of the plaintiff's bill was applied for and obtained by his present attorney, who had been his former attorney; which bill was accordingly delivered to his then attorney; and the question is, Whether such a delivery to the attorney of the defendant be not in construction of law a delivery to himself? and I think it is. If the defendant had sent a note to the plaintiff by another person desiring him to deliver his bill to the bearer, a delivery to that person must, I conceive, have been deemed sufficient: for if a man who is entitled to receive a certain thing puts another in his place for the purpose of receiving it, it is a waiver of the personal delivery contemplated to be made to himself. Then it is the same thing here where the delivery has been made to the person whom he had appointed to be his attorney in the conduct of the cause in the place of the plaintiff whom he had dismissed. The force of the argument here is, that the new attorney might have been appointed attorney for a particular purpose, but not for general purposes, and he might have done this unknown to his client, and might not have put the bill in a course of taxation, by which the defendant will have been deprived of the benefit of the act: but I think the answer is, that when the defendant constituted him his attorney, it was for all the proper purposes of an attorney so constituted; and his attorney obtaining the Judge's order must be taken to have been for the purpose of enabling his client to have the bill taxed; for the order is to deliver a *bill signed*, that is, in order that the attorney might be bound by it; and when delivered, the party may get an order for taxing it. Then shall the attorney be bound by this delivery so obtained under a Judge's order, and the client be enabled to have it taxed? and shall not the attorney have the benefit of it as a bill delivered against the client? Then suppose the client had, as he must have done, after the order to tax the bill, entered into an undertaking in the Master's books to pay so much as should appear due on the taxation; could he, after having so recognized, by signing the book, the act of his attorney in procuring the bill to be delivered, have objected that it was not delivered to him? It appears therefore to me, that the client, having appointed his attorney, has put him in his place for this purpose, and has thereby dispensed with that delivery to himself which the act would otherwise have required.

BAYLEY, J. On the best consideration I can give the question, but feeling nevertheless the weight of my Lord's reasons, I think the delivery of the bill to the client's attorney in the cause was sufficient. The act does not say that the delivery shall be to the client in person, but leaves that at large according to what shall be deemed a delivery to the party in point of law; and then by the general rule of law, a delivery to an agent authorized to receive it is a delivery to the party himself. The attorney is, indeed, the person to whom the bill would be regularly delivered for this purpose. The object of requiring the delivery is to have the bill taxed, and therefore the party would naturally

employ an attorney for the purpose. If such a delivery was not sufficient to enable the attorney to maintain an action for his bill, he would have a fair right when an order was taken out to compel a delivery of it, to have such order restrained to a delivery to the party himself; for he might well object to making a delivery which would be good against himself, but not available as a delivery for any purpose in his favour. It is said, that the defendant might not know that *Rogers*, his attorney, took out any order for this purpose: but the client must be taken to the cognizant for civil purposes of every step taken by his attorney in the cause; and if a delivery to a special agent would suffice, then a delivery under a Judge's order to the attorney, who is the party's agent in the cause for all matters within the scope of his employment as attorney, is *prima facie* evidence, at least, that the attorney was authorized to take out such order by his client, and throws it upon the client to shew that his attorney had no such authority.

Rule absolute.

Davidson v. Gwynne.

12 East, 361. May 25, 1810.

Where the master of a vessel covenanted with the freighter, (*inter alia*) that the vessel should proceed with the first convoy from England for Spain and Portugal, or either, as he should be directed by the freighter or his agents, and there make a right and true delivery of the cargo, agreeably to the bills of lading signed for the same; and to take in a home cargo, and return, and make a right and true delivery thereof at London, &c. In consideration whereof, and of every thing above mentioned the freighter covenanted (*inter alia*) to load the vessel out and home, and pay certain freight per ton per month, part before, and the remainder on the right and true delivery of the homeward cargo at London: held,

1. That the freighter having first ordered the master to proceed to Lisbon, in consequence of which the master had taken in goods and signed bills of lading for that port, could not afterwards countermand that order, and order him to proceed to Gibraltar, without first recalling the bills of lading, or at least tendering sufficient indemnity to the master against the consequence of his liability thereon.
2. But, supposing the freighter had such a power, yet his supercargo and agent who was on board the vessel, had the like authority, in the absence of his principal, even before the vessel sailed from this country, to alter again the destination to Lisbon.
3. That the master having proceeded with the outward cargo to Lisbon under the first order, and brought home a return cargo, and delivered the same to the freighter at London, was entitled to his freight for that voyage, though he had not sailed with the first convoy: the sailing with the first convoy not being a condition precedent to his recovering freight for the voyage actually performed under the first order, but a distinct covenant, for the breach of which he was liable in damages.
4. And he was entitled to recover such freight as upon a right and true delivery of the cargo agreeably to the bills of lading, upon proof of having delivered the entire number of chests, &c. for which bills of lading had been signed; though it appeared that the contents of the chests of fruit were damaged by the negligence of the master and crew on board, in not ventilating them sufficiently: the party injured having his counter remedy by action for such negligence.

THE plaintiff declared in debt on a charter party of affreightment, made at London on the 17th of October 1808, between himself, as master, and the defendant as freighter of the brig *Pomona*, then in the river Thames; whereby the master covenanted with the freighter, that the brig being tight, &c. and properly fitted, victualled, and manned for the voyage hereinafter named, should be at the disposal and direction of the freighter, his agents and assigns for 3 calendar months certain, and longer if required for the voyage, under the following covenants: viz. That the master should immediately load at London such goods as the freighter thought fit, and being dispatched, should immediately (wind and weather permitting,) proceed and join the first convoy that should sail after she should be so loaded from England for Spain and Portu-

gal, or either, and should therewith proceed to any port or ports in *Spain* and *Portugal*, or either, as he should be ordered by the said freighter, his agents or assigns, and at any or either of such port or ports as he should be ordered as aforesaid, should make a right and true delivery of the whole of the said outward goods, agreeably to bills of lading that should have been signed for the same; and having completed such delivery, should load at any port or ports in *Spain* and *Portugal*, or either, as he should be directed by the freighter, his agents or assigns, such goods as the said freighter, his agents or assigns, should think fit, and return therewith to *London*, and there make a right and true delivery of the whole of the homeward goods, agreeably to the bills of lading; (the act of God, the king's enemies, restraint of princes, fire, and the dangers of the seas, &c. excepted.) Also, the master thereby agreed to receive on board the said brig at *London* two supercargoes to be appointed by the freighter, and to convey them as cabin passengers to *Spain* and *Portugal*, or either, and back to *London*, free of passage-money. In consideration whereof, and of every thing above mentioned, the freighter covenanted that he, his executors, &c., agents or assigns, would employ the said brig under the conditions aforesaid, and would load the outward cargo and discharge the same in *Spain* and *Portugal*, or either; and would in *Spain* and *Portugal*, or either, load the homeward cargo and discharge the same at *London*: and would pay to the commander in full for the freight of the said vessel for the voyage aforesaid, at the rate of 1*l.* 10*s.* per ton per month from 5th of *October* 1808, until the delivery of the homeward cargo at *London*; part of the freight to be paid before the brig left *London*, &c., and the remainder on the right and true delivery of the homeward cargo at *London*. And to the true performance of all and every the foregoing covenants on the part and behalf of the said parties respectively, they bound themselves, their heirs, executors, &c., each to the other in the penal sum of 1000*l.* And by a memorandum at the foot of the charter-party it was agreed, that in case the freighter or his assigns should think proper to remove the brig to any other port than that in which she should have first arrived for the purpose of discharging her cargo, then he should pay all port-charges and pilotage arising therefrom. The plaintiff then averred, that he was ordered by the freighter to proceed with the said brig to *Lisbon* in *Portugal*; and thereupon the said brig being tight, &c. and properly fitted, victualled, and manned for the said voyage, the plaintiff immediately received on board her at *London* such goods as the freighter thought fit to load, and being dispatched, sailed with convoy (not saying with the first convoy) from *England* to *Lisbon*, and there made a right and true delivery of the whole of the outward cargo agreeably to the bills of lading that had been assigned for the same; and that the plaintiff, having completed such delivery, afterwards took on board the said brig at *Lisbon* such goods as the freighter thought fit, and returned therewith direct to *London*, where he made a right and true delivery of the whole of the homeward cargo, agreeably to the bills of lading signed for the same: and then he averred that the freight amounted, at the rate agreed upon by the charter-party, to 1050*l.* &c.

The second count was general, for so much money due for freight, &c. A third was for the use and hire of the vessel; and there were other common counts.

The defendant pleaded several pleas to the first count, 1. That after making the charter-party, the plaintiff as master took on board the brig at *London* a cargo loaded by the defendant, as freighter, and was therewith dispatched and ordered by the freighter immediately to proceed and join the first convoy that should sail from *England* for *Portugal*, and to make a delivery of the whole of the said outward cargo, agreeably to bills of lading signed for the same, at *Lisbon*: and that after the brig was so loaded, the first convoy sailed from *England* for *Portugal*, to wit, from *Portsmouth* to *Lisbon*, whereof the

plaintiff had notice: yet, though neither wind nor weather prevented the same, the plaintiff did not proceed and join such *first convoy*, but neglected so to do. 2dly, That after the master had been ordered by the freighter to proceed to *Lisbon*, and after the brig was dispatched, and had sailed from *London*, and before her arrival at *Lisbon*, the defendant, as freighter, countermanded the said order so by him given to the plaintiff to proceed in the said brig to *Lisbon*, and ordered him not to proceed with it to *Lisbon*, but to proceed therewith to *Gibraltar* in Spain, and there to make delivery of the cargo: yet the plaintiff, though wind and weather permitted, did not proceed to *Gibraltar*, but refused so to do. 3dly, The defendant, protesting that the plaintiff was not ordered by him, the freighter, to proceed with the brig to *Lisbon*, pleaded that after she was dispatched and had sailed from *London*, and before her arrival at *Lisbon*, the defendant, as freighter, ordered the plaintiff to proceed with her to *Gibraltar*, and there make delivery of the cargo: and then it alleged a breach of this last-mentioned order. 4thly, That though the plaintiff took on board the brig at *Lisbon* the goods mentioned in the first count, and returned therewith to *London*; yet the plaintiff did not then make a right and true delivery of the whole of the homeward cargo, agreeably to the bills of lading signed for the same. 5thly, That though the plaintiff took on board the brig at *Lisbon* the said goods, &c., and though the goods were shipped on board her in good order and well conditioned, and though the plaintiff thereupon signed bills of lading in respect of the said goods, and thereby undertook to deliver them to the defendant or his assigns in like good order and well conditioned at *London*, (the dangers of the seas only excepted,) and though the plaintiff did return with the said goods to *London*, and delivered the same there to the defendant; yet the plaintiff did not there deliver the goods to the defendant in like good order and well conditioned as the same were in when shipped on board the said brig, but in a much worse order and condition, and in a damaged and injured state, occasioned by the negligence of the plaintiff and his servants in the course of the voyage, whilst the goods were on board the brig, and not by the dangers of the seas, &c.: without this, that the plaintiff did make a right and true delivery of the whole of the said homeward goods, agreeably to the bills of lading which had been signed for the same, in manner and form as alleged in the first count. And to the general counts in the declaration the defendant pleaded *nil debet*.

To the first and third pleas the plaintiff demurred generally. To the second he replied, that after the defendant had countermanded the order given by him to the plaintiff to proceed with the brig to *Lisbon*, and had ordered the plaintiff not to proceed to *Lisbon*, the defendant again ordered the plaintiff to proceed with the brig so loaded to *Lisbon*, and there make delivery of the said goods according to the charter-party. To this plea the defendant rejoined: traversing, that after he had countermanded the order to proceed in the brig to *Lisbon*, as in the 2d plea mentioned, he again ordered the plaintiff to proceed with her to *Lisbon*, and there make a delivery of the cargo, as stated in the replication: on which issue was joined. On the 4th plea issue was also joined. To the 5th the plaintiff replied, as before, that he did make a right and true delivery of the whole of the said homeward goods, agreeably to the bills of lading signed for the same, in manner and form as alleged in the first count of the declaration; on which issue was joined. And issue was also joined on the *nil debet* pleaded to the common counts. At the trial of the issues certain questions arose, which were brought in discussion before the Court on a rule for a new trial moved for at the beginning of the term, and which was disposed of on this day after the argument on the demurrers.

Taddy, in support of the demurrer to the first plea, contended, that the sailing with the *first convoy* was not a condition precedent to the plaintiff's right to recover freight, as set up in defence by the first plea: the voyage hav-

ing been performed, and the outward and homeward cargoes delivered to the freighter's orders. He referred to the rule laid down in *Boone v. Eyre*,^(a) and recognized in *Hall v. Cazenove*, 4 East, 484, that where mutual covenants go only to a part of the consideration on both sides, where a breach may be paid for in damages, there the defendant has a remedy on the plaintiff's covenant, and shall not plead it as a condition precedent: and likened this to *Constable v. Claberie*, Palm. 397, cited by *Lawrence, J.* in *Hall v. Cazenove*, where the covenant being to sail with the next wind upon a certain voyage, the defendant traversed that the ship did sail with the next wind; which was over-ruled upon demurrer, as immaterial against a demand for freight after the voyage performed. And he also referred to *Havelock v. Geddes*, 10 East, 555, 562, the last reported case on the subject of a condition precedent in a charter-party, to the same effect. [Lord *Ellenborough, C. J.* then said, that the Court would hear from the defendant's counsel, whether this case were distinguishable from those cited, where the question had been fully considered.] Secondly, he contended upon the demurrer to the third plea, that such plea was clearly bad: it did not deny that the plaintiff was ordered by the defendant as freighter to proceed with the brig to *Lisbon*, as stated in the declaration; for a protestation of that fact is no denial of it; but it avers, that he was ordered by the freighter to proceed to *Gibraltar*. Now the second order is not inconsistent with the first, nor any countermand of it; but as the pleadings stand, the plaintiff might have been ordered to go to both places: and the breach of the last order is no answer to a demand of freight for the performance of the first. [Lord *Ellenborough, C. J.* Unless the first order be contradicted by the second, we will make the two orders consistent, if possible; and there being no incompatibility upon the face of them, they may well stand together.]

Lawes, contra, upon the second question, attempted to shew that the latter order was incompatible with the first, as it directed the brig to proceed to a different place, which necessarily superseded the original destination. [Lord *Ellenborough, C. J.* Supposing there had been a written order to proceed to *Lisbon and Gibraltar*, would not that order have sustained the allegation in the declaration?] The captain was to go to such port or ports in *Spain or Portugal* as he should be ordered by the freighter: this resolves itself into a condition precedent; for if the captain have disobeyed that order, he has not performed the voyage contracted for: the performance of part only may have frustrated the whole intention of the voyage. [*Le Blanc and Bayley, Justices*, observed, that the freighter and his agents had accepted the goods at the port where they were discharged, and therefore could not now make that objection.] The delivery was substantially different from that contracted for by the charter-party: and therefore, though the plaintiff might sue for freight in another action, he cannot recover upon this charter-party. [*Bayley, J.* He signed bills of lading for *Lisbon*, under the freighter's order, by which he bound himself to deliver the goods there to the consignees.] That might give him a remedy against the freighter, who by his act subjected him to such a responsibility, for a loss thereby occasioned: but still, if after that the freighter thought proper to alter the destination of the voyage, the captain was bound by his charter-party to comply with the subsequent order. Upon the other point, he argued from the terms of the contract and the apparent intention of the parties, that the sailing with the first convoy was a condition precedent, and not an independent covenant: it might be an object of the first consequence to the success of the adventure: and the freight was to be regulated by time, and therefore it was material that the voyage should be performed as speedily as required by the contract. [Lord *Ellenborough, C. J.* That only goes to the question of damages; but is there any thing in that which goes to the whole consideration?] The freight is covenanted to be paid in considera-

(a) B. R., E. 17 Geo. 3. 1 H. Blac. 273, n. and in *Campbell v. Jones*, 6 Term Rep. 573.

tion of every thing before mentioned, of which the sailing with the first convoy is one.

LORD ELLENBOROUGH, C. J. It is useless to go over the same subject again, which has been so often discussed of late. The sailing with the *first* convoy is not a condition precedent: the object of the contract was the performance of the voyage, and here it has been performed. The principle laid down in *Boone v. Eyre* has been recognized in all the subsequent cases, that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages.⁽¹⁾ It is useless to repeat all the cases, because we had the subject so fully before us very lately in *Ritchie v. Atkinson*, 10 East, 295, and in the other cases mentioned. Then upon the other plea; the question is whether, the ship having been first ordered to proceed to *Lisbon*, and goods loaded, and bills of lading signed by the plaintiff for that port, a subsequent order given by the freighter to go to *Gibraltar* be a bar to the plaintiff's claim for the freight out to *Lisbon* and back again to *London*. Now, after the freighter's order to the captain to go to *Lisbon*, and the latter had received on board goods and executed bills of lading for that place, it was not competent for the freighter to countermand that order; he could not capriciously change the destination of the vessel, without recalling the bills of lading, or at least offering sufficient indemnity to the captain against them. But nothing of that sort is stated. The case then stands thus, that the freighter, after giving an order to the captain to go to *Lisbon*, and suffering him to bind himself by signing bills of lading to deliver goods there, gives him another order to go elsewhere, and make himself liable to actions for the breach of engagement upon all those bills of lading. This the freighter had no right to do; and therefore the breach of that subsequent order affords no bar to the plaintiff's claim for freight for the voyage which he prosecuted under the first order, and to the prosecution of which he had bound himself by the bills of lading before he received such second order.

GROSE, J. The cases of *Boone v. Eyre*, and *Ritchie v. Atkinson*, and all the others which have been mentioned, determine the first question, that the sailing with the first convoy was not a condition precedent, but one of several mutual covenants: and if either of the parties broke his covenant, the other might bring his action for it: but the plaintiff's right to freight was not to depend upon that. As to the other question: after the first order given to go to *Lisbon*, under which goods had been received on board and bills of lading signed, by which the master made himself liable to answer in damages to the owners of the goods if he did not carry them according to his undertaking, it cannot be permitted to the freighter to countermand the voyage, and make the master liable to actions by those to whom he had so bound himself.

LE BLANC and BAYLEY, Justices, agreed in awarding judgment for the plaintiff on the demurrers.

The report of the evidence on the rule for a new trial was afterwards read; when it appeared, that after the *Pomona* was chartered, she took in her cargo for *Lisbon* by order of the defendant, and the plaintiff signed bills of lading accordingly for that port. She cleared out and left the river *Thames* on the 31st of *October* 1808, and arrived at *Portsmouth* to join convoy on the 1st of *November*, and on the 7th, received sailing instructions from the convoy. The fleet afterwards waited at *Spithead* for a wind till the 29th, when they sailed; but the *Pomona* missed the convoy, and was obliged to bring up again in *Lymington* road on the 1st of *December*, and while she was lying there the defendant came from *London*, and told the plaintiff, that instead of going to

(1) This principle was also recognized in *Bennet v. Executors of Pixley*, 7 Johns. 249, decided in the Supreme Court of New-York, nearly at the same time with the decision in the text.

Lisbon he should go to *Gibraltar*. The plaintiff objected, that he was bound by the charter-party, by his bills of lading which he had signed, and by his clearance, to go first to *Lisbon*, and he had also three cabin passengers for *Lisbon*; and after the defendant's departure and return to *London*, the plaintiff repeated his objections to *Stout*, the defendant's agent and supercargo, who still urged the plaintiff to go to *Gibraltar*: and the plaintiff declared that he would not go to *Gibraltar* without a written order from *Stout*, which the latter then gave him; but a few days afterwards *Stout* required the written order to be returned to him, which he tore in pieces, not choosing to take a personal responsibility on himself, as the plaintiff refused to go to *Gibraltar* without such written order. And there was other evidence on the part of the plaintiff, of *Stout's* having finally agreed that the plaintiff should proceed to *Lisbon*. But *Stout* himself who was examined as a witness, swore, that though he had no objection personally to the plaintiff's going to *Lisbon*, yet he had never given the plaintiff to understand that it was *Gwynne's* order, but the contrary. The *Pomona* afterwards sailed with another convoy and fleet on the 17th of *December*, and arrived in the *Tagus* on the 22d: and after discharging the outward cargo at *Lisbon*, and taking in there a homeward cargo, for which bills of lading were signed by the plaintiff, she sailed on her return to *London*, and arrived there on the 29th of *March*, and delivered her homeward cargo. It appeared also, that the cargo consisting of chests of oranges, was in good condition when shipped at *Lisbon*; but on the *Pomona's* arrival at *London*, it was found when unpacked to be much heated and damaged: and this was made out in evidence to have been occasioned by the negligence of the master and crew in not having given it sufficient ventilation during the voyage. The deterioration was from 10s. to 20s. a chest.

On these facts, it was contended, that the plaintiff was not entitled to recover upon this charter-party: first, because the destination of the vessel was altered from *Lisbon* to *Gibraltar* by the freighter before her sailing, which was a countermand of the first order; and that therefore the voyage to *Lisbon* was not performed under the charter-party. And further, that what passed between the master and *Stout*, after the departure of the defendant from *Lymington Road*, was no authority for resuming the original destination to *Lisbon*, even if a supercargo had authority, especially while the ship remained at home under the controul of the freighter himself, to issue any order in contradiction to the express order of the freighter himself; which authority was strenuously denied. To this it was answered, that supposing the freighter himself had authority to alter the destination of the ship, after bills of lading signed by the master to deliver under the first order; which was denied; yet the supercargo in the absence of his principal had authority to revoke that order, in the same manner as the principal freighter himself; and that the circumstances stated amounted to such revocation. 2dly, it was objected, that the homeward cargo having been damaged, and in part spoilt, while on board, by the negligence of the master and crew, the plaintiff had not made a right and true delivery of the whole of the goods as stipulated by the charter-party, agreeably to the bills of lading, by which he undertook to deliver the same in like good order and well conditioned as when shipped on board; and therefore that the defendant was entitled to a verdict on that issue. To which it was answered, and Lord *Ellenborough*, C. J. ruled accordingly, that the allegation of having made a right and true delivery of the cargo was satisfied by the delivery made of the number of chests of fruit shipped on board; and that if the contents of any of them turned out to have been damaged by the negligent stowing or subsequent want of care and proper ventilation by the master and crew, the defendant had a cross action to recover damages; but that it was no answer to an action for the freight. Though his Lordship intimated further at the trial, that if there had been any special provision in the bills of lading for the care or against the negligence of the master and crew, the issue on the 4th special

plea might have let the defendant into the proof of the negligence: but the issue being general on the fact of a *right and true delivery of the goods according to the bills of lading*, it was to be taken in a narrow and restrained sense, such as in his own experience it had always received, as meaning a right and true delivery of the entire number of chests or packages shipped on board, as specified in the bills of lading. Upon the other point his Lordship left it to the jury, whether in point of fact *Stout*, the supercargo, had ultimately concurred with the master in the original destination of the vessel to *Lisbon*: reserving for future consideration whether he had authority so to do: supposing, which was a question for the opinion of the Court in Bank upon another part of the record, that the freighter himself had authority to change the original destination of the voyage at that period, and under the circumstances of the case. And the jury upon the whole found a verdict for the plaintiff.

Garrow, on a former day of this term, moved for a new trial upon both the points, which had been made at the trial:

But the Court only granted him a rule upon the first, as to the authority of the supercargo to alter the destination of the vessel in the absence of his principal: Lord *Ellenborough*, C. J. saying, that if such authority did reside in *Stout* as supercargo, the jury found that he had exercised it. Upon the other point, all the Court were satisfied, that the right and true delivery of the goods according to the bills of lading was satisfied for the purpose of this action by the delivery of the entire number of chests, which had been received by the owners; and that the deteriorated state of their contents, owing to the negligence of the master in not giving them a sufficient ventilation, was no answer to this action. *Bayley*, J. added, that if the like good condition of the cargo when delivered as when shipped were a condition precedent to the right to recover the freight, then if the goods were damaged to the extent only of a farthing, the master would not be entitled to recover any freight; which never could have been the intention of the contracting parties. (1)

And now, after the demurrers were disposed of and the report of the evidence had been read, on the motion for the new trial, Lord *Ellenborough*, C. J. asked, how after the decision of the Court this morning on the demurrer to the third plea as to the authority of the freighter himself to alter the original destination, the issue upon the replication to the second plea could be material? But the defendant's counsel, considering him entitled to have had that issue found for him at the trial, (which would at least affect the costs) would not waive the rule.

The Attorney-General, *Park*, and *Taddy*, therefore, shortly shewed cause against the rule, and insisted upon the authority of the supercargo to countermand in the absence of his principal, the order to go to *Gibraltar*, and to order the master to go to *Lisbon*, to which he was originally destined. They observed upon the provisions in the charter-party, whereby the master expressly covenanted to receive the supercargo on board, and to proceed to *Spain* or *Portugal*, as he should be ordered by the freighter, *his agents or assigns*. And they contended for such an authority upon the general nature of a supercargo's appointment, when not obviously restrained by the contract of his principal, the nature of the voyage, or other special circumstances; and insisted, that at all events, the fact of his having given an order to proceed to *Lisbon*, which was found by the jury, decided the issue in question.

Garrow, *Marryat* and *Laves*, contra, contended, that the order given to the

(1) [See acc. *Bronneker v. Scott*, 4 Taunt. 1. *Shields v. Davis*, 6 do. 65. 3 Chit. Com. Law, 412-13. *Sheels v. Davies*, 4 Campb. 119. *Cock v. Taylor*, 2 do. 587. But see, in Pennsylvania, *Humphreys v. Read*, 6 Wh. 435-40. *Phillips v. Lawrence*, 6 W. & S. 150; as to allowing the negligence or default of the master to be given in evidence as a defalcation in an action by him for the freight. See also 3 Kent. Com. 220, &c. 3d ed.—W.]

master by the supercargo to go to *Lisbon*, (taking it to have been so found by the jury) was not binding on the defendant; and therefore he did not give such order in the terms of the issue. A supercargo has no authority to give an order in express contradiction to a recent order given by his principal, without any change of circumstances, and while the ship remains at home, and immediate reference can be had to the principal himself. The general nature of a supercargo's authority arises from necessity when he is absent with the ship in foreign parts, out of the reach of immediate communication with his principal, and obliged often to act on the spur of the occasion for the benefit of the adventure which he superintends: The immediate object of his appointment is to controul the sale of the cargo when it arrives at its port of destination, but not to alter the destination itself; and still less, while the ship remains in a port at home within reach of the personal controul of the principal.

LORD ELLENBOROUGH, C. J. The charter-party imports that the freighter might, by himself or his agent, order the destination of the ship and cargo to any port in *Spain* or *Portugal*. *Stout* is found to have in fact given a final order in this case to proceed to *Lisbon*; and the question is, whether he be such an agent as will bind the defendant for this purpose. It was proved, that he was appointed by the defendant his supercargo. A supercargo, unless his authority be expressly or impliedly restrained, must, from the nature of his employment, be invested with a complete controul over the cargo, and every thing which immediately concerns it; that must embrace its destination. Then unless the supercargo's general power was restrained by any thing in this case from varying the voyage within the limits agreed in the charter-party, he must be taken to have had it; and in fact he exercised it in this case. The only question is, whether, as the defendant himself had recently before come down to *Lymington*, and had directed the defendant to go to *Gibraltar*, that restrained the supercargo's general authority? But I do not see how that circumstance could restrain it. It is necessary from the nature of his agency that he should have power to alter the destination of the cargo, particularly in time of war. He may receive recent intelligence that the port of destination last fixed by his principal is blockaded; or other circumstances not less important to the success of the adventure may intervene. Then if he had such a power from the nature of his employment, and there was no special restraint of his authority in this case, and he did in fact change the destination from *Gibraltar* to *Lisbon*, *cadet questio*.

GROSE, J. was of the same opinion.

LE BLANC, J. From the nature of the appointment of a supercargo, where he is on board the ship and the freighter is absent, it follows that he should have the same power in this respect as the freighter himself; for he is to take advantage of every circumstance as it arises, to act for the benefit of his employer in the adventure. If indeed the charter-party had been made for a certain voyage, that would be a very different consideration; but I understand this charter-party as giving the freighter authority (unless restrained by circumstances, such as we have before decided upon) from time to time, by himself or his agents, to alter the destination of the vessel and cargo within the limits assigned.

BAYLEY, J. The power of a supercargo will depend much on the nature of the voyage. Here the destination was not fixed at the time the charter-party was executed, but it was afterwards to be fixed by the freighter or his agents. That shews that some alteration of the destination was looked to in the course of the voyage. The parties seem to have contemplated that circumstances might afterwards occur to make it prudent to alter the destination. Circumstances did occur which first induced the defendant to alter the destination from *Lisbon* to *Gibraltar*, and he altered it accordingly: then his agent, who was, as supercargo, entrusted by him with the controul of the cargo, had, in

his absence, the same power as his principal to alter it again, and he ordered the master to go to *Lisbon* as originally intended.

Rule discharged.

Hopkins v. Thorne.

12 East, 398. May 25, 1810.

A defendant cannot be held to special bail on an affidavit stating him to be indebted to the plaintiff in so much for goods *bargained and sold*, without also saying *delivered*.

THE defendant having been arrested and committed to custody for want of bail, upon an affidavit to hold to bail, stating him to be indebted to the plaintiff in so much *for goods bargained and sold* by the plaintiff to the defendant: *Taddy*, on a former day, obtained a rule *nisi* for discharging him on filing common bail, and stated that there was no precedent of an affidavit to hold to bail for goods bargained and sold merely, without its going on to allege that they were *delivered* to the defendant. *Comyn* opposed the rule, on the principle that as an action of *indebitatus assumpsit* would lie for goods bargained and sold, such an affidavit of the debt must necessarily be good. And he cited *Slade's case*, 4 Rep. 93, 4, 5, and Dy. 30, a. to shew that debt lies upon such a contract; and *Knight v. Hopper*, Skyn. 647, and Sheph. Touch. 222, 5th edit. ch. 10, that the property passes on the sale.

The Court, however, directed the matter to stand over till inquiry had been made whether there were any precedent of a defendant held to bail on such an affidavit: intimating, that they were not inclined to extend the practice beyond what had prevailed: and adverting to the abuses which had crept in, without observation, of holding persons to bail in trover; which abuses had been lately reformed by the Court. And Lord *Ellenborough*, C. J. said, that there was a material difference in this respect between the case of goods sold and *delivered*, and that of goods only bargained and sold. In the one case, the owner having parted with his goods is entitled absolutely to the price; in the other, where the goods are not delivered, he is entitled only to recover the difference in damages between the value of the goods and the price agreed on. And by *Bayley, J.* There is no reason why the plaintiff should have the security of the defendant's body under arrest, and also retain the security of the goods in his own hands.

After inquiry made, it now appeared, that in fact there had been instances of defendants holden to bail upon such affidavits; but they had passed without opposition, and this was the first instance in which the attention of the Court had been called to the subject: therefore the Court, adverting principally to the hardship of holding a party to bail for the value of goods sold by one who at the same time retained the security of the same goods in his own hands, made the

Rule absolute.

Sir Theophilus Metcalf, Bart. and Others v. Bruin.

[S. C. at Nisi Prius, 2 Campb. 422.]

12 East, 400. May 25, 1810.

A bond given to trustees to secure the faithful services of a clerk to the *Globe Insurance Company*, who were no corporation, may be put in suit by the trustees for a breach of faithful service by the clerk committed at any time during his continuance in the service of the actual existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer; the intention of the parties to the instrument being apparent to contract for such service to be performed to the company as a fluctuating body; and the intervention of the trustees removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body.

THIS was an action on a bond for 2000*l.* dated the 18th of June, 1803, whereby the defendant, as surety for *T. H. Wilkinson*, together with *Wilkinson* and another surety, bound themselves jointly and severally to the plaintiffs and two others, described in such bond as *seven of the trustees of the Globe Insurance Company*, or to their certain attorneys, executors, administrators, or assigns; with a condition, reciting that whereas *Wilkinson* was chosen and admitted into the service of the *Globe Insurance Company*, the condition of the obligation was, that if *Wilkinson* should from time to time, and at all times thereafter, during his continuance in the service of the said company, faithfully perform the said service, and all other services of the said company wherein he should be employed, and should, as soon as required, deliver in writing a true account of all money, &c. which in the said service should come to his hands on account of the said company, and pay over the balance to the said company, or to such person as the said company, or the court of directors thereof, for the time being, should appoint; and should indemnify the said company and the directors, and all other members thereof from all losses, actions, costs, &c. and expences which might be sued or prosecuted against them, or which the said company, or any member or members thereof, should or might bear, &c. by reason of any thing done or neglected, &c. by *Wilkinson* in or during his said service; then the obligation to be void. To this there were pleas of *non est factum*, and of performance, &c.: and the replication assigned breaches, in not paying over different sums received by *Wilkinson* for the company; on which issues were taken: and it was agreed at the trial, that if the plaintiffs were entitled to recover at all, the amount of the damages sustained upon those breaches should be referred to arbitrators.

But the principal question was, whether, as during the time that *Wilkinson* continued in the service of the company as secretary, which was from the date of the bond till December 1808, many of the members were changed^(a) by death and transfer of shares, the plaintiffs were entitled to recover at all upon this bond? The plaintiffs took a verdict *pro forma* at the trial, and liberty was given to the defendant to move the Court to set aside that verdict, and enter a nonsuit.

The Attorney-General, accordingly, obtained a rule nisi for this purpose, on the first day of the term; when he opened the question, and stated that the *Globe Insurance Company* was not a corporation, but by an act of the present king the company are enabled to sue and be sued by its treasurer: and he pointed to the difficulties which resulted on this and other occasions from this anomalous description of body politic. For not being a corporation, the law can only look to the company as individuals, and therefore a contract entered into by them, or by others on their behalf, can only be construed as a contract

(a) The fluctuation was proved to be from 50 to 100 in every year.

with so many hundred individuals, and must be governed by the same rules of law as if the individual members had contracted in their own names. Hence much confusion and perplexity, and many inconveniences, must, no doubt, arise, which could only be solved by applying to these bodies the characters of unity and perpetuity attributed by law only to corporations: which could not be done. And he deduced this consequence from considering the company in legal strictness only as so many individual partners contracting with the defendant, that upon any change of the then existing partners or members with whom the contract was made the obligation was gone, according to all the cases. (a)

Lord ELLENBOROUGH, C. J. then pointed to a distinction in this case, that here was no question as to the persons to whom the obligation was made: the only question was as to the description of persons to whom the service was conditioned to be performed, (who are described to be *the Globe Insurance Company*;) whether the obligors must not be taken by that description to have intended those who compose the company *for the time being*; which latter words occur in the condition, the whole of which seems to point at the same meaning.

Garrow, Topping, and Taddy, now shewed cause against the rule, and observed that the bond had been taken to trustees for the benefit of the company, on account of their not being a corporation, nor under legislative appointment to sue and be sued by their treasurer at the time when the bond was executed: but the interposition of trustees, who now sue, obviates all the legal difficulties which have existed in other cases, and brings the case to a question of mere intention, whether by the description of *the company* to whom the service was to be performed, the members for the time being were not necessarily meant. In some of the cases reliance was had on the circumstance that the obligor might have been induced to enter into the obligation to secure the fidelity of a clerk to the house or firm of the obligees, from his knowledge of and reliance on the particular partners at the time, to whom the faithful service was secured, that they would use due diligence to prevent or speedily to detect any malversation of their clerks; but that argument cannot apply to the case of a known shifting society composed of an indefinite or very numerous body of persons, the members of which every person must know were liable to be changed every day. This case, therefore, is stronger than that of *Barclay and Others v. Lucas*, (b) where the obligation was to the plaintiffs by name; but the condition, reciting that the clerk was to be taken *into their service and employ* as a clerk *in their shop and counting-house*, it was held not to be affected by their taking another partner into their house. Unless it can be said, that *company* cannot mean in legal acceptance a fluctuating body, the Court will understand the word as it occurs in the condition of this bond in the same manner that every body else must have understood it at the time.

The Attorney-General, Park, Wigley, and Comyn, contra, relied upon the same general arguments which were before urged in moving for the rule; and answered further, that as the law only recognized corporate and natural bodies, the word *company* must be taken in its legal sense to mean the then existing natural persons of whom the company was composed at the time it was executed. [Lord Ellenborough, C. J. Why may it not have been used in its popular sense? May not a bond be taken in the name of a trustee to secure the service of one to the occasional subscribers to a public room?] That would describe in the terms of it a fluctuating body. If this bond do not cease to communicate benefit to part of the body going out, it cannot in justice communicate benefit to others coming into the company after it was executed.

(a) Vide *Strange v. Lee*, 3 East, 484, where all the prior cases are collected; and *Dance v. Girdler*, 1 New Rep. 34.

(b) M. 24 Geo. 3. B. R., cited in *Barker v. Parker*, 1 Term Rep. 291.

Now, supposing the body consisted of 20 persons at that time, 10 of whom went out the next year; it cannot be doubted that any person having demands on the company, *e. g.* a carpenter, for work done in their office while those 10 continued members, might sue them, as well as the ten who remained in: and it would be no answer, that the credit was given to *the company*, and not to the individuals, and that the 10 had ceased to be members. Nor would it vary the case that the credit had been placed in the creditor's books to *the Globe Insurance Company*, or that the parties so meant it, and did not contemplate the legal distinction now in discussion: for when an action was brought to recover the debt, the company not being a corporation, it could only be brought against the individual members at the time of the debt contracted. If *Wilkinson* then received money of the company to pay such a demand at the time and embezzled it, those persons who would continue liable to the original creditor, though they had ceased afterwards to be members, would have a right to be indemnified by the obligors. On the other hand, to say that the bond shall include all persons who shall have been members of the company at any time during the existence of the bond, would make it a monstrous anomaly.

LORD ELLENBOROUGH, C. J. We cannot enhance the obligation beyond the terms of it; the only question, therefore, is upon the fair meaning of the terms used in it; and we must put upon the word *company* the sense in which the parties themselves used it in this instrument. We could not, indeed, invert the rules of law to enable persons to sue as a body or company who are not a corporation; but here the bond has been given to trustees, who are under no difficulty of suing upon it in their own names; and the only question is as to the description of persons meant to be designated under the term *company*. I will begin, therefore, by translating that word according to the subject-matter, namely, the *Globe Insurance Company*: it meant a fluctuating or successive body of persons, who should, from time to time, be carrying on the business of insurance under the name of the *Globe Insurance Company*. Now, suppose a bond given to a trustee to secure the performance of certain services to the commoners of such a common, would there be any difficulty in applying it to the use of the commoners for the time being, whoever they might happen to be, during the period for which the services were to be performed. There could be no doubt of it. Now, the persons constituting this company laboured at the time under an imperfection to contract from the fluctuating nature of their body, and therefore they constituted seven persons to be trustees for them; and whether those seven were members of the body or not, is for this purpose indifferent. Those seven entered into this contract for the benefit of the company; and if it had not been understood by the contracting parties, that the company therein mentioned meant a fluctuating company, we must suppose that they contemplated that the bond might probably be gone in 24 hours; which never could have been meant: It must, therefore, have been intended to secure the faithful performance of the service to a succession of masters, who might from time to time constitute the company. *Wilkinson* then was admitted into the service of the *Globe Insurance Company*: the parties well knowing that a body so constituted would be continually changing and fluctuating: and they looked to his "*continuance* in the service of the said *company*;" which could not mean a continuing in the service of the same individuals, some of whom might be changed before the wax on the bond was cold: but must have meant the successors of the persons so called the *Globe Insurance Company*. He is then to account to the said company, that is to the same successive body; and he is to indemnify "the company, and the directors, and all other members thereof from all losses, actions, &c. which may be sued against them, or which the said company, or any member or members thereof should bear," &c. by reason of his neglect: all this looks to the change which might take place in the body. There is nothing contrary to any rule of law in such an agreement: a man may well agree to serve the sub-

scribers to the rooms at *Bath*. A contract with the body itself at large would not have done; but a contract with the trustees for the benefit of the body gets rid of all the difficulty. So, if a contract were made with the commoners themselves of a certain common, the successive commoners could not come into court and sue upon the contract, but a trust may be created for such a body which would extend to those who were successively clothed with the right of the original body. However anomalous, therefore, the body may be, if we can get at the intent of the contracting parties in their description of it, there is nothing illegal in such a contract. Nor does our opinion clash with any of the cases which have proceeded upon the terms of the respective bonds. A bond to *A*. cannot be extended to *A*. and *B*., unless, as in *Barclay v. Lucas*, the terms of the bond may be taken to explain such an intention. It may be even thought, that there was greater difficulty in that case than in the present; but I only collect from it the principle on which it professes to proceed, which was the apparent intention of the parties at the time of entering into the contract to provide for a service to a changeable body carrying on the same concern. In the present case, the intent appears very clearly to look to the service of a fluctuating body.

GROSE, J. The obligors undoubtedly meant to secure the faithful services of *Wilkinson* to such persons as should be called the *Globe Insurance Company* for the time being. There is no fraud, nor inconvenience, nor any thing illegal in this: the trustees, therefore, to whom the bond is given, may sue upon it: and to determine otherwise would be to violate the manifest intention of the parties.

LE BLANC, J. The difficulty raised in the argument lies in considering this as if it were a bond given to the company, and was now to be enforced in a suit brought by themselves; but that difficulty was gotten rid of by the substitution of the trustees as the obligees of the bond in the place of the company; and the only question now is as to the intent of the parties in the description of *the company*, to whom the service was to be performed. Now the persons in contemplation to be secured were the owners of shares in this company, which, from their numbers, must necessarily vary almost every day; and in consequence the obligors must have intended to become bound for *Wilkinson's* service to such persons as should be denominated *the Globe Insurance Company*, so long as they continued owners of shares in that company. I can see no objection to an obligation to a trustee conditioned for the faithful service of one to such persons as should be partners in *Child's Banking-house*: while they continued partners; and this is in effect the same thing.

BAYLEY, J. This bond must receive such a construction as the parties meant it to have at the time they entered into it: and I must consider that they meant to secure *Wilkinson's* faithful service to such persons as the company for the time being should consist of: the obligation was to be co-extensive with the service which he continued to perform to the company called the *Globe Insurance Company*. If this were not so, the single change of one out of 900 persons would have put an end to the obligation, and the probability was, that in a week or a month after the execution of the bond some one person would drop off. Now it is impossible to consider that for so short a time only the continuance of the service should have been in the contemplation of the one party, or the responsibility attached to it in that of the other. In *Barclay v. Lucas* the obligation was understood as intended to secure the service to such persons as should become partners in the same house of trade. This mode of considering the case gets rid of the difficulty started in the argument, that if it were extended beyond the continuance of the then existing members of the body, it should include all who then were and should thereafter become members: but it meant only the company for the time being, which gets rid of the difficulty.

Rule discharged.

Crosby v. Leng.

12 East, 409. May 28, 1810.

After an acquittal of the defendant upon an indictment for a felonious assault upon the plaintiff by stabbing him, the plaintiff may maintain trespass to recover damages for the civil injury, if he be not shewn to have colluded in procuring such acquittal.

THIS was an action for an assault, very aggravated in its kind, which was tried before *Le Blanc*, J. at the last assizes at *York*, when a verdict was given for the plaintiff for 100*l.* damages, subject to the opinion of the Court upon a point of law which was reserved. And *Park* having moved, by leave, at the beginning of the term, for a rule to enter a nonsuit, in order to bring the question before the Court, *Le Blanc*, J. now reported shortly, that the assault was proved at the trial to have been committed under such circumstances as in his judgment would have amounted to a stabbing within the act of the 43 G. 3. c. 58; which makes it a capital felony wilfully, maliciously, and unlawfully, to stab with intent to murder, maim, disfigure, or disable any person, &c. where, if death had ensued, the case would in law have amounted to murder: and he said, that he should have so left the case to a jury on the trial of an indictment for the felony; but that in this case it appeared by a record produced in court, on the part of the plaintiff, that the defendant had been before tried for the felony and acquitted: and the question was, whether after such acquittal this action lay?

Holroyd and *Richardson* now opposed the rule, and contended that the trespass was not entirely merged in the felony, but only till after the party had been tried for the felony, whether such trial ended in an acquittal or conviction. The justice of the country was then satisfied; and the doctrine of the merger of a trespass in felony was only to stimulate the party injured to bring the offender to trial for the public offence, and to prevent any compromise of that, by denying to him, in the first instance, all redress for the private injury he may have received from the commission of the felonious act, till the judgment of the law had been passed upon it: but by no means to take away his redress absolutely after the ends of public justice were attained. In *Markham v. Cobb*, W. Jones, 147. Noy, 82, and Latch, 144; *Doddridge and Whitlock*, Justices, (against *Jones*, J.) held, that trespass for breaking the plaintiff's house and stealing his money lay after a conviction of the defendant for the burglary and felony. The same point was adjudged by the Court upon a special verdict in *Dawkes v. Covenigh*, M. anno, 1652, Styl. 346, and 2 Rol. Abr. 557, after a conviction for larceny, on which the convict had his clergy, and was burnt in the hand, and discharged. And Lord *Hale*, 1 Hale P. C. 546, referring to these authorities, lays it down, that after conviction, the action lies to the party injured, because he has prosecuted the law against the offender, and there can be no mischief to the commonwealth. The same law then must hold after an acquittal of the felony: and the objection which may be urged, that this may lead to collusive prosecutions for the purpose of an acquittal, cannot hold; for if any collusion appeared, the plaintiff in the action could not recover, because he could not avail himself of a judgment procured by fraud, as was held in the *Duchess of Kingston's* case, 11 St. T. 198. Ambl. 761, 2. But where no collusion or fraud is shewn, the judgment of acquittal would be conclusive evidence in a collateral proceeding, (a) that the party was not guilty of the felony: and so *W. Jones*, J., W. Jones, 150, who differed from the other judges in *Markham v. Cobb*, considered that after an acquittal of the felony, the party grieved might have his action of trespass, because there was no affirmation of record against him. And in *Lutterell v. Reynell*

(a) Vide Bull. N. P. 244.

and Others, 1 Mod. 282, which was trespass for taking moneys numbered, the Attorney-General of counsel for the defendants, though he objected as to some of them that the evidence, if true, destroyed the plaintiff's action, as it went to prove the defendants guilty of felony: admitted that it would lie against two of them who had been acquitted upon an indictment of felony for the same matter. "Indeed," said he, "if they had been acquitted or found guilty of the felony, the action would lie." [*Le Blanc*, J., mentioned Bull N. P. 245, which refers to 3 Mod. 164, as taking a distinction between the conclusiveness of a conviction and an acquittal in a prosecution for bigamy, when given in evidence in ejectment upon a question touching the validity of the second marriage: that an acquittal ascertains no fact as a conviction does. But at any rate, he observed, that this was a different case; for here, if the felony had been pleaded, the plaintiff might have replied the record of acquittal; and that would have concluded the question unless there had been a rejoinder of *per fraudum*.] After the felony has been tried and disposed of, there is a sort of moral estoppel in the law of England, as *Ld. C. J. Eyre* said in *Gibson v. Minet*, 1 H. Blac. 611, by which no man shall be allowed to allege his own crime in his defence. They alluded to other cases of judgments *in rem*, which were held to be conclusive: (But the Court thought they did not bear on the present question.) They then mentioned a case of *Hayton v. Brown*, which was tried before Mr. Baron Wood at the last summer assizes at Lancaster, where he permitted the plaintiff to recover in an action of trespass for a similar assault to the present, after the defendant had been tried for the felony and acquitted at the antecedent summer assizes.

Park, in support of the rule, argued from the defect of precedents in this case in support of the action, that the general opinion of the profession must have been against it, particularly where the occasion must have frequently occurred. The cases have already broken in too much on the common law principle, that the trespass is merged in the felony, by admitting the action to be brought after a conviction of the felony: but if this be now extended to cases of acquittal, it will let in all the mischief against which the common law meant to guard, by encouraging faint or collusive prosecutions for the felony, to give a better opportunity to the party injured of obtaining private redress. The cases are not reconcileable; for in *Higgins v. Butcher*, T. 4 Jac. 1 *Yelv.* 90, all the Court agreed, that if one beat the servant of another, so that he die, the master shall not have an action for the battery and loss of service, because the felony drowns the private wrong, and his action is thereby lost. This was prior to *Dawkes v. Caveneigh*; but it was agreed to be law in a subsequent case of *Cooper v. Witham*, M. 20 Car. 2. 1 Sid. 375. But see 1 *Lev.* 247. S. C. He admitted the weight due to the late decision in the case of *Hayton v. Brown*; but as that was never brought in revision before the Court in Bank, he considered that decision as still open to review.

Lord ELLENBOROUGH, C. J. The policy of the law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offence; and after a verdict either of acquittal or conviction, the judgment is so far conclusive in any collateral proceeding *quoad* the particular matter, that the objection is thereby removed of bringing that *sub judice* in a civil action, which was the proper subject matter of a criminal prosecution. Here the defendant having been before tried and acquitted of the felony, the objection founded upon the general policy of the law does not apply. This point has been before decided in the cases of actions brought after a conviction of the defendant for the felony: and the only difference which can be suggested between the case of a prior conviction, and that of an acquittal, is, that the acquittal may have been brought about by the defendant's colluding with the prosecutor: but if the acquittal be shewn either in pleading or by the evidence

to have been obtained by collusion, it would be put aside, and the objection would still remain. All the mischief, therefore, that could result from extending the same rule to cases of acquittal which has established the right to sue after a conviction of the felon, is done away by letting the defendant in to shew that the judgment of acquittal was obtained *per fraudem*.

GROSE, J. The true ground of the general rule against the plaintiff's right to sue for damages in a civil action, for any act which amounts to felony, is to prevent the criminal justice of the country from being defeated; which it would be very likely to be, if the party were first permitted to obtain a civil satisfaction for the injury: but that does not apply to this case where there has already been a trial and acquittal of the felony.

LE BLANC, J. The defendant having been acquitted of the felony, and that without fraud, as it must be taken to be; the case stands clear of the general objection, that if the action were sustained, criminal justice might be defeated. All the cases which shew that the action lies after conviction of the defendant for the felony, apply strongly in support of it after acquittal; for it is a stronger case to permit the party injured to proceed upon his civil remedy to recover damages after a conviction of the offender, when the law has, by means of the forfeiture of his property consequent upon a conviction, taken away from him the means of satisfying the damages. Besides, when the defendant, after an acquittal of the felony, is called upon to make recompence in civil damages to the party grieved, it would be stronger for him to be permitted to allege that he was not properly acquitted, than in the other case it would be to allege that he had not been properly convicted. And here the defendant cannot say, against the record of acquittal, that this was a felony. After the question of felony has been determined, it leaves the trespass untouched: the defendant has committed the trespass, which is the subject of the civil action; but the question on the indictment was whether he had not done something more. It often happens, that after an acquittal of the felony, the defendant is tried for the misdemeanour upon the same evidence: and it would be no objection though the judge might still think that there was evidence of the felony to have gone to the jury.

BAYLEY, J. If this action would not lie, there might be cases where a party injured would be without remedy, and yet, the wrong-doer would not be liable to punishment: as, for instance, there might be circumstances known only to the plaintiff himself, which, when proved by him upon the prosecution of the defendant for felony, would entitle him to be acquitted: when, without such proof, the evidence might lead to convict him. Suppose, upon the indictment for the felonious stabbing, it lay only within the knowledge of the plaintiff that a previous provocation had been given, which, if death had ensued, would have reduced the offence to manslaughter; there would be a defect of justice if the plaintiff could not afterwards obtain reparation in damages for the civil injury, because for want of the proof of such provocation, known only to himself, the offence appeared to be felony. The record of acquittal is at least conclusive evidence that the defendant was not proved guilty of the felony, and he cannot be questioned for the same offence again; but it leaves the civil remedy open. Unless, therefore, in those cases where the conduct of the party complaining can be impeached as having colluded in procuring the acquittal, it operates as an answer to any objection that the fact proved would be evidence of felony.

The King v. Eyre.

12 East, 416. May 30, 1810.

The *lessee* of the *tolls* of a public bridge is not rateable as such, whatever rent he may pay; it not appearing that he was the *occupier* of any local visible property within the parish: and that he was an *inhabitant resident* there, deriving profit there from such tolls beyond the rent paid by him for the same, which was applicable to the public purposes of the bridge.

THE defendant appealed to the *Borough Sessions* of *Tewkesbury* against a poor's rate, wherein he was assessed as "lessee of the tolls of the *Key Bridge*" at *Tewkesbury*, at 350*l. per ann.* The Sessions confirmed the rate, upon the general principle, as they stated, that the rent *bona fide* paid by the occupier is the best criterion by which to judge of the value of property; but subject to the opinion of this Court upon the following case:

By the stat. 48 Geo. 3. c. 62. certain trustees are appointed for rebuilding the *Key Bridge* across the river *Avon*, in the borough of *Tewkesbury* in *Gloucestershire*, and for making convenient roads thereto. The act enacts, that out of the first moneys arising by the tolls to be collected by virtue of the act, or out of the first money which should be borrowed upon the credit thereof, the trustees shall in the first place pay the expences of passing the act, and repay all sums advanced thereon, with interest, and also all expences in making the plans and estimates of the bridge: "and that after payment thereof, all the money which should come to the hands of the trustees or their treasurer for the purpose of the act should from time to time be applied in erecting the turnpikes or toll-houses, and in making the temporary bridge, and in erecting the new bridge, and in keeping the same in repair, and opening and making proper approaches thereto, and in defraying all other necessary charges and expences attending the execution of the act, and in paying the interest of the principal money so to be borrowed, and in otherwise carrying this act into execution; and to or for no other use, intent, or purpose whatsoever." "That as soon as the several purposes of the act should be carried into execution, and the principal and interest borrowed and secured thereon should be repaid, all the tolls thereby imposed should absolutely cease, and the new bridge and the approaches leading thereto should thereafter be repaid by such persons as were by law liable to repair the same." The trustees, being empowered by another clause to lease the tolls, under the clauses and stipulations therein expressed, have leased the same to the appellant, at the annual rent of 350*l.* It has been the usual custom of the parish to make their rates upon the pound rent; but it was not proved that the appellant made any profit on the said tolls, nor that such tolls left any residue after payment of the said yearly rent of 350*l.*: on the contrary, it is believed that the present lessee has a most unprofitable taking, and that he will not even clear his present rent.

Jervis and *W. E. Taunton*, in support of the order of Sessions, stated, that the objections made below to the rate were, 1st, that the subject-matter of it was occupied for public purposes, and was therefore not rateable at all: but, 2dly, that if it were rateable in the hands of a lessee on account of any personal benefit derived to himself, it did not appear by the case, as stated, whether he derived any such benefit beyond the purposes of the trust.

But the Court, after observing upon the loose and imperfect manner in which the case was drawn up; in not stating either that the lessee was the *occupier* of any toll-house or dwelling-house within the parish, which was the proper subject matter of a rate; or that he was an *inhabitant* of the parish, in the sense which had been lately(a) put by the Court on that word in the

(a) Vide *Rex v. Nicholson*, ante 330, and *Williams v. Jones*, ante 346.

statute 43 Eliz. c. 2; and in not finding the fact whether the lessee did receive any profit to himself from the tolls beyond the rent which was applicable to public purposes, but merely stating that *it was believed* that he did not; were inclined to have sent the case back to the Sessions to be re-stated in a more perfect manner. But *The Attorney-General* and *Abbott*, in opposition to the rate, having suggested that it would not answer any purpose to send the case back, all the facts having been stated which were capable of proof on the part of those who supported the rate; and that the only question meant to be raised by them was, Whether the tolls of a public bridge were rateable in the hands of a lessee? Lord *Ellenborough*, C. J. said, that as the Court had so recently decided that tolls *per se* were not rateable; and that as the appellant was rated merely as lessee of the tolls, and for nothing else, which might have given them a corporeal quality and locality within the parish, such as for a sluice, or the like: and that as it did not appear that he was an *inhabitant* of the parish, or made any profit of the tolls; there was nothing stated in the case to raise any question. And that though it should turn out to be the fact (which was suggested from the bar) that there was a toll-house attached to the bridge where the appellant dwelt; yet as the sending the case back to the Sessions to be re-stated would probably only lead to their inserting as a fact what at present they had only stated as matter of belief, that the lessee derived no profit to himself from the tolls; it was better for all parties to quash this rate; and if at any future time the parish thought they could make out a better case against the lessee, they might rate him again.

Per Curiam,

Order of Sessions confirming
the Rate quashed.

Gordon v. Swan.

[S. C. at *Nisi Prius*, 2 Campb. 429, n.]

12 East, 419. May 30, 1810.

Though an agreement for the sale of goods which were afterwards delivered give a certain day of payment for the price, interest does not run upon the sum due from that day.

THE plaintiff declared in the common form of the count for goods sold and delivered, and sought to recover a large sum: the value of copper sold by him to the defendant, under a contract in writing, which was given in evidence at the trial, and stated the copper sold to be 150 tons, at 84*l.* per ton, to be received in 14 days, payable at six months: the credit on which expired on the 23d of *April*, 1809. After judgment by default, and a writ of inquiry issued, the balance due to the plaintiff at the time of the trial of the inquisition (after allowing the amount of certain securities then in his hands) was proved to be 3247*l.* 18*s.* and the *interest* on the whole account amounted to 300*l.*; and the jury, in answer to a question put to them, declared their willingness to give the interest as well as principal; but the under-sheriff directed them, that in point of law the plaintiff was not entitled to recover interest, as he had not declared specially upon the contract, but generally for the value of goods sold and delivered; and on that express direction, they found the principal sum only, without interest.

Taddy now moved(a) to set aside the inquisition, upon the misdirection of the under-sheriff: and contended, that interest began to run after the expiration of the six months for which the credit was given; and that the giving of a particular day of payment for goods sold and delivered shewed the intention

(a) I was not present in court when this motion was made, but a friend at the bar gave me a note of what passed.

of the parties to consider it as a liquidated debt at that period, and made it competent at least for the jury to allow interest. And he referred to *Mountford v. Willes*, 2 Bos. & Pull. 337, where the vendor was held entitled to interest under such a contract from the day of payment given. But by

Lord ELLENBOROUGH, C. J. I think the contract only means, that he vendee at all events shall not be called upon for payment till the time given; but it is still a contract for the sale of goods. The giving of interest should, I think, be confined to bills of exchange, and such like instruments, and to agreements reserving interest.(1)(2)

Per Curiam,

Rule Refused.

Napier v. Shneider.

12 East, 420. May 30, 1810.

Upon a motion to refer it to the Master to compute principal, interest and costs upon a bill of exchange drawn in *Scotland*, upon and accepted by the defendant in *England*, the Court will not direct the Master to allow re-exchange.

CAMPBELL moved to refer it to the Master to tax principal, interest, and costs upon a bill of exchange. The bill was drawn in *Scotland*, and was accepted by the defendant in *England*, but not paid; and he prayed that the Master should be directed to allow re-exchange. But

The Court were clearly of opinion, that this could no be allowed against an acceptor here, who, by his acceptance, only charges himself with a liability to pay according to the law of this country; and if he do not pay, the holder has his remedy over against the drawer. The Court would not, they said, refer it to the Master to try foreign customs and facts, but only to compute what was due upon the bill itself.(3) They, therefore, granted the motion in the common form.

(1) In a note to *Atkins & al. v. Wheeler & al.* in error, 2 New Rep. 205, I had occasion to collect and arrange the principal cases, which I had then met with, relating to the allowance of interest. It will, perhaps, be sufficient, in this place, to refer to that note, and to the following decisions which have since appeared. *Porter & al. v. Palsgrave*, 2 Campb. 472. *Boyce & al. v. Warburton*, 2 Campb. 480. *Beecher & al. v. Jones*, 2 Campb. 428, n. *Newell v. Griswold*, 6 Johns. 45. *Skirving v. Executors of Stobo*, 2 Bay, 233. *South v. Leavy*, Hardin 518. *Beals v. Guernsey*, 8 Johns. 446. *De Bernales v. Fuller & al.* 2 Campb. 426. *Murray v. Ware's Administrator*, Hardin 519, n. *Birmingham v. Kirroan*, 2 Scho. & Lef. 455. *Commonwealth v. Crevor*, 3 Binn. 121. *Miller v. Beverleys*, 4 Hen. & Munf. 415. *Fitzgerald v. Jones*, 1 Munf. 150. *Dillard v. Tomlinson & al.* 1 Munf. 183. *Whitehorn & al. v. Hines & al.* 1 Munf. 557. *Delaware Insurance Company v. Delaunie*, 3 Binn. 295. *Tazewell's Executor v. Barrett & al.* 4 Hen. & Munf. 259. *Ross v. Austin*, 4 Hen. & Munf. 502. *Wilson v. Triplett*, 4 Hen. & Munf. 433. *The Attorney General v. Turpin*, 3 Hen. & Munf. 548. *Newton v. Wilson* 3 Hen. & Munf. 470. *Bantleon v. Smith*, 2 Binn. 146. *Clark v. Barlow*, 4 Johns. 183. *Hart v. Tobias*, 2 Bay 408. *Johnston v. Brannan*, 5 Johns. 268.

(2) [See also *Graham v. Williams*, 16 S. & R. 257. *Koons v. Miller*, 3 W. & S. 271. *Boyd v. Boyd*, 1 W. 369. *Miller v. Bk. of Orleans*, 5 Wh. 503. *Knettle v. Crouse*, 6 W. 123. *Hunt v. Nevors*, 15 Pick. 500. *Barnard v. Bartholomew*, 22 do. 291. *Oriental Bk. v. Tremont Ins. Co.*, 4 Met. 1. *Lord v. The Mayor, &c.* 3 Hill. 426.—W.]

(3) The general rule is, that the law of the place where the contract is to be performed, is to govern. The contract entered into by the acceptance, was clearly to pay in *England*. On the subject of the *lex loci*, see *Melon v. The Duke Fitzjames*, 1 Bos. & Pull. 141, (Day's edit.) and the editorial notes, in which the principal authorities are collected.

Gouthwaite v. Duckworth, Browne, and Powell.

12 East, 421. June 1, 1810.

A. & B. general partners in trade, being indebted to *C.* for advances paid by him on the joint account of the three in the purchase of tobacco, which had been sent out on a special joint adventure to *Spain*; with a view to liquidate that balance, *C.* agreed with *A.* and *B.* to join with them in another adventure to *Lisbon*, of which he was to have one moiety; and it was agreed that *A.* and *B.* should purchase goods for the adventure to be shipped on board a certain vessel, and pay for them, and the returns of such adventure were to be made to *C.* to go in liquidation of his demand on them; but *C.* was to bear his proportion of the loss, if any, and also to receive his share of the profit, if any, after reimbursing himself out of the returns the amount of his advances previously made to *A.* and *B.*: held, that this agreement constituted a partnership between the three in the adventure at and from the time of the purchase of the goods for the adventure by *A.* and *B.*; although *C.* did not go with them to make the purchase, nor authorize them to purchase on the joint account; but *A.* and *B.* alone in fact made the purchase; and although *C.* also purchased in his own name, and paid for goods to be sent out at the same time, in which *B.* was to share the profit or loss, and these goods were consigned for sales and returns to the same person who went out as supercargo on the joint account of the three.

THIS was an action for goods sold and delivered, which was tried before *Le Blanc, J.* at the last assizes at *Lancaster*, when it appeared, that the goods had been in fact supplied by the plaintiff to *Browne and Company*, which at that time was generally understood to mean *Browne and Powell*, and they alone paid for the cartage of the goods from the plaintiff's to the ship on board which they were ordered to be sent: but *Browne and Powell* afterwards becoming bankrupts, and *Duckworth* having been examined by the commissioners under their commission, the question arose upon his deposition whether he were not a partner with *Browne and Powell* in the adventure for which these goods were ordered, which were afterwards shipped and sent: and this was the only question at the trial; where, the learned Judge being of opinion that the facts stated in such deposition amounted to a partnership between the defendants, a verdict passed for the plaintiff. And a motion having been made, in order to take the opinion of the Court upon the case, to set aside the verdict for the plaintiff and enter a verdict for the defendants.

Le Blanc, J. now reported the facts, and read the examination of the defendant *Duckworth* taken on the 27th of April 1809, on which the question arose; and which stated in substance, that *Duckworth* had various transactions in business with *Browne and Powell* in 1808, and was a creditor of theirs. That in September 1808, he entered into an agreement with *Browne* to be jointly concerned in an adventure to *Lisbon* with him and his partner *Powell*; of which adventure *Duckworth* was to have one-half share. That *Browne and Powell* were at that time indebted to *Duckworth* in nearly 2000*l.* for advances made on the joint account of the three in the purchase of tobacco, and which had been sent out on the joint account to *Spain* before that time; and also for money lent before that time. That *Browne and Powell* were to purchase goods for the adventure to *Lisbon*, which were to be shipped on board the *Betsey*, and to pay for the same, and the returns of such adventure were to be made to *Duckworth*, and to go in liquidation of his demands on *Browne and Powell*. That in consequence of this agreement, *Browne* proceeded to purchase goods from different persons, and amongst others from the plaintiff *Gouthwaite*: but *Duckworth* did not go with *Browne* to make any of the purchases, nor did he ever authorize *Browne* to make the purchases on the joint account of the three. That if any loss were to arise on the sales of the adventure, *Duckworth* was to bear his proportion, and was also to receive his share of the profits, if any, after reimbursing himself out of the returns the amount of his advances previously made to *Browne and Powell*. That *Duckworth* purchased

and paid for goods also to be sent out at the same time, in *his own name*; and *Browne* was to receive a share of the profit, and to bear a proportion of the loss on the sales of these last-mentioned goods, which were consigned for sales and returns to *Barlow*, who went out as supercargo on the joint account of *Browne*, *Powell* and *Duckworth*. That *Barlow's* instructions were signed by *Browne* and *Duckworth*. That *Duckworth* afterwards received from *Barlow* on account of such adventure 1861*l.*, though from what particular set of goods this arose *Duckworth* could not tell: which sum *Duckworth* applied in reimbursing himself the advances he had made to *Browne* and *Powell* on account of the said adventure and otherwise. It also appeared, that *Duckworth* had, at other subsequent times, received remittances and goods from *Browne* and *Powell* which he carried to account in reduction of his advances to them; and there were other distinct transactions between them relative to the purchase of goods; in one of which some coffee had been originally purchased from *Sill* in July 1808, by *Duckworth*, on the joint account of himself, *Browne*, and *Powell*, and he paid for them: but *Browne* not paying his moiety of the purchase money at the time appointed, *Duckworth*, with *Browne's* consent, took them all on his own account, and in August following sold part of them to *Browne* himself, and the price was settled in account between them; and this was done to enable *Browne* with the coffee to pay another tradesman for goods furnished to *Browne* for the adventure. All the goods mentioned in the examination were shipped on board the *Betsey* for *Lisbon*, which was chartered by *Browne* and *Powell*.

The rule was now opposed by *Park* and *Littledale*, and supported by *Scarlet*; and it was not denied by the latter, that the facts of the case constituted a partnership in the adventure between the three defendants; but the only question made was, at what period the partnership commenced: the plaintiff contending, that it existed at the time when the goods were ordered: the defendant, that it originated only after the goods had been shipped into the common stock for the purpose of the adventure; likening it to the case of so much capital agreed to be brought by parties into one common stock or house, where each would be answerable separately for such part of his contribution as was raised upon his own separate credit, notwithstanding the object for which it was raised. The defendant's counsel also denied, that the object of the joint adventure being to liquidate the prior advances of *Duckworth* to *Browne* and *Powell* could vary the legal effect of the joint engagement: and urged the fact of goods having been furnished by *Duckworth* for the same adventure, which were obtained on his separate credit. [But *Bayley*, J. observed, that it did not appear that *Duckworth* had brought any goods into the common stock in the transaction in question.] The case mainly relied on by the defendant's counsel was *Saville v. Robertson and another*, 4 Term Rep. 720, where several agreed to fit out a ship and cargo on a joint adventure; but it was also agreed, that one was not to be bound for any goods ordered or shipped by another: and the plaintiff (besides supplying copper sheathing for the vessel, which was admitted to be on the joint concern,) delivered copper on board by the separate order of *Pearce*, one of the contracting parties: but this was held not to bind the other parties to the contract, and that the partnership only commenced upon the delivery of the cargo on board. The plaintiff's counsel, on the other hand, applied to this case what was said by Lord C. J. *De Grey* upon the subject of partnership in *Grace v. Smith*, 2 Blac. Rep. 1000, where he states the true criterion to be, to inquire whether one agreed to share the profits of the trade with the other, or whether he only relied on those profits as a fund of payment: and here they said it was clear that *Duckworth* was not only to share in the profits upon the goods ordered by *Browne*, but the identical goods which were to constitute the adventure were to be purchased and sent for the express purpose of liquidating *Duckworth's* demand. And they also referred to *Waugh v. Carver*, 2 H. Blac. 235—246, where, though

it was taken to be the clear sense of the parties to the agreement as between themselves, that they were not to be partners, and that each house was to carry on its trade without risk of each other, and to stand to their own loss: yet as they had agreed to share each other's profits, they were held liable as partners to third persons: and to *Hesketh v. Blanchard*, 4 East, 144, which went on the same principle.

LORD ELLENBOROUGH, C. J. It comes to the question whether, co-temporary with the purchase of the goods, there did not exist a joint interest between these defendants. The goods were to be purchased, as *Duckworth* states in his examination, *for the adventure*: that was the agreement. Then what was this adventure? Did it not commence with the purchase of these goods for the purpose agreed upon, in the loss and profits of which the defendants were to share? The case of *Saville v. Robertson* does indeed approach very near to this; but the distinction between the cases is, that there each party brought his separate parcel of goods, which were afterwards to be mixed in the common adventure on board the ship, and till that admixture the partnership in the goods did not arise. But here the goods in question were purchased, in pursuance of the agreement *for the adventure*, of which it had been before settled that *Duckworth* was to have a moiety. There seems also to have been some contrivance in this case to keep out of general view the interest which *Duckworth* had in the goods: the other two defendants were sent into the market to purchase the goods in which he was to have a moiety; and though they were not authorized, he says, to purchase on the joint account of the three; yet, if all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same for this purpose, as if all the names had been announced to the seller, and therefore all are liable for the value of them.

GROSE, J. I think this is a strong case of partnership within the description given of it by Lord C. J. *De Grey* in the case cited.

LE BLANC, J. The case is the stronger against *Duckworth* inasmuch as there had been a previous partnership between him and the other two defendants upon the purchase of tobacco on their joint account, for a similar adventure to *Spain*; in respect of which the latter were indebted to *Duckworth* for his advances upon the joint account: and it was in order to liquidate that debt that the agreement in question was entered into for another *joint* adventure to *Lisbon*, in pursuance of which agreement the goods in question were purchased.

BAYLEY, J. In *Saville v. Robertson*, after the purchase of the goods made by the several adventurers, there was still a further act to be done, which was the putting them on board the ship in which they had a common concern for the joint adventure; and until that further act was done, the goods purchased by each remained the separate property of each. But here, as soon as the goods were purchased, the interest of the three attached in them at the same instant by virtue of the previous agreement.(1)

Rule discharged.(a)

(1) [See *Buttley v. Lewis*, 1 M. & G. 155. *Smith v. Craven*, 1 C. & J. 500. *Gardiner v. Childs*, 8 C. & P. 345. *Greenslade v. Dower*, 7 B. & C. 635.—W.]

(a) The last case on this subject is *Barton v. Hanson and others*, 2 Taunt. 49.

Rochfort v. Robertson.

12 East, 497. June 4, 1810.

Where the defendant was residing in *London* before and at the commencement of the action, eight days' notice of executing a writ of inquiry is sufficient, though the defendant had in the intermediate time permanently removed above 40 miles from *London*, (to *Tortola*,) if he did not give the plaintiff previous notice of such removal.

THE defendant resided in *London* at the time when the cause of action, which was for goods sold and delivered, accrued, and when the action commenced: but pending the action, and before the plaintiff gave notice of executing a writ of inquiry, the defendant removed permanently to *Tortola*; but his attorney gave the plaintiff no notice of the defendant's removal until the plaintiff had given the usual eight days' notice of executing the writ of inquiry, as for a town cause, which was executed accordingly. Whereupon *Reader* obtained a rule nisi for setting aside the execution of the writ of inquiry, for irregularity; contending that the defendant should have had fourteen days' notice, as residing at the time above forty miles from *London*; and cited *Spencer v. Hall*, 1 East, 688. [*Bayley*, J. Previous notice was there given of the change of residence.]

Richardson on shewing cause observed, that the stat. 14 Geo. 2. c. 17. s. 4, was merely for regulating notices of *trial*; but that no statute applied to writs of inquiry,^(a) which depended altogether upon the practice of the Court.

Lord ELLENBOROUGH, C. J. If the defendant do not give notice of the change of his residence from town, it must still be taken to be a town cause; and then the notice was regular.

Per Curiam,

Rule discharged.

(a) *Lloyd v. Hooper*, 7 East, 624, was the case of a writ of inquiry, but no distinction was taken between that and a trial at the Sittings.

CASES

IN

TRINITY TERM,

IN THE FIFTIETH YEAR OF THE REIGN OF GEORGE III.

The King v. The Directors of the Bristol Dock Company.

12 East, 429. June 23, 1810.

Under the *Bristol* dock act, 43 G. 3. c. 140, s. 107, which gives compensation where, "by means of the dock works, or in the progress or execution thereof, damage may be done to any hereditaments, houses, lands, and tenements, or the same may be rendered less valuable thereby," no compensation is due to the owners of a brewery for a loss arising to them in their business from the deterioration of the water of the public river *Avon*, from which the brewery had been before supplied by means of pipes laid under low water mark; the use of the water having been common to all the king's subjects, and not claimed as an easement to the particular tenement. The only remedy for such an injury is by indictment, which was taken away in this case by the act of parliament.

SCARLETT moved, upon the acts of the 43 Geo. 3. c. 140, and 48 Geo. 3. c. 11, made for improving and completing the harbour of *Bristol*, for a mandamus to the defendants to issue their precept to the sheriffs of *Bristol* for summoning a jury to assess a compensation for an injury sustained by *Rd. Woolfrye's* and Co. in consequence of the dock-works. The applicants were brewers occupying a brewhouse and other premises in *Queen-Street*, in the castle precincts of *Bristol*, for a term of seven years, with liberty to purchase the premises for 4000*l.* for the remainder of a term of 40 years granted by the corporation of *Bristol*. Before and at the time of passing the stat. 43 Geo. 3, these premises were supplied with fresh water, fit for brewing, from the river *Avon*, to which the brewery was contiguous, which water was raised and brought into the brewery by pumps and pipes laid into and along the bank, and communicating with the river at low water mark, at which time it was pumped into the brewery: but by means of the works and improvements authorized by the acts of parliament, and particularly by the damming up of the river for the purpose of forming and floating the harbour, the water in the river at the point of communication with the pipes became brackish and noxious, so as to render the water unfit for brewing: by reason of which the applicants had sustained loss in their trade; and after sinking a well for the purpose of getting spring water for the brewery, which in part failed after a time, and was also found unfit for brewing, they were obliged to abandon their premises; and having then applied without effect to the defendants to grant a compensation for their loss, estimated at above 3000*l.* they now made this application, for the purpose of trying their right to receive such compensation.

The compensation clause upon which the motion was founded was the 43 Geo. 3. c. 140. s. 107, which, after reciting that the works and improvements

"authorized by the act would render certain docks and mills useless, and by means of such works and improvements, or in the progress and execution thereof, injury and damage may be done to other hereditaments, houses, lands, and tenements, or the same may be rendered less valuable thereby," enacts that the dock company shall, and they are thereby directed either to purchase, or to make a just and liberal "compensation to the owners and other persons interested in such docks, mills, lands, houses, tenements, or hereditaments, so rendered useless, injured, or made less valuable, at the option of such owner or other persons, as aforesaid," &c. And if the claimants do not agree with the directors for the compensation to be made, a jury is to be summoned in the manner now prayed for, and to be sworn before the justices of the peace at the quarter sessions, who are to ascertain it.

Upon the opening of this application the great doubt with the Court was, whether the claimants could establish such an interest or easement annexed to their premises in the water of the river *Avon*, which was a public river, common alike to all the king's subjects, as would entitle them to compensation under the general words of the clause. And they asked whether, if any person before the act passed had done any thing to deteriorate the water of the river, these parties could have brought an action as for a private injury to their property. *Scarlett* argued that they might; and that there were instances where persons, having acquired a right to use the water of rivers, for their own purposes, had maintained actions on the case against those who disturbed them in their enjoyment of it, either by drawing off or deteriorating the quality of the water. But by

Lord ELLENBOROUGH, C. J. Those were cases where the owners of the property by long enjoyment had acquired special rights to the use of the water in its natural state, as it was accustomed to flow, by way of particular easement to their own properties; and not merely a use which was common to all the king's subjects. But here the injury, if any, is all to the king's subjects: and that is the subject matter of indictment, and not of action; otherwise every person who had before used the water of the river might equally claim a compensation; for which there is no pretence. And by the same rule, if the salubrity of the air in *Bristol* were impaired in consequence of the docks, every inhabitant of the place might as well claim a compensation. For general injuries common to all the subjects the remedy is by indictment; but that I suppose is taken away by the act; (which was admitted:) then the act has taken away the only remedy which the law would have given for this general injury.

GROSE, J. was of the same opinion.

LE BLANC, J. These persons have no more claim to compensation under the act than every inhabitant of *Bristol* would have who had been used to dip a pail into the river for water for the use of his house.

BAYLEY, J. agreed.

Rule refused.(1)

(1) Vide 27 H. 8. pl. 27. Moore 180, pl. 321. *Williams's case*, 5 Co. 73. *Finoux v. Hovenden*, Cro. Eliz. 664. *Paine v. Partrich*, Carth. 194. *Hubert v. Groves*, 1 'Eap. 148, acc. In the following cases where the injury was of a public nature, it was held that there was a sufficient special damage to the party to entitle him to maintain an action. *Bendloes v. Kemp*, and *Westbury v. Powell*, cited Cro. Eliz. 664. *Fowler v. Saunders*, Cro. Jac. 446. *Maynell v. Saltmarsh*, 1 Keb. 847. *Hart v. Basset*, Sir T. Jones 156. *Iveson or Jeverson v. Moor*, 1 Ld. Raym. 486, 496. S. C. 12 Mod. 262. 269. S. C. Com. Rep. 58. S. C. 1 Salk. 15. S. C. Carth. 451. S. C. Holt 10. S. C. Comb. 480. S. C. cited Willes 74, n. (a) where the reasons of the courts of Common Pleas and Exchequer are stated from a MS. note of Ch. J. Willes. *Chichester v. Lethbridge*, Willes, 71. *Burrows v. Pizley*, 1 Root. 362. *Hughes v. Haizer*, in error, 1 Binn. 463.

Bateman v. Joseph.

[S. C. at *Nisi Prius*, 2 Campb. 461.]

12 East, 433. June 25, 1810.

The want of due notice of the dishonour of a bill is answered by shewing the holder's ignorance of the place of residence of the prior endorser, whom he sues: and whether he used due diligence to find out the place of residence is a question of fact to be left to the jury.

THIS was an action by a subsequent indorsee against the drawee and first indorser of a bill of exchange, which became due on the 27th of *September*, when it was presented for payment to *Parry*, the acceptor, in *London*, and dishonoured. Notice of the dishonour reached *Manchester*, where the plaintiff lived, on the 30th of *September*, early enough for him to have given notice to the defendant on that day by the post from *Manchester* to *Liverpool*, where the defendant lived; and the plaintiff had the like opportunities of giving notice on the 1st, 2d, and 3d of *October*; but no notice was given to the defendant till the 4th, when he received it in a letter from the plaintiff directed to him at *Liverpool* generally. At the trial before Lord *Ellenborough*, C. J. at *Guildhall*, this apparent laches of the plaintiff was accounted for by the evidence of his servant, that his master did not know the residence of the defendant till the day when the notice was sent by the post; though it appeared that he knew the residence of *Parry*, the acceptor in *London*, and of *Danson*, the drawer at *Liverpool*; and his Lordship left it to the jury to say, whether the plaintiff had used due diligence in acquiring the knowledge of the defendant's place of residence: for it was admitted, that if he had known it at the time when notice of the dishonour reached him at *Manchester*, or had been negligent in his endeavour to acquire that knowledge afterwards, the notice given to the defendant was too late. The jury having found a verdict for the plaintiff;

Garrow now moved for a new trial, and contended, that as the law required due diligence in giving notice of the dishonour of a bill to those whom it concerns, it must also require due diligence in making the inquiries necessary to enable him to give the notice: and here there was no evidence of any inquiry concerning the defendant having been made either at any of the banking houses in *Manchester*, where the plaintiff was most likely to have received the information, or of the drawer at *Liverpool*.

But *all the Court* agreed, that this was a question proper to be left to the jury, and they had decided it. Whether due notice has been given of the dishonour of a bill, all the circumstances necessary for the giving of such notice being known, is a question of law; but whether the holder have used due diligence to discover the place of residence of the person to whom the notice is to be given, is a question of fact for the jury. (1) Rule refused.

(1) Where the holder being ignorant of the drawer's place of residence, put a letter into the post-office, in due season, addressed to him at the place where, from the best information that could be obtained, he was supposed to reside, it was held that due diligence had been used, and sufficient notice given, though he in fact resided at a different place, and it did not appear that he had actual notice. *Chapman v. Lipscombe & al.* 1 Johns. 204. In *Tunno & al. v. Lague*, 2 Johns. Ca. 1, the prevalence of the yellow fever in *New York* was held a sufficient excuse for delaying notice of non-payment from the 12th of *September* until some time in the month of *November*. That there is no universal rule as to what shall constitute reasonable notice, but that this question in each case is a compound of law and fact, see *Haynes v. Birks*, 3 Bos. & Pull. 602. *Darbishire v. Parker*, 6 East, 9, 10. *Hilton v. Shepherd*, 6 East, 16, n. *Hopes v. Alder*, 6 East 17, n. *Jackson v. Saunders*, 1 Scho. & Lef. 461. *Bank of North America v. M'Knight*, 2 Dal. 158. *Mallory v. Kirwan*, 2 Dal. 193. *Warder & al. v. Carson's Executors*, 2 Dal. 233. *Bank of North America v. Pettit*, 4 Dal. 129. *Taylor v. Bryden*, 8 Johns. 177. In *Mullman & al. v. D'Eguino*, 2 H. Blac. 565, it was held, that what is a reasonable time for the presentment of a bill payable at sight, or a certain time after, is a question for the jury to decide from the circumstances of the case.

Roscow v. Hardy.

[S. C. at *Nisi Prius*, 2 Campb. 458.]

12 East, 434. June 25, 1810.

The holder of a bill before it was due, having tendered it for acceptance, which was refused, kept it till due, when it was tendered for payment and refused, and then immediately returned it on the second indorser, who not knowing of the laches, took up the bill: held that his ignorance when he paid the bill of the laches of the former holder did not entitle him to recover against the first indorser, who set up such defence.

THE plaintiff, as indorsee, sued the indorser of a bill of exchange for 50*l*. dated *Manchester*, 4th *January*, 1810, and stated it to have been drawn by *J. and P. Walmsley*, at three months after date, in favour of *R. Kirk* or order, on Messrs. *Shaw and Edwards, Walbrook, London*, and indorsed by *Kirk* to the defendant, and by the defendant to the plaintiff. At the trial at *Guildhall* before Lord *Ellenborough*, C. J. the bill, when produced, had eleven other indorsements upon it; and it appeared that it was in the possession of the *Warrington Bank* when it was tendered for acceptance on the 23d of *January*, and refused to be accepted; but it did not appear that the *Warrington* bankers had given any notice of the dishonour at the time to any person; but as soon as the bill was due, they again tendered it for payment; which, being refused, they called upon the plaintiff for payment; and he, not knowing any of the circumstances, took the bill up, and then called upon the defendant: who, being apprised of the dishonour on the 23d of *January*, refused payment; alleging his discharge by the laches of the then holders. And upon proof of these facts the plaintiff was nonsuited.

Topping moved to set aside the nonsuit, and contended that the plaintiff ought not to be prejudiced by the laches of the subsequent holders of the bill, of which he was wholly ignorant at the time when he paid it, and without any means of information. The bill apparently came back to him in due course of time, and there was nothing apparent upon the face of it by reference to its date to raise the suspicion of a diligent man that it had been presented for payment and dishonoured two months before, nor any thing to impeach his want of due diligence in obtaining knowledge of that fact; and without that knowledge he could not have defended himself against an action on the bill by the *Warrington* bankers. Then no laches being imputable to himself, or apparent upon the face of the bill when paid by him, he ought not to be debarred from his remedy over.

LORD ELLENBOROUGH, C. J. If the indorsers on the bill be once discharged by the laches of the holder at the time in not giving due notice of the dishonour of it, their responsibility cannot be revived by the shifting of the bill into other hands.

LE BLANC, J. It is admitted, that the fact of the dishonour on the 23d of *January*, and the want of due notice, would have been a good defence to the plaintiff against the *Warrington* bankers, if he had been apprised of it at the time of the demand made upon him: and that such laches was also a discharge to the other indorsers: how then can it change the liability of those other indorsers, who perhaps might have known the fact, and had a legal defence to the action, if payment had been then demanded of either of them by the *Warrington* bankers, that those bankers first called upon one of the indorsers, who happened not to know of their laches?

The other Judges assenting,

Rule refused. (1)

(1) The *Philadelphia* edition here cites "4 Dall. Rep. 109;" but I perceive no analogy between the two cases. The point on which the case in the text turned, appears to be a new one; and is very satisfactorily settled.

Bigland and another v. Skelton and another.

12 East, 436. June 26, 1810.

A bond conditioned to pay costs on 29th November in Cumberland, when taxed by the Master of K. B. is forfeited by non-payment; though in fact the costs were only taxed on the 25th of November, of which the defendant had no notice on or before the 29th; for the defendant might have had them taxed before, and thus have known their amount in time.

DEBT on bond for 200*l*. Plea, craving oyer of the bond and condition, which latter was to abide the award of T. B. and W. B. in all actions between the plaintiffs and the defendant Skelton; and that the costs of the cause and of the arbitration should be in the discretion of the arbitrators; and that the submission should be made a rule of Court: and then the defendants pleaded, that the arbitrators, on the 2d of September, 1809, awarded (*inter alia*) that an action then depending between the parties should cease, and that the defendant should, on the 20th of November then next, at a certain house at Wigton in Cumberland, pay the plaintiffs the costs of the said action and of the arbitration, to be taxed by the Master of K. B. at Westminster: and then averred, that the defendant Skelton had not further proceeded in the said action, and that he had not at any time, on or before the said 29th of November, next after making the said award, any notice that the costs of the plaintiffs in the action and arbitration had been taxed by the Master of K. B., or to what amount such costs had been taxed; wherefore he could not pay such costs to the plaintiffs at the day and place in the award mentioned, according to the form and effect of the said award, and of the said condition. Replication—that after the making of the award, viz. on the 25th of November, 1809, the costs of the plaintiffs in the action and the costs of the award were taxed by the Master of K. B. at 44*l*.; and that though the plaintiffs were ready and willing, at the time and place appointed in the award for the payment of the said costs, to have accepted the same so taxed, to wit, at Preston, &c.; yet the defendant Skelton did not then and there pay to the plaintiffs the said 44*l*., but made default, &c.; neither hath the defendant at any time hitherto paid the same, although the plaintiffs heretofore, viz. on the 30th of November, 1809, to wit, at Preston aforesaid, &c. gave notice to the defendant Skelton that the said costs were taxed by the Master of K. B. at the said sum of 44*l*. and then and there requested the defendant to pay them the same: and the said sum is still wholly due and unpaid, &c. To this the defendants demurred specially, because the replication did not admit the want of notice of the taxation of costs by the defendant S., as alleged in the plea; nor aver that such notice was given on or before the 29th of November, 1809, when the taxed costs were by the award to be paid; and because it attempted to prevent the defendants from insisting, that no notice of taxation was given to the defendant S. on or before the said 29th of November.

Walton, in support of the demurrer, stated the question to be, whether the defendant were bound to take notice of the taxation of costs on the 25th, at which he was not present, and of which he had no notice, and therefore could not be prepared to pay the amount on the 29th in Cumberland. He referred to *Bear v. Choldwich*,^(a) in which the rule was laid down, that where an obligation is conditioned to do a thing which lies more properly within the conscience of the plaintiff than of the defendant, there notice shall be given to the defendant: and amongst other things is instanced the paying of the plaintiff's costs of suit. But he admitted, that in *Candler v. Fuller*, Wille's, 62, it was held, that arbitrators having awarded the defendant to pay the plaintiff's costs

(a) Cited in Hardr. 42.

of suit, to be taxed by the proper officer of the Court, before a certain day, it was the defendant's business to have them taxed before that day. And of this opinion were the Court, (without hearing *Littledale* contra.) And by

Lord ELLENBOROUGH, C. J. The defendants had the means of knowing what the taxation of costs would amount to, in time to have paid them at the time and place specified, by taking out an order for the plaintiffs to attend the taxation: and this point being against the defendants, it is enough, without adverting to any other objection,

Per Curiam,

Judgment for the plaintiffs.

Gildart v. Gladstone and Gladstone, in Error.

12 East, 439. June 26, 1810.

Under the *Liverpool* Dock acts of 8 Ann. and 2 Geo. 3, tonnage duties are payable to the Dock Company on all vessels sailing with cargoes outwards or inwards, which rate varies according to the several descriptions of voyages in the acts, one of which is to and from *America* generally: so as no ship shall be liable to pay more than once for the same voyage out and home: held, that a voyage out from *Liverpool* with a cargo to *Halifax* in *North America*, where the ship delivered it, and took in another cargo there for *Demarara* in *South America*, and after delivering that, returned to *Liverpool* with a cargo from *Demarara*, was all the same voyage out and home within the meaning of the acts, and chargeable only with one tonnage rate for the use of the docks.

THIS was another action brought in the court of C. P. by the *Gladstones* against *Gildart* to recover back 33*l.* 15*s.* 3*d.* paid by them to *Gildart* by compulsion and under protest, under circumstances similar to those which existed in the case already reported^(a) between the same parties, and arising upon the same acts of parliament of the 8 Ann. c. 12, and 2 Geo. 3. c. 86, for establishing the *Liverpool* docks, and granting certain tonnage-rates on vessels sailing with cargoes outwards or inwards; and which provide, that no vessel shall be liable to pay more than once for the same voyage out and home. The defendant pleaded the general issue; and at the trial a special verdict was found stating that the plaintiffs were owners of the ship *Kelton* belonging to and registered at the port of *Liverpool*, which ship in *Sept.* 1807, was about to clear outward from *Liverpool* with a cargo of goods for *Halifax* in *North America*: and thereupon *Gildart*, as collector of the *Liverpool* dock duties, demanded from the plaintiffs as owners of the *Kelton*, 33*l.* 15*s.* 3*d.* as the duty payable on her so clearing out, and refused to permit the ship to clear out till payment of the same: on which the plaintiffs paid that sum to enable their ship to clear out. The ship thereupon cleared out, and proceeded with her cargo from *Liverpool* to *Halifax*, where the goods were discharged, and she took in another cargo for *Demarara* in *South America*, which she afterwards delivered there: and then she took in a cargo at *Demarara* for *Liverpool*, and sailed from thence, and returned back to and arrived at *Liverpool* in *June*, 1808, with the last-mentioned cargo. That upon her arrival there, *Gildart*, as collector, demanded from the plaintiffs, as owners of the ship, payment of a further sum of 33*l.* 15*s.* 3*d.* as for the *Liverpool* dock duty, insisted by him to be payable on her entry inwards, and refused to admit her to enter until the same was paid: whereupon the plaintiffs paid that sum in order to obtain an entry inwards for their ship into the port of *Liverpool*; having first protested against the validity of the demand. But whether on the whole the plaintiffs below were entitled to recover the last-mentioned sum, the jury submitted to the Court. The court of C. P. gave judgment for the plaintiffs below, 2 Taunt. 97, on which this writ of error was brought.

^(a) 11 East, 675, where so much of the acts as is necessary to raise the question is set out.

J. Clarke contended, that the facts stated in the special verdict disclosed two different voyages, and not the *same* voyage, out and home; and therefore, that the plaintiff in error was justified under the stat. 8 Ann. in receiving the two sums mentioned in the special verdict as for the duties on *one* voyage out from *Liverpool* to *Halifax*, and for *another* voyage home from *Demarara* to *Liverpool*; the intermediate voyage from *Halifax* to *Demarara* having broken the continuity of the *same* voyage out and home. He relied on the strict words of the act, a departure from which, he said, would open a door to frauds; for different duties being made payable on different classes of voyages, ships intending to go to places in different classes would clear out for the first port in the lower class, and thereby pay only the smaller duty, when they intended ultimately to proceed on a voyage taxed with a higher duty. [But the Court said, they should decide upon that case when it arose; and intimated that the higher duty or the difference would be afterwards recoverable when the fact was ascertained. Here, however, they said, the vessel went out to *America* and returned from *America*, which was within the same class of voyages described in the act.] He then referred to the judgment of this Court in the former case, where the case is put—"Suppose a ship comes to *Liverpool* in ballast, carries out an outward cargo, and makes several other voyages without touching at *Liverpool*, and then comes into *Liverpool* with a cargo inwards; would there be an exemption from payment for the latter cargo, because the whole duty had been paid for the former? &c. would not the answer have been, that the owner had no right under these acts of parliament for both an outward and an inward cargo, unless they be upon the same voyage: and he endeavoured to apply that to the present case.

Richardson, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. I should not wish to put a construction on the act which would limit the just profits of this company which the legislature has given to them for the use of their docks; but we must construe the words in their plain and ordinary sense; and nothing is so familiar upon this subject as to speak of the *same* voyage out and home to the *East Indies* and to the *West Indies*; though such voyages frequently embrace a variety of intermediate parts, as from one presidency to another in the *East Indies*, and from one island to another in the *West*: and the question is, whether the legislature in using these words did not contemplate to use them in their ordinary and familiar sense. What more does the *same* voyage out and home mean than one continued voyage from the departure of the vessel out until her return home? The act does not confine it to the same port of delivery outwards, but embraces intermediate voyages from one port to another before her return home. If, indeed, the vessel afterwards happened to go upon an intermediate voyage in a different class of duties, that would be another question; but no such difficulty arises in this case; and there being no varying duty, this must be considered as the *same* voyage out and home, though consisting of different parts, within the meaning of the acts. And this decision is entirely consistent with the construction we put upon them in the former case, *Gildart v. Gladstone*, 11 East, 675.

GROSE, J. declared himself of the same opinion.

LE BLANC, J. The only question is, What is the meaning of the words, "the *same* voyage both out and home," for which one duty only is payable? This was a *Liverpool* ship, the owners of which resided there; and she sailed from thence on her outward voyage, which was a voyage from *Liverpool* to *Halifax* and *Demarara*; but the argument now is, that the voyage to *Halifax* only was her outward voyage, and that her proceeding afterwards to *Demarara* was a different voyage out: but we cannot suppose that to have been the meaning of an act imposing a dock duty at home upon the *same* voyage out and home, which must mean with reference to the port of *Liverpool*, which was the ship's home, and for the use of the docks there. To hold otherwise would be to say, that

there could only be a voyage out to *one* port abroad. The language of the Court in the former case was applied to a ship not belonging to *Liverpool*, but domiciled at another port, which after leaving *Liverpool* with a cargo might happen to go several intermediate voyages out and home to her place of domicile, and then return again to *Liverpool*: and that the Court held did not privilege her to sail outwards from *Liverpool* again, upon a distinct voyage outwards, without payment of a new duty. The inconvenience suggested is, that a ship may clear out to the nearest port to which she is destined, for which the smallest duty is payable, and afterwards pursue her voyage to a more distant port, for which a higher rate of duty is payable, and so avoid the higher duty: but it will be sufficient to deal with that case when it arises: that may require a different consideration: the duty may be collected either on the voyage outwards or homewards.

BAYLEY, J. A voyage may be considered as the same voyage out and home, though the ship bring home a cargo from a different port from that where she delivered her outward-bound cargo; and there may be different stages in the same voyage out and home. The crew are always engaged for the whole voyage out and home; and the ship's trading to different ports in her progress out and home would not vary the contract with them. Now here, *America* was the place, within the description of the act, to which her outward-bound cargo was sent, and *America* was also the place from whence she brought her homeward cargo; and it made no difference to the port of *Liverpool* whether or not she made any intermediate voyages to different parts of *America*. The expression alluded to as falling from the Court in giving judgment in the former case related to the supposed case of a ship not belonging to *Liverpool*, but coming there in ballast, and carrying out a cargo, and then going intermediate voyages out and home to and from the place to which she belonged, and then returning again to *Liverpool*.

Judgment confirmed.

Fenn, on the several Demises of Thomas Matthews, Edward Lewis and Charles Lewis, v. Smart.

12 East, 444. June 27, 1810.

A forfeiture by tenant for years in levying a fine, not having been taken advantage of by the entry of the then reversioner to avoid the lease, cannot be taken advantage of, after the reversion has been conveyed away, to recover the estate in ejectment from the tenant, upon the several demises of the grantor and grantee of such reversion.

THIS ejectment was brought to recover a dwelling-house, &c. in the parish of *Caerwent* in *Monmouthshire*; and the declaration contained three counts on the demise of *Thomas Matthews*, laid 1st, on the 9th of *December*, 1790; 2dly, on the 2d of *March*, 1808; and 3dly, on the 2d of *December*, 1808; and counts on the several demises of *Edward* and *Charles Lewis*, both laid on the 2d of *December*, 1808. At the trial before *Bayley, J.* at *Monmouth*, a verdict was found for the plaintiff, subject to the opinion of the Court, upon the following case.

In 1779, *Thomas Matthews*, one of the lessors of the plaintiff, (being lord of the manor of *Caerwent* in the parish of *Caerwent*,) granted a lease to Mr. *Attwood*, an attorney, for 99 years determinable on three lives, at a reserved rent of 1s. per annum, of part of the waste lands of the manor of *Caerwent*, on which part of the premises in dispute, being a large dwelling-house and garden, pleasure ground, &c. were erected and laid out by Mr. *Attwood*. The three lives in the lease were Mr. *Attwood*, his wife, and child, of whom Mrs. *Attwood* is the only survivor. In *Hilary* term, 1792, a fine sur conuissance de droit come ceo, &c. with proclamations, was levied in C. B. in which,

T. B. Bridgen, Esq. was plaintiff, and the said *Charles Attwood* and *Mary* his wife were defendants; which fine comprised the premises in question, which had been so leased by *Thomas Matthews*, and was levied to Mr. *Bridgen*, who purchased the premises at that time from Mr. *Attwood*. None of the lessors of the plaintiff had any knowledge of this fine until some time after *Thomas Matthews* had conveyed the premises in question to *Edward* and *Charles Lewis*, by lease and release of the 4th and 5th of July, 1808. Mr. *Bridgen*, the purchaser under *Attwood*, paid the rent reserved up to 1799. In 1803, the defendant purchased the premises from Mr. *Bridgen*, and has ever since claimed a freehold therein. Previous to this ejectment being brought, an actual entry was made(a) upon the premises in the name of each of the lessors of the plaintiff to avoid the fine. The question was, whether the plaintiff were entitled to recover? If not, a verdict was to be entered for the defendant.

Fuller, for the plaintiff, first stated the defendant's objection to be, that the lessors *E.* and *C. Lewis*, who were the purchasers under *Matthews*, the other lessor, could not avail themselves of the forfeiture of the tenant for years, incurred by levying the fine at the time when *Matthews* was seised of the reversion: and that *Matthews*, the only person who could have entered for the forfeiture before his conveyance to the *Lewis*s, could not enter for it after he had parted with the reversion: for that a forfeiture of tenant for years only gives a right of entry to the reversioner, which right of entry cannot be conveyed, and therefore the grantee of the reversion cannot take advantage of it. To this he answered, that in the case of a forfeiture by tenant for years in levying a fine, no entry was necessary to avoid the term, as it would have been to avoid the estate of a freehold of a rent for life. Mr. Justice *Blackstone*, 2 Vol. Com. 275, lays it down generally, that the forfeiture accrues upon the discovery of it; and in *Pinnant's* case(b) the period of such discovery was held to be material and issuable: but a distinction is there taken in the fifth resolution, between a lease for life and a lease for years: if the latter be made on condition that if the lessee do or omit some collateral act, the lease shall be void; there, if the lessor grant over the reversion, and afterwards the condition be broken, the grantee, though a stranger, shall take the benefit thereof; for the lease is void, and not voidable by re-entry: but if the lease be made for life, with such condition, there the grantee shall never take benefit of it; for the estate for life doth not determine before entry, and entry or re-entry in no case by the common law can be given to a stranger. The same distinction is taken in *Matthew Manning's* case, 8 Rep. 95, b. and in Co. Lit. 214, b. 215, a. and Lord *Coke* in the latter place also states another diversity between conditions in deed and in law; and puts the case of a lease for life, to which there is a condition in law annexed, that if the lessee make a greater estate, &c. the lessor may enter; and he says, that of this and the like conditions in law which give an entry to the lessor, not only the lessor and his heirs shall take benefit, but also his assignee, and the lord by escheat, "every one for the condition in law broken in their own time." This latter, it is to be observed, is said of a freehold interest determinable only by entry. Again, Lord *Coke* says, there is a diversity between the common law, of which *Littleton* wrote, and the law at this day by force of the stat. 32 H. 8. c. 34; that by the common law no grantee of a reversion could take advantage of a re-entry by force of any condition: but now by that statute, all grantees or assignees of reversions may have the like advantages against the lessees by entry for non-payment of rent, or for doing of waste, or other forfeiture, and shall also have the like benefit and remedies by action only for not performing of other conditions and covenants, &c. expressed in their leases, as the lessors, or grantors, or their heirs might

(a) The entry was in fact made in November, 1808.

(b) 3 Rep. 65, and *L'Estrange v. Temple*, 1 Sid. 90, and *Buckler v. Hardy*, Cro. Eliz. 450, 585, were also referred to.

have had. But this statute does not affect conditions in law; and what was said in Eyre's case, Moor, 52, against the successor of an ecclesiastical person taking advantage of a condition in law broken by a lessee for years in the time of his predecessor, must be taken with reference to this statute. Here then it was a condition in law annexed to *Attwood's* estate for 99 years, that he should not levy a fine; and having levied it, his estate, which was only a chattel interest, was absolutely avoided and ceased altogether; and it not being necessary to avoid it by entry, as in the case of a freehold, the grantee of the reversion may take advantage of it at any time, as soon as the forfeiture is discovered. And if this distinction hold with regard to a condition in deed annexed to the grant of a term of years, *a fortiori* it should hold in the case of a condition annexed to such an estate by law, to which greater effect ought to be given. [*Bayley, J.* Must not the necessity of an entry depend upon the wording of the condition? If the words be, that upon the doing of such an act, the reversioner may enter, there must be an entry to avoid the estate: but if the estate be granted upon condition, that if the grantee do such an act, the estate shall thereupon immediately cease and determine, there no entry is necessary.]

Abbott, contra, said that the fine of a tenant for years continuing in possession and paying rent, being described in the books^(a) as a mere nullity, like the fine of a copyholder, no injustice could be worked by it, and therefore no injustice will be done by suffering the tenant to continue in possession to the end of the lease; which was all that he now claimed. [But this proposal not being acceded to;] be contended, that no advantage could now be taken of the forfeiture, which happened in the time of *Matthews*, the former reversioner, who has since granted the reversion to the *Lewises*. *Littleton*, s. 347. Co. Lit. 214, b., says, that no entry, nor re-entry, which is the same thing, may be reserved or given to any person, but only to the donor or lessor, or to their heirs; and such re-entry cannot be given to any other person. And then he puts the case if one let to another for life by indenture rendering rent: and for default of payment a re-entry, &c.: if the rent be behind, the grantee of the reversion may distrain for it, but may not enter and oust the tenant, as the lessor or his heirs might have done if the reversion had continued in them. "And in this case the entry is taken away for ever; for the grantee of the reversion cannot enter, *causa qua supra*: and the lessor or his heirs cannot enter: for if the lessor might enter, then he ought to be in his former state, &c.; and this may not be, because he hath aliened from him the reversion." The distinction taken as to estates avoided upon condition broken, without entry, refers to conditions in deed, where, by the express terms of the deed the estate is declared to cease and be void on breach of the condition. But this is a breach of a condition in law, which the party may or may not take advantage of; and if he do not, the estate continues in law, and the grantee cannot afterwards enter for the forfeiture. None of the cases of entry for forfeiture distinguish between terms for years or for life. Every one Lord Coke says, Co. Lit. 215, a., shall take advantage of the condition in law broken in *his own time*. 3 Com. Dig. Forfeiture, A. 6 & 7, states that "entry for a forfeiture ought to be by him who is next in reversion or remainder after the forfeited estate—as if a tenant for life, or years, commit a forfeiture, he who has the immediate reversion or remainder ought to enter," &c. and cites 1 Rol. 857. l. 45. 50. 858. l. 5. "But he in the next remainder or reversion shall not enter for the forfeiture, if his estate do not continue. In *Johns v. Whiteley*, 3 Wils. 127—140, where the question arose upon the breach of a condition in a lease for years, the Court held that the lessor was bound to enter for such condition broken during the continuance of the lease; that is in effect during the continuance of his estate in the reversion. And in *Lady Montague's* case,

(a) *Ferner's* case, 3 Rep. 77, b. 79, a, b.

Cro. Jac. 301, it was expressly held in the case of a copyholder, that if a forfeiture were incurred by leasing for ten years, and the lord of the manor in whose time the forfeiture was committed died before his entry or seizure, the reversioner could not take advantage of the forfeiture committed before her time. And the same point was ruled in *Roe d. Tarrant v. Hellier*, 3 Term Rep. 162, with the exception of cases where the act of forfeiture destroys the estate of the lord: but here the fine by tenant for years continuing in possession and paying rent could have no such operation. In *Goodright v. Forrester*, 8 East, 552, this Court held, that a right of entry for a forfeiture was not deviseable: then if not deviseable, it is not assignable. [Lord Ellenborough, C. J. To hold the lease to be absolutely avoided by the levying of the fine, without the entry of the lessor to take advantage of the forfeiture, might in some instances be prejudicial to the lessor himself; as if the lease turned out not to be beneficial to the lessee, who might wish to get rid of it.] He concluded by observing, that where it is made a question in the books, who *may enter*, that must now be taken to mean who has *the right to enter*, and asserts it by action; for actual entry is now only held necessary to avoid a fine with proclamations.

Puller, in reply, insisted that the breach of this condition in law avoided the estate without an actual entry: and that where Lord Coke says, that every one should take advantage of the condition broken in his own time, that must mean with reference to what he had said before of the breach of such a condition annexed to an estate for life, where an entry is necessary. The same answer will apply to the case of the copyholder, who holds at least for life. [Lord Ellenborough, C. J. His estate is held only at the will of the lord.] In effect it is for life, unless he incur a forfeiture. Then it cannot be prejudicial to the lord to hold the estate to be avoided without entry, as it is always in his power to avail himself of the forfeiture or not, at his option; and if he did not, it could not be permitted to the tenant to set up his own wrongful act against the lord.

LORD ELLENBOROUGH, C. J., after consulting with the rest of the Court, said, that at present it appeared to them as if an entry by the lord were necessary to avoid the lease; but that they would look into the cases and mention the matter again, if in the mean time the lessors of the plaintiff would not accept the terms offered. And on the next day, his Lordship said, that they could not find any case which established a difference between tenant for life and tenant for years, as to the necessity of an entry to avoid their estates, in case of a forfeiture incurred by the levying of a fine, but an entry was necessary against both; and none having been made to avoid the lease in the present case in the time of the then reversioner, the plaintiff was not entitled to recover. The mischief, he added, would be enormous, that a tenant should be able to get rid of a burthen-some lease at any time by his own wrongful act in levying a fine of the premises.

Postea to the defendant.(a)

(a) Vide Co. Cop. s. 60. "Regularly it is true, that none can take benefit of a forfeiture but he that is lord of the manor at the time of the forfeiture: and, therefore, if a copyholder maketh a feoffment, and then the lord alieneth, neither the grantor nor the grantee can take benefit of this forfeiture; for neither a right of entry nor a right of action can ever be transferred from one to another. And, therefore, if a freeholder alienate in mortmain, and then the lord granteth away his seignory, neither the one nor the other can ever take benefit of this forfeiture."

Weall v. William King and Henry King.

12 East, 452. June 27, 1810.

Upon a declaration in case, alleging a deceit to have been effected upon the plaintiff by means of a warranty made by two defendants upon a joint sale to him by both, of sheep, their joint property, the plaintiff cannot recover upon proof of a contract of sale and warranty by one only as of his separate property; the action, though laid in tort, being founded on the joint contract alleged.

THE plaintiff declared, that on the 10th of *October*, 1805, the defendants at *Weyhill Fair* exposed to sale two hundred *South Down* lambs as and for stock, i. e. sound lambs, and thereupon the plaintiff bargained with the defendants for the said lambs, as and for stock, i. e. sound lambs, at and for a certain price to be therefore paid by the plaintiff to the defendants for the same; and the defendants by then and there falsely and fraudulently warranting the said lambs to be stock, i. e. sound lambs, then and there falsely, fraudulently, and deceitfully sold the said 200 *South Down* lambs to the plaintiff, as and for stock, i. e. sound lambs, for a large price, to wit, 400*l.*, which was afterwards paid by the plaintiff to the defendants for the same: whereas in fact the said lambs, at the time of the sale and warranty of them, as aforesaid, were not stock, i. e. sound lambs, but were unsound and afflicted with the rot; by means whereof 37 of them died, and the rest became useless to the plaintiff; and the plaintiff lost the price and expected profit of them, &c. There were other counts laying the contract in different ways, but all of them charging it as a joint contract made by the defendants with the plaintiff. The defendants pleaded *not guilty*: and at the trial before *Heath, J.* at *Croydon*, the plaintiff proved a warranty to the effect above stated, made by the defendant *Henry King*; but there was no evidence to affect the other defendant, *William King*: on which it was objected by the defendant's counsel, that the evidence did not maintain the declaration. To which it was answered, that the action arose on the *tort*, and not on the *contract*. But the learned Judge allowed the objection, and nonsuited the plaintiff; stating, that in his consideration of the case, if that reasoning were to prevail, every breach of promise might be converted into a tort. And further, that if this declaration could be considered as laid in tort founded on a contract, he should have submitted the case of *Gouett v. Radnidge and Others*, 3 East, 62, on which the plaintiff's counsel principally relied, for the reconsideration of the Court of *K. B.*, how far the same could be reconciled with the cases of *Bristow v. Wright*, Dougl. 665, and *Beson v. Sanford*, Skin. 278. Salk. 449; more especially as the Court of Common Pleas had lately, in the two cases of *Powell v. Layton*, 2 New Rep. 365, and *Max v. Roberts*, (a) decided, after mature consideration, against the authority of *Gouett v. Radnidge*, under similar circumstances. A rule nisi was afterwards obtained by *Garraw*, in last *Michaelmas* term, for setting aside the nonsuit, which, in *Easter* term, was opposed by *Marryat* and *Lowes*, and supported by *Garraw* and *Espinasse*. I was not present in court at the time when the case was argued; but the subject seems to have been exhausted in the reports of the cases before referred to. And after time taken by the court to consider of the case, and of the conflicting authorities,

Lord ELLENBOROUGH, C. J. now delivered judgment.—

This was an action against the two defendants for deceit, stated to have been committed in a joint sale, alleged in the declaration to have been made by them, of some sheep, their joint property, and to have been warranted by them to be stock or sound sheep, and which proved to be unsound: and the question is, whether the nonsuit, which proceeded on the ground of there being no evi-

(a) 2 New Rep. 454, and vide ante, 89, S. C.

dence in this case to affect *William King*, one of the defendants, be maintainable? The argument on the part of the defendant has been, that this is an action founded on the *tort*; that torts are in their nature *several*; and that in actions of tort one defendant may be acquitted, and others found guilty. This is unquestionably true, but still is not sufficient to decide the present question. The declaration alleges the deceit to have been effected *by means* of a *warranty* made by both the defendants in the course of a joint sale by them both of sheep, their joint property. The joint contract thus described is the foundation of the joint warranty laid in the declaration, and essential to its legal existence and validity: and it is a rule of law, that the proof of the contract must correspond with the description of it in all material respects: and it cannot be questioned, that the allegation of a joint contract of sale was not only material, but essentially necessary to a joint warranty alleged upon record to have been made by the supposed sellers, by whatever circumstances, and in whatever action, be the same debt, assumpsit, or tort, the allegation of a contract becomes necessary to be made; and such allegation, or any part of it, cannot (as here it certainly cannot) be rejected as mere surplusage: such allegation requires proof strictly corresponding therewith: it is in its nature entire, and indivisible, and must be proved as laid in all material respects. We prefer deciding this case upon a principle which is certain and universal, rather than by a reference to any cases either of doubtful authority, or in which the particular facts may seem to afford a special rule of construction.—In this case a joint contract was necessary to be laid, in order to maintain the ground of action as stated upon the record; and being so laid, and not being proved, the plaintiff was properly nonsuited.(1)

Rule discharged.

Right, on the Demise of Harriett Phillipps, and others, v. Smith.

12 East, 455. June 27, 1810.

Under a devise to trustees, their heirs, &c. of freehold and leasehold estate, on trust to permit and suffer the testator's wife to receive and take the rents and profits until his son should attain 21, and then to the use of his son in fee: and a devise of other lands to the trustees, upon trust to receive the rents and profits till his son attained 21; and in the mean time to apply the profits in discharging the interest of a bond of 3000*l.*; and on the son's attaining 21, upon trust by sale, lease, or mortgage of the last mentioned premises, to raise the 3000*l.* and discharge the bond; and subject thereto, to the use of his son in fee on his attaining 21: and a third devise of other lands, and the residue of his real and personal estate, to the use of the same trustees, in trust, by sale, lease, or mortgage of the same, to raise 3000*l.* and pay it to his daughter *Elizabeth*; and after

(1) The case in the text affords a fair inference, that if the plaintiff had been able to prove a joint contract, which he had stated, he would have been entitled to recover; but whether it would be on the ground that the declaration was laid in contract simply, or that the declaration was laid in tort founded on a contract, and that such contract must be proved as stated, the opinion of the court does not decide. If the former was the true ground this case must be considered as overruling that of *Govett v. Radnidge & al.* 3 East, 62: If the latter, there is no inconsistency in the two cases. It ought to be observed, however, that in *Powell v. Layton*, 2 New Rep. 365, and *Max v. Roberts & al.* 2 New Rep. 454, the court of *Common Pleas* are explicit in considering the declaration, in each of those cases, as laid in contract, though the action was in form of tort. In *Connecticut*, declarations in the form of tort, stating the injury to have been effected by means of a contract, have been sustained. *Stoyell v. Westcott*, 2 Day 418. *Bulkley v. Storer*, 2 Day 531. But the objection in those cases was not, as in the text, that the plaintiff had failed in proving the contract stated, but was taken after verdict on the ground of a misjoinder of actions; and the same judgment might have been given, whether the court were of opinion with the King's Bench in *Govett v. Radnidge & al.* that the declaration was laid in tort arising out of a contract, or with the *Common Pleas* in *Powell v. Layton*, and *Max v. Roberts & al.* that it was wholly laid in tort: for in neither point of view would there have been a misjoinder of actions.

payment thereof, absolutely to sell and dispose of so much of the residue of his said lands, &c. as they should think proper to raise money to pay his debts, legacies, and funeral expenses; and then upon trust to pay the interest and produce of his real and personal estate to his then wife, for the maintenance of herself and two children, till the latter should attain 21, if she continued his widow; but if not, then for the benefit of the two children till 21, and then to transfer to those children such residue; with further trusts, if either or both of them died under 21, with a Proviso—"that it should be lawful for the trustees, and the survivor, at any time or times, till all the said lands, &c. devised to them *should actually become vested in any other person or persons by virtue of the will, or until the same or any part thereof should be absolutely sold as aforesaid, to lease the same or any part thereof,*" for any term of years not exceeding fourteen, at the best rent:—

Held, that the devise to the first clause to the trustees, upon trust *to permit and suffer the testator's wife to receive and take the rents and profits* of the lands there described until his son attained 21, vested the legal estate of those lands in her, and was not affected by the subsequent leasing proviso given to the trustees, which was confined to premises originally vested in them as trustees, or over which, when afterwards becoming vested in others, the trustees retained a power of sale, &c.

THIS was an action of ejectment brought to recover possession of a messuage and tenement in *St. Stephens* by *Launceston*, in the county of *Cornwall*. The declaration contained three demises, 1. by *Harriett Phillippis*, widow, Sir *John Kennaway*, Bart., *R. Kennaway*, and *R. Winslow*; 2. by *T. J. Phillippis*, and 3. by *Harriett Phillippis* alone. At the trial at *Bodmin* a verdict was found for the plaintiff on the third demise, subject to the opinion of the Court on the following case.

Thomas Phillippis being seised in fee of the premises, devised the same as follows: "I devise unto Sir *John Kennaway*, Bart., *R. Kennaway*, and *R. Winslow*, clerk, their heirs, executors, administrators, and assigns, all my freehold and leasehold messuages, lands, &c. in the parish of *St. Stephen*, in the county of *Cornwall*, (including the premises in question,) upon trust "to permit and suffer my wife (the lessor of the plaintiff in the third demise) "to receive and take the rents and profits thereof until my son *Thomas Phillippis* "shall attain the age of 21 years; and from and after his attaining that age, "then upon trust and to and for the use of my said son *Thomas*, his heirs, executors, &c. during all my estate and interest therein respectively." The testator then devised to his said trustees and their heirs and assigns, as follows, viz. "All my messuages, lands, and hereditaments, then lately purchased "by me in the parish of *Saint Thomas*, near *Launceston*: upon trust nevertheless to receive the rents and profits thereof until my said eldest son *Thomas* "shall attain the age of 21 years, and pay and apply the same in the mean "time in discharge of the interest to become due on my bond for 3000*l.* And "when my said son shall attain the age of 21 years, then upon trust that they, "my said trustees, shall by sale, lease, or mortgage of all or any part of the "said last-mentioned lands, as they my said trustees shall think proper, raise "and levy the sum of 3000*l.*, and apply the same in discharge of the principal monies due on the said bond: and after raising and payment of the said "3000*l.*, and subject and chargeable thereto, I give and devise the said last-mentioned messuages, lands, &c. unto and to the use of my said eldest son, "on his attaining such age as aforesaid, and his heirs for ever." The testator then devised to the same trustees "all my messuages, lands, tenements, and "hereditaments, of what nature or kind soever, situate in *Tiverton*, in the county of *Devon*, or elsewhere in the counties of *Devon* or *Cornwall*, (except as aforesaid,) and also all the messuages, lands, &c. whether freehold, copyhold, or leasehold, which I am lately become entitled unto, under the will of "my late father, and the residue of all my real and personal estate and effects "whatsoever, subject to such charges and incumbrances as are now affecting "the same, to hold the same unto and to the use of them the said trustees, their heirs, executors, administrators, and assigns, upon trust nevertheless that they, "my said trustees, shall, at any time after my decease, either by sale, lease, or

"mortgage of all and every or any of my said freehold, copyhold, or leasehold messuages, lands, &c. or any part thereof respectively by me lastly hereinbefore given and devised to them my said trustees, as aforesaid, as they shall think proper, raise the said sum of 3000*l.*, and pay the same to my daughter Elizabeth Patience, in discharge of a legacy given to her by the will of Sir Jonathan Philipps; and after payment thereof, shall absolutely sell and dispose of all or any part or parts of the residue of my said messuages, lands, tenements, and hereditaments, at such time, and in such manner also, as they my said trustees shall think proper; and shall pay the clear residue of the monies to arise by such sale in discharge of my debts, funeral expences, and legacies: and upon trust to pay the interest, dividends, and produce of my said real and personal estate, after payment of such incumbrances, and my debts, funeral expences, and legacies, as aforesaid, unto my said wife, for the better support of herself and her children until my two children by her shall respectively attain the age of 21 years, if my said wife shall so long live and continue my widow: but if not, then upon trust that they my said trustees shall pay the income and produce of the residue of my said real and personal estate unto and for the benefit of my said two children, by my present wife, as my said trustees shall think proper, till such children shall attain such respective ages as aforesaid; and then, upon trust to pay, assign, convey, and transfer all the residue of my real and personal estate, subject as aforesaid, unto my said two children, their heirs, executors, &c. equally between them as tenants in common: or if either such children shall die under that age, then to the survivor of them, his or her heirs, executors, &c. on his or her attaining such age as aforesaid. And if both my said children by my present wife shall die under 21, then upon trust to pay the clear income and produce of the residue of my said real and personal estate to my said wife for her life; and after her decease, to pay and transfer the residue of my said real and personal estate unto my son Thomas and my daughter Elizabeth Patience, equally between them, share and share alike, when and as they shall respectively attain the age of 21 years, and the income thereof in the mean time: and if either of such last-mentioned children shall die under that age, then to the survivor of them, his or her heirs, executors, &c. on his or her attaining such age as aforesaid." Then followed this provision. Provided also, and I do hereby direct, that it shall and may be lawful for my said trustees, and the survivors, &c. at any time or times till all the said messuages, lands, tenements, and premises hereby devised to them upon trust, as aforesaid, shall actually become vested in any other person or persons by virtue of this my will, or until the same or any part thereof shall be absolutely sold and disposed of as aforesaid, to devise and lease the same premises, or any part thereof, to any persons, for any term or number of years not exceeding fourteen years in possession, and not in reversion, at the best and most reasonable rack rent, &c., so as such lease or leases be made dispunishable of waste: and that the lessee or lessees do execute counter-parts of such leases respectively." The testator afterwards died seized of the premises mentioned in the third demise, leaving all the lessors of the plaintiff him surviving. If the plaintiff were entitled to recover on such third demise, the verdict was to stand: if not, then a nonsuit was to be entered.

This case was argued in the last term, by A. Moore for the plaintiff, and by Courtenay for the defendant. The argument turned upon the particular words of the will noticed in the judgment of the Court, which was now delivered by

LORD ELLENBOROUGH, C. J.—The only question in this case was, whether Harriett Philipps, widow, upon whose demise the plaintiff had recovered a verdict, took the legal estate in the premises in question under the will of Thomas Philipps? By that will Thomas Philipps devised to Sir John Kenna-way, Bart. and others, their heirs, executors, administrators, and assigns all his

freehold and leasehold messuages, &c. in *St. Stephen*, upon trust to permit and suffer his wife, the said *Harriett Phillipps* to receive and take the rents and profits until his son, *Thomas Phillipps*, should attain 21; and upon his said son's attaining that age, then upon trust to and for the use of his said son, his heirs, executors, administrators, and assigns. This devise includes the premises in question, which are freehold. The testator also devised certain other premises to *Sir John Kennaway* and the others before named with him, upon trust to receive the rents and profits till his said son *Thomas* should attain 21, and to pay and apply them in the mean time in discharge of the interest on a bond for 3000*l.*; and on the son's attaining 21, upon trust, by sale, lease, or mortgage, of all or any part of those premises to raise the 3000*l.*, and subject thereto, to the use of his said son *Thomas*, on his attaining 21, and his heirs. The testator also gave certain other freehold, copyhold, and leasehold premises, and the residue of his real and personal estate, to the same persons; to hold the same unto, and to the use of them, their heirs, executors, administrators, and assigns, upon trust that they should, either by sale, lease, or mortgage of all or any part of the real estate raise the sum of 3000*l.*, and pay it to his daughter *Elizabeth Patience*, in discharge of a legacy given her by *Sir John Phillipps*; and after payment thereof, to sell and absolutely dispose of so much of the real estate as they should think proper, to raise money to pay his debts, funeral expences, and legacies, and upon trust to pay the interest, dividends, and produce of his said real and personal estate to his wife, for the better maintenance of herself and her children, till the testator's two children by her should attain 21, if she should so long continue his widow: but if she should not, then upon trust to pay the income and produce of the residue of his real and personal estate for the benefit of the said children till 21, and then to convey and transfer to them such residue: with further trusts, if either or both of them should die under 21. The will then contains a proviso, "that it shall and may be lawful to and for my said trustees, and the survivors and survivor of them, at any time or times, till all the said messuages, lands, tenements, and premises hereby devised to them, upon trust as aforesaid, shall actually become vested in any other person or persons by virtue of this my will, or, until the same or any part thereof shall be absolutely sold and disposed of as aforesaid, to demise and lease the same premises, or any part thereof, to any person or persons, for any term not exceeding 14 years, in possession and not in reversion, at the best rent," &c. It was admitted upon the argument, that a limitation of the freehold premises to trustees, upon trust to permit another to receive the rents and profits, will in general vest the legal estate in the person who is to receive the rents and profits; and *Broughton v. Langley* (Ld. Ray. 873,) is an authority in point that it will. But it was contended, that the power of leasing in this will distinguished this case from that of *Broughton and Langley*; that this power extended to the premises in question, as well as to all the other premises devised; and that when the testator gave the trustees this power, he must have understood that he had before given them the legal estate.—Upon an attentive consideration, however, of this proviso, it appears that it does not extend, and was not meant by the testator to extend, to the premises in question, but is confined, and was intended to be confined, either to premises which, having been originally vested in them as trustees under the will, might afterwards become vested in another person or persons, or to those over which the trustees had power of sale given to them: and if the intention were in this respect even doubtful, it would be sufficient for the plaintiff; because the devise in trust to permit *Mrs. Phillipps* to receive the rents, &c. must have the ordinary effect of such a devise, unless the Court can pronounce affirmatively that it was the testator's intention to include the premises in question in the power of leasing. The will contains three devising clauses, the second and third of which contain powers of sale; but the first contains no such power, but is in trust to permit the widow to receive the

rents till the son should attain 21, and it is then to the use of the son in fee. It is true, that the first clause contains leaseholds as well as freeholds; and, as to the leaseholds, the legal estate must be in the trustees; but though the legal estate as to them be in the trustees, it does not follow that the testator intended that they should be included in the power of leasing; and even if they were intended to be included, it does not follow that there was the same intention as to the freeholds. The trustees were to have no controul over these premises *for any purposes of the testator's will*, but they were to vest and enure for all beneficial purposes solely to the use of the widow till the son was 21, and then to enure wholly to that of the son; and there is nothing upon the face of the will bespeaking an intention that the mother and the son should not respectively have, in succession, the legal estate, and, if they thought fit, the actual possession: whereas if the defendant be right, and the power extend to these premises, the trustees might lease them when the son was upon the eve of 21, and might deprive him of the actual possession till he was nearly 35. A construction which would produce such a consequence, without any obvious benefit on the other side, is not to be adopted, unless the words absolutely require it, and which, upon a fair consideration of them, they do not appear to do. The words give the trustees the power of leasing "till all the messuages, &c. devised to them upon trust as aforesaid shall actually become vested in some other person, or until the same shall be absolutely sold." The words, "upon trust as aforesaid," are not very definite. They may mean upon which trusts are to be executed by the trustees, i. e. upon which they are to raise money, &c. and if that be their meaning here, they do not extend either to the premises in question, or to the leaseholds which were included in the first devise. The words, "till they shall actually become vested in some other person by virtue of this my will," imply that the testator was contemplating property as to which he had already used words which would vest it in the trustees in the first instance, and afterwards pass it beyond them to some other person: whereas he had not before used any words as to the property in question, which would have that effect. Upon these grounds, therefore, that the words here used in the devise to *Harriett Phillipp*s are sufficient to pass the legal estate to her, unless the power of leasing controuls them; that there are no purposes expressed in the testator's will which a lease of these premises will advance; that it might materially prejudice the interests of those persons to whom the will gives these premises to extend the power of leasing to them; and that all the words of the power and the probable intention of the testator, may be satisfied without that extention: we are of opinion, that *Harriett Phillipp*s took the legal estate in the premises in question, and consequently that the plaintiff is entitled to recover. This is certainly the justice of the case in this action; for *Sir John Kennaway* and the others appear by the first count to have concurred in the ejectment, though, from a mistake, there is no count upon which they could have recovered, had the legal estate been in them.

Roe, on the demise of Bamford, v. Hayley.

12 East, 464. June 27, 1810.

A proviso in a lease for 21 years that if either of the parties shall be desirous to determine it in 7 or 14 years, it shall be lawful for either of them, *his executors or administrators*, so to do, upon 12 months' notice to the other of them, *his heirs, executors or administrators*, extends, by reasonable intendment, to the devisee of the lessor who was entitled to the rent and reversion.

IN ejectment to recover messuages and lands at *Wolverhampton*, in the county of *Stafford*, the demise of which was laid on the 26th of *March*, 1809,

a verdict was taken at the trial at *Stafford* for the plaintiff; subject to the opinion of the Court upon this case.

William Bamford, deceased, being seised in fee of the premises in question, demised them by an indenture of lease, dated 25th of *March*, 1802, to the defendant *Hayley*, his executors and administrators, from the day of the date, for 21 years, at a yearly rent, payable half yearly, on the 29th of *September*, and the 25th of *March*, unto the said *William Bamford*, his heirs or assigns, subject to this proviso, for determining the said lease. "Provided, that if either of the said PARTIES shall be desirous to determine this lease at the end of the first 7 or 14 years of the said term, then it shall and may be lawful for either of them, his executors and administrators, so to do, upon giving unto the other of them, his heirs, executors or administrators, or leaving the same at his or their place of abode, 12 months' notice in writing of such his or their intention, any thing therein contained to the contrary notwithstanding." *William Bamford* being so seised, afterwards by his will, in *September*, 1807, devised the premises to his youngest son *Benjamin B.* (the lessor of the plaintiff,) in fee, and appointed the said *Benjamin B.* and *T. C.* his executors, and died on the 17th of *December* following; leaving *William Bamford* his heir at law. The executors proved the will. On the 3d of *March* 1808, *Benjamin Bamford* alone delivered notice in writing, signed by himself, to the defendant, as follows. *Mr. J. L. Hayley*.—As devisee in fee under the will of my late father, *William Bamford*, deceased, and in pursuance of the proviso in the lease of the buildings, lands, and premises made by him to you, I hereby give you notice to quit and deliver up to me, at or upon the 25th of *March* 1809, the possession of all the buildings, lands, &c. thereto belonging situate in *Wolverhampton*, &c. so leased by my said father to you." Dated the 26th of *February*, 1808, and signed *Benjamin Bamford*. If the plaintiff were entitled to recover, the verdict was to stand; otherwise a nonsuit was to be entered. The case was argued in the last term.

Abbott, for the plaintiff, stated the question to be, whether the devisees of the lessor who made the lease were competent within the meaning of the proviso to give the notice to determine it; and contended that the meaning of the proviso, though not conveyed in the most apt terms, was, that the notice should be given by or to the owner at the time of the estate, on the one hand, and to or by the person interested in the lease at the same time, on the other: and that it could not have been the meaning of either party, that such notice should be given to or by a stranger to the estate, which, if the words were construed strictly, would be the case. For the executor of the lessor, (which the plaintiff also is as well as devisee,) is, as executor, a stranger to the real estate; and the heir of the lessee, would, as such, be a stranger to the term. Rent, or a right of entry, or re-entry, must follow the estate, and cannot be reserved to a stranger, *Lit. s. 347*. In *Sacheverell v. Fraggatt*, 2 *Saund.* 370, a reservation of rent during a term of years to the lessor, his executors, administrators, and assigns, was held to extend to a devisee who sued the lessee, upon his covenant. There, indeed, was the word *assigns*, which would be taken to include a devisee: but a reservation of rent to tenant in tail and his heirs, will, by intendment of law, carry the rent with the estate to the heir in tail, 1 *Ventr.* 162, and *Lit. s. 347*. So where a feoffment is made on condition, the law allows him who hath interest in the land, as a sub-feoffee, as well as the party or parties privy to the condition, to perform it, and save the estate, *Lit. s. 336*, and *Shep. Touch.* 137; and the like rule holds of a mortgage on condition to be performed by the mortgagor and *J. S.* before a certain day, where if either of them die before the day, the condition may be performed by the other alone, *Co. Lit.* 219, b. In like reason, by analogy to the rule in those cases, the words of this proviso, which speak of the notice to be given by either of the said parties desirous of determining the lease, his executors or administrators, to the other, his heirs, executors or administrators, must be taken to

mean generally all the *representatives* of either party standing in privity to their respective estates and interests.

Williams, Serjt. *contra*, admitted, that by the rule of the common law no entry could be reserved to a stranger, but denied that a devisee stood in a different predicament. The stat. 32 H. 8. c. 34, (a) was the first act which gave power to an assignee of the reversion, as a devisee is, to enter on the lessee for a condition broken: but that does not apply to this case, which stands upon the words of the proviso. Then it is admitted, that a devisee does not come within the words; and there is no authority for construing them in the large and general sense contended for. The distinction is taken in one of the books cited, (b) between conditions to defeat and conditions to preserve an estate; the former are always construed strictly; and the present case is of that description: the authorities cited are instances of the latter description. The estate of the lessee can only be defeated in the very mode stipulated for in this lease, which has not been pursued.

Abbott, in reply, said, that the proviso was introduced for the equal benefit of both parties, for either may determine the lease; and therefore was not to be governed by the strict rule of construction in cases of forfeiture or conditions broken, which are to determine an estate for the benefit of the grantor only.

Cur. ad. vult.

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court. The only question in this case was upon the validity of a notice for determining a lease. *William Bamford*, being seised in fee, demised the premises in question to the defendant for 21 years from *Lady-day*, 1802, subject to this proviso, "that if either of the said parties shall be minded and desirous to determine this lease at the end of the first seven or fourteen years of the said term, then and in such case it shall and may be lawful for either of them, *his executors or administrators*, so to do, upon giving unto the other of them; *his heirs*, executors, or administrators, twelve months' notice, in writing, of such his or their mind or intention." *William Bamford* devised to the lessor of the plaintiff in fee, and made him and one *Cheshire* executors of his will, and died. On the 3d of *March*, 1808, the lessor of the plaintiff gave notice in his character, and by the name and description of "devisee in fee under the will of his late father, *William Bamford*, deceased," for putting an end to the lease of *Lady-day*, 1809, in pursuance of the proviso therein contained: and it is upon the validity of the notice thus given by him that the case depends. It is contended, on the part of the defendant, that this proviso is to be looked upon as a condition to defeat an estate; that it ought, therefore, to be strictly and literally pursued; and that as it gives no power, in terms, but to the parties, *their executors or administrators*, it does not warrant a notice by a *devisee*. On the other hand, it was urged, that this was intended as a privilege or power to accompany the estate of the lessor on the one part, and of the lessee on the other, into whatsoever hands it might pass; and that the words "*executors and administrators*" were put for representatives in general: and that a notice might be given by an *assignee* of either party, or by the *heir or devisee* of the lessor, as well as by the parties themselves, their executors or administrators: and this we think the right construction. The object of such a proviso manifestly is, that the inheritance should not be bound on the one hand against the will of the persons to whom the inheritance belongs; and that, on the other hand, the lessee and those claiming under him should not be bound against their will; but that in all instances the parties interested, whosoever they might be, should have power to give the necessary notice for this purpose. The intention was not to give a collateral power, to

(a) Vide Co. Lit. 215, a.

(b) Vide Co. Lit. 219, b.

be exercised by a stranger, but to annex certain privileges to the term and to the reversion, to pass with such term and with such reversion respectively, and to be exercised by the persons, whosoever they might be, to whom such term or reversion should come. The right respects the interest demised; and according to the rules which ascertain whether a covenant is to be deemed to run with the land or not, (a) would be considered as annexed to the reversion on the one hand, and to the term on the other. A covenant by a lessor that he would renew at the end of his term has been adjudged to run with the land, and to bind the grantee of the reversion; (b) and there is no substantial difference, in point of construction, between a stipulation for extending the term, and a stipulation for shortening it. So a covenant to renew at the request of the *lessee* has been held in equity to run with the estate, and to oblige the lessor to renew at the request of the *lessee's* executors; there being nothing in the lease to shew that the renewal was intended to be confined personally to the lessee, and it being considered that the executors were identified with the lessee, *Hyde v. Skinner*, 2 Pr. Wms. 196. If the proviso in this case is to be construed literally, what will be the consequence? If the lessee or his executors assign, such assignee cannot give the notice, because he is not within the words: but if any notice is to be given on his part, he must procure it to be given by the lessee or his executors: and for the same reason, if the lessor die, his heir or devisee cannot give it; but, if any notice in such case is to be effectual, it must be from the executors or administrators of the lessor. Now, it never could be intended, that the right of determining the term should be taken from the only persons interested in it, and given to a mere stranger, having no interest in it whatever. We therefore think the true construction of this proviso is not according to the letter, but according to the spirit; and that we may adopt the expression in *Dyer*, 15, a. "that in every deed and condition which are private laws between party and party, a reasonable and equal intention shall be construed, although the words sound to a contrary meaning." An additional argument in favour of the construction we adopt may be drawn from the latter part of the proviso, which says, that the notice shall be to the other, his *heirs*, executors, or administrators; so that, though it in terms requires notice from the party, his *executors or administrators*, it allows it to be given also to *heirs*, which furnishes a fair ground for supposing that the word *heirs* was before omitted merely by a mistake in the enumeration of the different classes of representatives of the original parties to the lease. And if the word *heirs* be thus applied in the former part of the proviso, on the ground of a supposed omission by mistake, a devise as *hears factus*, would be in like manner supplied or introduced by reasonable intendment and construction arising out of the terms and object of the same instrument. Upon the other ground, however, we are all clearly of opinion, that the proviso extends in reasonable construction to *all* representatives; and consequently that the notice given was sufficient to determine the lease. The *postea*, therefore, must be delivered to the Plaintiff.

(a) 5 Rep. 16, and 3 Wils. 27, were referred to.

(b) *Moor*, 159, was mentioned; and see upon the same subject *Isted v. Stonely*, 1 And. 82.

Cole and Others, Assignees of Doyle, a Bankrupt, v. Parkin.

12 East, 471. June 27, 1810.

The stat. 26 G. 3. c. 60. s. 17, avoiding a bill of sale of a registered ship, which does not truly and accurately recite the certificate of registry; where parties by mistake misrecited in a bill of sale the certificate of registry, by stating *Guernsey* as the port where the certificate was granted instead of *Weymouth*; which mistake was rectified when discovered by consent of all parties, and the deed delivered *de novo*: held, that no new stamp was necessary upon such re-execution: the deed taking no effect from its first delivery, and the defect arising not from intention but from mistake, and the alteration merely making the contract what it was originally intended to have been.

IN trover for a ship, which was tried before Lord *Ellenborough*, C. J. at *Guildhall*, the plaintiffs proved a bill of sale of the ship executed by the defendant to *Doyle*, the bankrupt, on the 26th of *June*, in which, by mistake, as it afterwards appeared, the certificate of registry was recited to have been granted at *Guernsey* instead of *Weymouth*, where it was in fact granted; but when it was sent down to *Weymouth* to be registered by the proper officer there, the mistake was discovered after some time, and it was returned again to the parties on the 5th of *September*, and then the mistake was rectified with the consent of both parties, by striking out *Guernsey* and inserting *Weymouth*, and the deed was re-executed and delivered *de novo*, but without any new stamp. It appeared further, that the ship was in port on the 26th of *June*, when the bill of sale was first executed, and remained there till the 30th, when she sailed; and she was out of the port when the deed was re-executed, on a voyage in which she was afterwards lost at sea, and on which she had been sent by the defendant. On the objection being taken of the want of a new stamp, the plaintiffs were nonsuited at the trial, with leave to move to set the nonsuit aside: and a rule *nisi* having been granted for that purpose in last *Hilary* term, cause was shewn against it in the same term by

The *Attorney-General* and *Marryat*, who urged that the instrument after the first execution of it was perfect upon the face of it, and was only proved to be inoperative by extrinsic circumstances. The vendee used and acted upon it in this state by sending it to *Weymouth*, and attempting to get it registered there. If one alteration of this sort, especially in a material part, were allowed upon the same stamp, the instrument might be altered in every part of it, even in the name and description of the ship, so as altogether to make it a new instrument; and it would often be difficult in these cases to distinguish between alterations arising from mistake and those from design, which would open a door to frequent evasions of the stamp duties. Suppose where the stamp is calculated by the number of words, it was found, after the execution of the deed, that the number of words exceeded the allowance; could some superfluous words be struck out, and the deed be re-executed without a new stamp? If so, then in the case of annuities, or bargains and sales, which are to be enrolled within a certain limited time after execution, the second execution would give the instrument a new date, from whence the time for enrolment would be calculated: and yet if a new date be given to a bill of exchange, that has been held to require a new stamp. (a) [*Le Blanc*, J. That is not the correction of a mistake, but the case of a new instrument intended to be made. In another case, *French v. Patton*, 9 East, 351, where a broker by mistake made a policy of insurance on *ship and outfit*, instead of *ship and goods*; yet when it was corrected, it was held to require a new stamp. [*Le Blanc*, J. That was a proposed alteration after the contract had been entered into with those who meant at the time what was first expressed.] In this case, the ship having been in port when the deed was first executed, and out of

(a) Vide *Bowman v. Nichol*, 5 Term Rep. 537.

port when the alteration was made, a different law had operated upon her, as to the time within which the registry was to be made: for by s. 15, of the stat. 34 G. 3. c. 68, when the vessel is in port at the time of the transfer, the indorsement of it on the certificate of registry is to be *forthwith* made; but if at sea, then it is to be made within ten days after her return to port. A mistake of a name in a deed whereby a trader conveyed away all his property would still be an act of bankruptcy; and if the vendor, a trader, had had no other property than this ship, it would have that operation, though the requisites of the registry acts had not afterwards been complied with by the vendee; otherwise it would be in his power to make it an act of bankruptcy or not in the vendor.

Park and *Scarlet*, contra, said, that in every case where a new stamp had been held necessary upon the alteration of an instrument, the instrument was good upon the face of it, and valid between the parties; but here it had no validity till properly registered, and there could be no registration of the ship at *Guernsey*; the invalidity of it, therefore, appeared upon the face of it. This is a mere clerical mistake in copying the certificate of registry, and it has never been held, that the correction of mere clerical mistakes, upon which the parties re-execute the instrument requires a new stamp; and yet in many cases of clerical errors, it has been held to have an operation between the parties, according to their manifest intent. Where a deed contains too many words, it is the fault of the parties, who must look to that at their peril; but it cannot be said, that the words used were not intended to be used; but if the superfluous words were inserted by mistake of the copyist unknown to the parties, the case would be different; as suppose the same words were twice written. Clerical mistakes in deeds may be averred in pleading, and the deed will be good, though left uncorrected. The present case is the stronger in favour of admitting the alterations, because the conveyance of the ship was not complete until the registration of the bill of sale, and before that was completed, the alteration was made.

Lord ELLENBOROUGH, C. J. at the conclusion of the argument, said, it was a case of general consequence beyond the value in dispute between these parties, and it would therefore be proper for the Court to take it into further consideration before they deliver their opinion, with a view to some general rule. And in this term his Lordship proceeded to give the opinion of the Court.

The only question in this case was, whether an alteration in the bill of sale of a ship, made a new stamp necessary. The bill of sale was originally executed on the 26th of *June*; but in reciting the certificate of registry, it stated *Guernsey* as the port where the certificate was granted instead of *Weymouth*. It was sent down to *Weymouth* for registration, and returned the 5th of *September*, and then the mistake was rectified by consent of all parties, and the deed delivered *de novo*. And whether this second delivery made a new stamp necessary was the question reserved for the further consideration of the Court. And upon such further consideration, we are all of opinion it did not. By stat. 26 G. 3. c. 60. s. 17, a bill of sale of a registered ship, "which does not truly and accurately recite the certificate of registry in words at length, shall be utterly null and void to all intents and purposes." And it has been decided upon this clause, that a bill of sale not conformable to it is so completely void that a stranger may insist upon its insufficiency; (*Westerdell v. Dale*, 7 Term Reports, 306,) and that it gives no title even in equity. (*Camden v. Anderson*, 5 Term Rep. 709—711, and *Hibbert v. Rolleston*, 3 Bro. Ch. Cas. 571.) (1) This bill of sale, therefore, when first executed, was, from the mis-

(1) It may not be improper in this place, to take some notice of the regulations by statute in the *United States*, and the decisions of our courts, relative to the *registry of vessels*. By an act of Congress passed December 31, 1792, ships or vessels built within the *United States*, and belonging wholly to citizens of the *United States*, or not built within the

take in the recital of the certificate of registry, to all intents and purposes null and void; it took no effect whatever from its first delivery; and the stamp impressed upon it was wholly inoperative. This defect arose, not from intention, but from mistake. The instrument, as first executed, was not what the parties meant to execute, and it was not in the state in which it was at first intended to be, till it was altered. This is not the case of substituting a new and second contract, in the place of a preceding effectual one, upon a change of intention in the parties; but merely making the contract what it was originally intended to have been: and in such a case, where the instrument upon

United States, but on the 16th of May, 1789, and continually thereafter, belonging to citizens; and ships or vessels captured by citizens in war and condemned as prize, or seized and condemned for a breach of revenue laws, and wholly belonging to citizens, may be registered. 2 *United States Laws*, 132. The provisions of the above clause refer to ships or vessels engaged in foreign trade. By the act of February 18, 1793, ships or vessels employed in the coasting trade or fisheries, possessing the above qualifications, if above twenty tons, are entitled to be enrolled; if under twenty tons, are entitled to a licence, with all the privileges of ships or vessels of the *United States*. 2 *United States Laws*, 168.

Where American citizens, with the funds, and for the benefit of an alien, purchased a ship, obtained a certificate of registry, and entered the cargo at the custom house, as *their own*, it was decided that they could not recover a balance due for money advanced, commissions, &c. in aid of the transaction, it being a violation of "the positive provisions of the laws of the *United States* respecting American registered vessels, the national policy of our navigation system, good faith towards the belligerent powers, and the very foundations of morality." *Maybin v. Coulon*, 4 Dall. 298.

In *Duncanson v. McLure*, 4 Dall. 308, it was decided, that an alien owner of a ship, which was registered in the name of *Murgatroyd*, an American citizen, could not maintain trover against the purchaser of the ship under a pretended condemnation, "inasmuch as his claim to the ship was founded upon a transaction, in fraud of the positive laws and public policy of the *United States*, which exclude an alien from any degree of interest in an American registered vessel, by way of trust, confidence or otherwise." In replevin for the same ship, by *Murgatroyd*, the Court said, that "the whole transaction was a mere cover to evade the laws of the *United States*." Plaintiff nonsuited. S. C. 4 Dall. 342.

The fourteenth section of the act of December 31, 1792, requires that when any ship or vessel, which shall have been registered, shall, in whole, or in part, be sold or transferred to a citizen of the *United States*, or shall be altered, &c. in every such case, the said ship or vessel shall be registered anew, by her former name, according to law, (otherwise she shall cease to be deemed a ship or vessel of the *United States*;) and the former certificate of registry shall be delivered up to the collector, to whom application for such registry shall be made, at the time the same shall be made, &c. And in every such case of sale or transfer, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite at length the said certificate; otherwise the said ship or vessel shall be incapable of being so registered anew.

In the case of the *United States v. Willings and Francis*, the *Supreme Court* of the *United States* affirmed the judgment of the circuit court, deciding that an American registered vessel, in part transferred by parol while at sea to an American citizen, and resold to her original owners, on her return into port, before her entry, does not, by that operation, lose her privileges as an American bottom, nor become subject to foreign duties. 4 Cranch, 48. S. C. 4 Dall. 374.

The act of December 31, 1792, sec. 4, requires the owner, before he can obtain a certificate of registry, to make oath or affirmation, that the ship or vessel has the requisites contained in the first paragraph of this note. The 14th section of the act provides, that if any matters of fact in the said oath alleged, which shall be within the knowledge of the party so swearing, shall not be true, there shall be a forfeiture of the ship and appurtenances, in respect of which the oath shall have been made, or of the value thereof, to be recovered with costs, of the person by whom such oath shall have been made.

In the case of the *United States v. Grundy & al.* the court held, that the property of a vessel subject to forfeiture under the above clauses of the act, did not vest in the *United States*, until an election made to proceed against the vessel so forfeited; and that *assumpsit* would not lie against the assignees of the person who took the oath, and who had become bankrupt; the assignee having sold the vessel and received the purchase money, before seizure of the vessel. 3 Cranch 337.

In the case of the *United States, v. the Anthony Magin, Norman, claimant*, under a sale by the assignees of the owner, who became bankrupt after the right of forfeiture accrued, Judge *Winchester* decided that the claimant was entitled to the ship, he being a *bona fide* purchaser and not having notice of the cause of forfeiture. 3 Cranch 356.

its first execution was void to all intents and purposes; where its insufficiency arose from a mere mistake; where in consequence of that mistake, it was not in the state in which it was intended to have been when it was so executed; and where upon its second execution, it is only put into that state in which it was originally intended to have been; we think it is not going beyond the fair spirit of the stamp laws to hold, that upon such second execution, being the first which was effectually operative, a new stamp was not requisite. *Kershaw v. Cox*, (3 'Esp. N. P. Cas. 246,) was a stronger case than this; for there the bill of exchange was available in the hands of the payee, though not negotiable for want of the words "or order;" and the mistake in omitting those words was not discovered till after the bill had been in fact indorsed and negotiated by the payee, when they were inserted by the consent of all parties, and this Court, in Lord *Kenyon's* time, held that a new stamp was not necessary on such alteration. In *Knill v. Williams*, (10 East, 431,) where a note was altered the day after it was made, by stating what was the consideration for it, viz., the goodwill of a lease and trade, the Court held a new stamp necessary: but that was, because it did not appear to have been the original intention that the consideration should be stated, but it was clearly an afterthought; and the case was said not to be like *Kershaw v. Cox*, where, by mistake as it appeared, the bill had not "been drawn according to the intention of the parties at the "time, and it was brought back the next day to *Kershaw*, the drawer, to have "the imperfect execution of it perfected." In this case this bill of sale was, by mistake, drawn contrary to the intent of the parties at the time, inasmuch as they meant that the certificate should be truly recited; and the second execution of the deed only perfected what was before imperfect. We are of opinion, therefore, that in this case the nonsuit should be set aside, and a new trial granted.

The King v. The Commissioners of Compensation under the London Dock Acts.

12 East, 477. June 27, 1810.

The compensation clause in the *London Dock act*, reciting that divers tenements, &c. may become less valuable by the trade being diverged therefrom, provides that in case they do so, or the owners or occupiers suffer loss by the dock works, the commissioners shall make them compensation; and no claim is to be made for compensation till three years after the opening of the docks; and then it is to be made within a given time: held, that where the owner of the inheritance of a tenement which was in lease died after the three years from the opening of the docks, without having made any claim, her devisee, and not her executor, was entitled to claim within the time allowed compensation for an injury done by the dock works to the inheritance in the time of his testatrix.

LORD ELLENBOROUGH, C. J. delivered the judgment of the Court in this case, which had stood over for consideration.

This was an application for a mandamus to the commissioners of compensation to proceed upon a claim preferred by *Thomas Brown*. The property, in respect of which the claim was made, belonged to a *Mrs. Hodson* till her death, which happened in *June, 1808*, and *Mr. Brown* in entitled for life under *Mrs. Hodson's* will. The *West India Docks* were opened in *August, 1802*, and the *London Docks* in *January, 1805*: and by the acts, 39 Geo. 3. c. 69, and 39 & 40 Geo. 3. c. 47, for founding those establishments no claim could be made for compensation till three years after the docks had been opened; and the claim was then to be made, in some instances within one year, and in others within two. The claim has been resisted on the ground, that as the docks had been open three years before *Mrs. Hodson* died, the injury for which compensation was to be made was complete in her time, and the property

passed to Mr. *Brown* in its deteriorated state; that Mr. *Brown*, therefore, had no claim to compensation; and that if any claim could be made, it could only be by Mrs. *Hodson's* executors. On the other hand, it has been urged that the executors could support no claim for an injury to the reversion and inheritance, which this is; and that, unless Mr. *Brown* and Mrs. *Hodson's* devisees can support the claim, no other person can. It appears by the claim, that the chief part of the premises were under lease from the time the dock acts passed till after Mrs. *Hodson* died; so that the only claim she could have made must have been purely for the injury to the inheritance: and it is difficult to say, upon legal principles, that for such an injury any claim could have been made by an executor. The compensation clauses (which are nearly the same in all the acts) recite, that divers tenements, &c. may become less valuable by the trade being diverted therefrom, and divers owners and occupiers may thereby sustain loss or damage, and they provide, that in case such tenements be rendered less valuable by the trade being diverted therefrom, or the owners or occupiers suffer loss or damage by the works of the docks, the commissioners shall make them compensation for the loss or damage they shall have thereby suffered. These clauses do not provide in terms for such a case as this, where the owner dies after the three years are completed, without having made any claim; nor can I find any clause or expression in the act which throws light upon the point. It must have been intended, that in every case where the property was injured, there should be a compensation; and if no claim can be made by Mrs. *Hodson's* executors, it seems to follow, that the claim by Mr. *Brown* may be supported. He is "owner" at the time he makes the claim; and there is nothing in the acts which expressly and in terms confines the claim to persons who were owners, either when the acts passed, or within the three years. The right to claim may be considered in this instance, where there is no other person to answer the character of owner, to pass with the land. This is not the case of an owner selling his estate after the three years have elapsed, without expressly selling the right to compensation; for as, in the case put, he sells it in its deteriorated state, he may be considered as reserving the right of claiming compensation; but here Mr. *Brown* answers the character of owner of the deteriorated property, and which had received its damage within the three years, and there is no other person who can claim in opposition to him. Mrs. *Hodson* might have made the claim in her own life time: she might perhaps have given contingent directions by her will as to the produce of such claim, if allowed; but as she has not done so, the right must, we think, be considered as passing with the estate; and consequently, that the rule for the mandamus ought to be made absolute.

The King v. Shaw.

12 East, 479. June 27, 1810.

Upon an appeal against a rate, made under a private act of parliament, the respondent appearing to answer the appeal and admitting, when called upon by the Sessions, that he had made the rate by virtue of a certain act of parliament, a printed copy of which, in the common form, was produced in court by the appellants: and the Sessions having thereupon entered into the merits of the appeal, and decided upon them, notwithstanding an objection made by the respondent that the appellants had not given legal evidence of the jurisdiction of the Sessions to receive the appeal for want of proof of the printed copy having been examined with the rolls of parliament; this Court refused to quash their order, which was removed by *certiorari*.

AT a Quarter Sessions holden for the West Riding of the county of *York*, it was ordered as follows:—"Upon hearing the appeal of *W. Green* and *R. Wilson* against the assessment of *W. Shaw*, dated the first of *May*, 1809, made by him under the authority of the *Wakefield* inclosure act, to defray damages

occasioned by the working of the Duke of *Leed's* colliery; it is ordered, that the said assessment appealed against be quashed, and the case hereunto annexed granted by the Court for the opinion of the Court of *K. B.*" "At the general Quarter Sessions held at *Wakefield* for the *W. R.* of the county of *York*, on *January* 11th, 1810, an appeal came on to be heard in which *Green* and *Wilson* were appellants, and *Shaw* respondent. This was an appeal against an assessment made under a clause contained in a private act of parliament; a printed copy of which was offered in evidence, without any proof of its having been examined with the rolls of parliament. The Court decided, that such proof was not necessary, and admitted the copy to be received in evidence, both parties being interested under the act of parliament."

This order with the case being removed into this court by *certiorari* at the instance of the defendant, he obtained a rule calling on the appellants to shew cause why the order of sessions "made on the appeal of *W. Green* and *R. Wilson* against the assessment of the defendant, dated the 1st of *May*, 1809, made by him under the authority of the *Wakefield* inclosure act, to defray damages occasioned by the working of the Duke of *Leed's* colliery, should not be quashed for insufficiency, &c.

Parke and *Lambe* shewed cause against the rule, and contended, that it was not competent to the defendant, who had made the rate under the act in question, which gave the appeal, to call upon the appellants at the sessions to prove their right to appeal by giving strict legal evidence of the act, as a private act: for it is a general rule, that where both parties claim under the same authority, neither can object to it. [*Le Blanc*, *J.* Is not the respondent to begin, by shewing that he had a right to make the rate under the act?]

Holroyd, contra. The defendant only admitted, that he had made the rate under a certain act of parliament; but he did not admit the authority of the appellants to appeal to the sessions against his rate: when, therefore, they did appeal he had a right to object that the sessions had no jurisdiction to receive such an appeal, and to call upon the other parties to prove it. In *Rex v. The Mayor, &c. of Liverpool*, 4 *Burr.* 2244, an inquisition taken by virtue of a private act of parliament before the sheriff of *Lancashire* was, on its being removed by *certiorari* into this court, quashed: because it did not set out that certain notices had been given to the parties interested, without which the sheriff had no jurisdiction; and the Court would intend nothing in favour of an inferior jurisdiction.

Lord ELLENBOROUGH, C. J. The appellants by their appeal assumed that the sessions had jurisdiction: the respondent, if he meant to deny their jurisdiction, might have staid away; but he followed the appellants to the sessions, and appeared there to defend his rate. Then, in a case like this, the sessions did right in calling upon both parties to say whether they claimed to act under the same act of parliament: and if the respondent admitted, that he made the rate under the act which was produced, it is in derogation of justice, and a disgrace to the administration of the law, to take such an objection. And the sessions having overruled it upon that admission, and gone into the merits, we will not disturb their decision.

Rule discharged.

The King v. The Inhabitants of Mildenhall.

12 East, 482. June 27, 1810.

A servant, 11 weeks before the end of his year, on a quarrel with his master, applied for his *discharge*, which the master refused, unless the servant could get another man to stand in his stead; the servant accordingly procured another, to whom he gave money for the purpose out of his own pocket, in addition to the wages which the new man was to receive from the master; and the servant then left the service, and hired himself as a day labourer for the remainder of the year: held, that this was proper evidence from whence the Sessions might draw the conclusion of a dissolution of the contract; though it was encountered by the evidence of the servant, that his master said to him at the time, that if the other man did otherwise than well, he could send for the servant and make him serve out his time; to which the latter assented: which account was, in the judgment of the Sessions, impeached by the master's having no recollection of having so said, and saying that he had not any *intention* to have the servant back, they having parted on bad terms; which latter expression the Court received, not as evidence *per se* of the master's *intention*, but only as a reason assigned by him why he was not likely to have said what the servant stated.

WILLIAM DOWLING, his wife, and three children, were moved from the parish of *Wilcot* to that of *Mildenhall*, both in *Wilts.* The sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case.

The pauper being settled at *Mildenhall*, at *Michaëmas*, 1808, agreed with *J. Stratton*, of *Wilcot*, to serve him for a twelve month, at 6s. a week in the winter, and 6s. 6d. in the summer; with an allowance of small beer and lodging all the year, and victuals during the harvest. He went into the service at *Old Michaelmas*, and served his master at *Wilcot* till *July*, within eleven weeks of the expiration of the year. The pauper not behaving as he ought, and neglecting his business, his master and he had a dispute, in consequence of which the pauper asked his master to discharge him; but he answered he would not, unless the pauper would get another man to stand in his stead. The pauper accordingly got *W. Racey*, to whom he agreed to give a guinea and a half out of his own pocket, to take his place, besides his wages, which were to be paid to him by *Stratton*, the master. The pauper stated, that when he brought *Racey* to his master, he said, "If this man does any otherwise than well, I can send for you and make you serve your time out;" to which the pauper replied "Very well." On the contrary, the master stated, that "he did not recollect having said to the pauper that he should expect him to "return; that it was not his intention to have him back; and that they parted "on bad terms." The guinea and a half was paid by the pauper to *Racey* at the time he entered the service, and *Racey* served out the remainder of the year with *Stratton* at *Wilcot*, and received the wages from him for that time. The pauper during the remainder of the year hired himself as a day labourer in the adjoining parish, and occasionally slept at *Wilcot*. *Racey* continued to serve *Stratton*, under a new agreement, till the end of the year.

Casberd and *Merewether* were to have argued in support of the orders; but the Court thought it unnecessary to hear them. *Le Blanc, J.* observed that there was contradictory evidence before the sessions, whether this were a dissolution of the contract, or a dispensation of the service; and the sessions had decided upon it, as it was their province to do.

Burrough, *Gaselee*, and *Gunning*, contra, objected that the sessions had received illegal evidence from the master, that it was not his *intention* to have had the pauper back again; by which they had been misled. They urged, too, that there was no contradiction in the evidence; for the master did not deny the pauper's statement, but only did not *recollect* it; and according to the testimony of the latter, the settlement was clearly established in *Wilcot*. The master insisted on keeping the pauper to his contract: he merely dis-

pensed at the time with his personal service, but obliged him to procure a substitute; and said, that if the substitute did not behave well, he should expect the pauper to return; and the pauper paid the expence of the substitute. [Bayley, J. asked, if there were any case where the pauper had been held to gain a settlement by hiring and service, where after leaving his master during part of the year he had actually hired himself to another master?] They referred to *Rez v. Goodnestone*, Burr. S. C. 251, where the master consented that the pauper should go to the herring fishery, (where he must have served somebody else,) if he could get a man to do his work to the master's liking; which the pauper did, and paid the man; and did not return till after the year: and yet he was held to gain a settlement by such hiring and service. And here the pauper, having only hired himself as a day labourer, was at liberty to return at any time into the master's service when called upon.

LORD ELLENBOROUGH, C. J. The case of *The King v. Goodnestone* was an express case of dispensation of service, and the servant might have returned within the year. But let us see whether in this case the justices might not reasonably draw the conclusion which they have done, that what passed between the master and servant was a discharge of the latter. The pauper in consequence of his ill behaviour had a dispute with his master, and desired to be discharged: the master refused, unless the pauper would get another man to stand in his stead: another man was accordingly procured and brought to the master. And then, according to the pauper's evidence, the conversation between them is this:—The master said, If this man does otherwise than well, I can send for you and make you serve your time out." The pauper answered "Very well." In contradiction to this evidence, (for so the sessions must be taken to have understood it by the manner of their stating the case; for they say on the contrary,) the master swore, that he had no recollection of having said to the pauper that he should expect him to return. This was evidence to impeach what the pauper had sworn, of which the sessions were to judge: and then what follows is not giving evidence of the master's intentions, but is merely stated by the master, in confirmation of his accuracy, in not recollecting what the pauper had stated him to have said; as if the master had said, that what confirmed him in supposing that no such conversation passed, was, that he had no intention to take the pauper back. The sessions evidently understood what the master said as importing a contradiction to the evidence of the pauper: and can we say, that they did wrong in drawing that conclusion? The pauper then left the service eleven weeks before the expiration of the year: the master agreeing to his discharge, upon his getting another man to serve in his stead, whom he did procure, and who did accordingly serve: and the pauper himself entered into another service. And though it is said, that the pauper might have returned at a day's notice if recalled, I do not think that varies the case. According to the master's account, it was a case of dissolution of the contract: and the sessions have drawn that conclusion, and we cannot say that it is wrong.

GROSE, J. The pauper, upon the quarrel with his master, applied for his discharge: the master refused, unless upon condition that the pauper procured another person to serve in his stead; and the pauper complied with the condition. And then the sessions, contrasting the master's evidence with the pauper's, have drawn the conclusion that he was discharged, and that the contract was dissolved; and we cannot quarrel with that conclusion which it was competent for them to draw.

LE BLANC, J. Though the statute has said, that no settlement shall be gained by a servant unless there be a contract of hiring for a year and a service for a year, yet the cases have decided, that if the servant be absent from the service any part of the year with the leave of his master, he shall still gain a settlement. Therefore, it always becomes a question of fact in these cases, whether the absence be accounted for by a dispensation of the service,

or by a dissolution of the contract of hiring. Here the sessions have concluded, that the contract was dissolved; but they have also stated the evidence on which they drew their conclusion; and we are now called upon to say, whether that conclusion were wrong. The pauper and his master quarrelled: the pauper applied to be discharged: the master objected, unless the pauper got another man to stand in his stead: he therefore consented, if the pauper did get another man: the pauper got another man who served out the time. Was it not competent for the sessions on these facts to conclude that he was discharged? But the pauper was asked, what passed at the time; and he said, that his master said, that if the man did otherwise than well, he (the master) could send for the pauper and make him serve out his time; to which the pauper assented. The master, however, when questioned, did not recollect any such thing to have passed, and he assigned a reason why it could not probably have passed; and the sessions, taking the whole together, considered his evidence as a contradiction of what the pauper had sworn to have passed, and drew their conclusion accordingly; by which it appears, that they did not give credit to the pauper's account. Then it is said, that the pauper only engaged as a day labourer, and could have returned again into the service if recalled: but that is no confirmation of his account; for the time of year did not render it likely for him to engage in any other kind of service. There is nothing, therefore, to shew, that the conclusion drawn by the sessions was wrong; and unless we could see clearly that it was so, we should not reverse it.

BAXLEY, J. There was conflicting evidence for the sessions to decide upon; and this being a matter of fact rather than of law, and they having drawn their conclusion from the evidence, we cannot say it is wrong.

Orders confirmed.

Tunno v. Edwards.

12 East, 489. June 29, 1810.

Goods insured upon a valued policy having been seized, confiscated, and sold by order of the enemy's government, on their own account, but the necessary documents to verify the loss not having arrived here; the underwriters, on application to pay their subscriptions, agreed to adjust and pay immediately 50*l.* per cent. *in account*, but no *abandonment* was made by the assured; and in the mean time the foreign consignees of the goods, in consequence of remonstrances to the enemy's government, obtained a restoration of *half* the proceeds of the goods which had been so seized and sold; which half amounted to more than the whole sum at which they were valued in the policy: yet held, that the underwriters were not entitled to recover back the fifty pounds per cent. they had paid on account; the assured having in fact sustained a loss of half his goods for which he was no more than indemnified by the fifty pounds per cent. he had received; and there having been no abandonment to the underwriters; and the superior value of the other half of the proceeds arising from the benefit of the market, in which the underwriters had no concern.

THE plaintiff declared on the common money counts, and at the trial before Lord Ellenborough, C. J. at *Guildhall*, took a verdict for 100*l.*, subject to the opinion of this Court upon a special case.

In July, 1807, the defendant shipped 60 hogsheads of sugar on board the *Wildeman*, at *London*, for *Rotterdam*, and effected an insurance thereon against all risks whatever, and until safely landed and warehoused in the warehouse of the consignee at *Rotterdam*; such sugars having, with the charges, cost him 1543*l.* 18*s.* 10*d.*, and being valued at 1500*l.* in the policy, which was in the usual form, allowing the assured to sue, labour and travel, &c. for the recovery of the goods insured, and to call on the underwriters to contribute to the charges thereof. The plaintiff was one of the underwriters upon this policy, for 200*l.* The *Wildeman* sailed on the voyage insured under a licence

for that purpose from the *British* government, and in *August*, 1807, arrived at *Rotterdam*, where the whole of her cargo (together with the cargoes of other vessels from *Great-Britain*) was seized before landing, and afterwards confiscated, and sold by the orders, and for the account and benefit of the government of *Holland*. In *December*, 1807, the defendant applied to the plaintiff and the other underwriters on the policy for the payment of their subscriptions; but no documents to verify the loss having at that time arrived in *England*, the plaintiff and the other underwriters agreed with the defendant, that 50*l.* per cent. should be paid him immediately on account: and an adjustment was thereupon indorsed on the policy, and signed by the plaintiff and the other underwriters as follows; "adjusted a return for loss of 50*l.* per cent., on account;" and the plaintiff accordingly paid the defendant 100*l.*, being 50*l.* per cent. on his subscription. In *July* 1808, in consequence of strong remonstrances made to the *Dutch* government by the several consignees at *Rotterdam* of the said sugars, and of the other cargoes, that government consented to restore half the proceeds of the several cargoes which had been seized under the decrees against trading with *England*; amongst which the *Wildeman's* cargo was included. The gross proceeds of the said sugars amounted to 3866*l.* 10*s.* 11*d.* the moiety whereof was 1933*l.* 5*s.* 5*d.* 1-2*d.*; and from this last sum 378*l.* 4*s.* 5*d.* was deducted for the proper proportion of the freight and charges of sale, &c., and the balance of 1551*l.* 1*s.* 0*d.* was before the commencement of this action paid at *Rotterdam* to the consignees of the sugars, and handed over by them to the defendant. The question was, whether the plaintiff were entitled to recover back the whole or any part of the 100*l.* paid by him to the defendant, under the circumstances above set forth? If he were, the verdict was to stand for such sum as the Court should direct: if otherwise, a nonsuit was to be entered.

Marryat, for the plaintiff, contended, that the underwriter was entitled to recover back the whole of what he had paid, the assured having in fact since received more than the full amount of the sum insured upon the goods; and having received his indemnity from another quarter, by whatever means, was not entitled to receive, or having received, to retain it from the underwriter, according to the principle laid down in *Godsall v. Boldero*, 9 East, 72. The seizure and confiscation by the *Dutch* government was in its nature a total loss at the time; and though there was in fact no abandonment, yet that is not necessary where the *spes recuperandi* is gone: as where the goods are sunk at sea. The defendant applied to the underwriters as for a total loss, which would have been then paid but for want of the necessary documents; and in the mean time he received the 50*l.* per cent. on account: and an adjustment on account always implies an ulterior demand. [*Bayley*, J. Suppose a capture, and after application to the underwriters for payment of a total loss, but before they settle it, there is a recapture, does it not cease to be a total loss? Lord *Ellenborough*, C. J. After the seizure it remained contingent whether it would be a total loss or not; and in order to make it so, should not the assured have given notice of abandonment? There was nothing but the possibility remaining, the *spes recuperandi*, of getting back the goods, which could have prevented the payment of a total loss; for this was a valued policy.] The doubt was whether the seizure were made before or after the goods had got into the warehouses of the consignees. [*Bayley*, J. The payment of the 50*l.* per cent. was not intended to vary the rights of the parties.] If there had been a destruction of half the hogsheads shipped, or a recovery in bulk of half of them, it may be admitted that the assured would not have been entitled to recover more than half from the underwriters: but to this moment the loss continues total; for the whole of the goods were alike confiscated: and where there has been a total loss, and afterwards a salvage, it matters not how that a salvage arose. Now here it is impossible to distinguish the one half in bulk of the goods insured from the other half. Though the *Dutch* govern-

ment assumed to restore half the proceeds, yet if the assured had only received 20*l.* *per cent.* it could not have been said to be more than so much salvage. [*Bayley, J.* The 1500*l.* insured was the prime cost with the charges, and the assured stood his own insurer as to imaginary profits.] If the assured be indemnified by any means to the amount of his insurance before the action brought, he cannot recover. [*Lord Ellenborough, C. J.* If he have lost a moiety of the value of the thing insured, is he not entitled to his indemnity for that? The superior value of the other moiety arises from the mere accident of the market. But is it not an established and familiar rule of insurance law, that where the thing insured subsists in specie, and there is a chance of its recovery, in order to make it a total loss, there must be an abandonment? Now here, after the seizure, and pending the application of the claimants to the Dutch government, it remained uncertain whether there would be a total loss, or a partial remuneration; and there having been no abandonment before the action brought, and it now appearing that there has been a loss of half, and that the underwriter has only paid 50*l.* *per cent.*, which is his proportion of the loss, how can he recover it back again? *Bayley, J.* This was either a gift of half of the subject matter of insurance by the Dutch government to the owners of the goods, or an abandonment to them by that government of half the confiscation; i. e. of half the goods. *Lord Ellenborough, C. J.* The date of the confiscation does not appear; therefore I must consider the goods as subsisting in specie till the time when they were directed to be sold, and half the proceeds paid to the claimants.] It must be taken upon the facts stated, that the confiscation was immediately upon the arrival of the goods, the trade with *England* being prohibited. [*Bayley, J.* Supposing the Dutch government had returned the whole of the proceeds, would the underwriters have been entitled to recover the whole sum?] They would: but having only made a payment of 50*l.* *per cent.*, the underwriters stand in the situation of the purchasers of half. [*Lord Ellenborough, C. J.* It never was contended before, and there is no principle on which it can be contended now, that an underwriter who has paid so much *per cent.* on a partial loss is a purchaser of the goods *pro tanto*]. Suppose the assured had brought his action on the policy in *December, 1807*: at which time no salvage had been received, he must either have recovered a total loss, or nothing; if he had then recovered, or were paid his 100*l.* *per cent.* the underwriter would have been entitled to the full salvage, whatever it might have been; but instead of that, he entered into an arrangement with the underwriters, by which he received 50*l.* *per cent.* as for half of the goods insured. Now, in fact, all the goods have been lost by the confiscation, but the assured has received back by half of the actual proceeds the full sum insured, and therefore can have no claim against the underwriters upon a mere contract of indemnity. [*Lord Ellenborough, C. J.* Half the proceeds and the proceeds of half the goods are the same thing. *Le Blanc, J.* The case of *Godsall v. Boldero* was not like a mercantile insurance, for there could be no ulterior profit.]

Lawes, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. This is a case where the underwriter, having been paid 50*l.* *per cent.* on a loss, brings an action to recover it back. The goods insured were seized and confiscated by the enemy; and while it remained uncertain what would be the ultimate event, the assured applied to the underwriter, and he, contemplating his own liability to a greater amount in the event, agreed to pay 50*l.* *per cent.* in the mean time: but it turned out, that on application to the Dutch government by the consignees of the goods, such restitution was agreed to be made by that government as leaves to the assured no further claim upon the underwriters. Having therefore received half the sum insured from the underwriters, and half the proceeds from the Dutch government, and the assured being thereby fully indemnified, he could not, according to the principle which we laid down in *Godsall v. Boldero*,

maintain any action against the underwriters. But now, though the assured has lost half his goods, and only half, and the underwriter has paid but for half, the latter claims to be repaid his 50*l.* per cent. upon the ground that this was a total loss, and that the assured has received the full value of the sum insured out of the proceeds of the other half: but in order to have made it a total loss, there ought to have been an abandonment, which there has not been: therefore there is no ground for the underwriter's claim.

The other Judges assented.

Postea to the defendant.(a)

Puller and Another v. Halliday.

12 East, 494. June 29, 1810.

Where a ship was chartered to take a cargo of lead from *London* to *St. Petersburg*, and there immediately receive a return cargo from the freighter's agent, and bring it to *London*; with a proviso, that if political circumstances should prevent a return cargo from being loaded, the master, after waiting at *St. Petersburg* 40 running days without the outward cargo being unloaded, and consequently without the return cargo being loaded, should be at liberty to return to *London*, or any port in *England*; and the ship not having been permitted to unload at *St. Petersburg*, by the *Russian* government, the master, after waiting there the 40 running days, loaded a return cargo for his own benefit upon the outward cargo, both of which he brought home, and earned new freight on the homeward cargo; which freight was adjudged to him by the judgment of the Court of *C. B.* in an action between him and the freighters, over and above the dead freight stipulated to be paid by the charter-party: held, that the freighters were entitled to recover the whole of such dead freight from the underwriters upon a policy of insurance, whereby they agreed to pay a loss in case the master should not be allowed by the *Russian* government to unload the outward cargo at *St. Petersburg*; the vessel having sailed chartered by the freighters on a voyage from *London* to *St. Petersburg*, and back: and that the underwriters were not entitled to deduct such return freight earned by the master on his own account, and adjudged to him by *C. B.*; they having agreed with the assured pending this action in *C. B.* that in case the plaintiffs (to whom they had paid a per centage loss) should not be able to obtain so large an allowance as the full return freight paid to the master by reason of any demurrages or expences being allowed against the said freight, the difference should be paid by the underwriters by a further per centage, whether the same were settled between the plaintiffs and the ship by arbitration, or by legal decision.

THIS was an action against an underwriter on a policy of insurance, in which a verdict was taken for the plaintiffs at *Guildhall* for 190*l.* 1*s.* 8*d.*, subject to the opinion of this Court on the following case.

The policy was underwritten on the ship *Resolution*, Capt. *Bell*, laden by the plaintiffs with a cargo of lead; and the risk by a special memorandum therein was thus declared. "In consideration of ten guineas per cent. hereby acknowledged to be received, the underwriters on this policy agree to pay a loss in case the *Resolution*, Capt. *Bell*, should not be allowed by the *Russian* government to unload her outward cargo at *Cronstadt* or *St. Petersburg*: the said vessel having sailed chartered by Messrs. *C.* and *R. Puller*, on a voyage to *St. Petersburg* and back." In the charter party to which the memorandum alludes, (and which was annexed to this case and taken as part thereof,) the plaintiffs covenanted with Capt. *Bell*, "that if political or other circumstances should arise to prevent the shipping a return cargo, or discharging the outward cargo, they would pay 2700*l.*, with 10*l.* per cent. thereon, and 100 guineas as a gratification to Capt. *Bell*." When the ship arrived at *St. Petersburg*, she was not allowed by the *Russian* government to unload her cargo; but Capt. *Bell*, after remaining at *St. Petersburg* the due time, according to his charter-party, and conforming himself in all things thereto, took in a cargo of *Russian* produce for *Thorntons* and *Bayley*, in *England*, and stowed the

(a) Vide *Allwood v. Henkill*, Park, 6th edit. 239. *Johnson v. Shedden*, 2 East, 581.

same over the lead with which his ship was loaded by the plaintiffs, and brought both direct to *London*, and received from *Thorntons* and *Bayley* 2156*l.* 10*s.* 9*d.* for the freight of the cargo brought to them. The plaintiffs commenced actions in this court on the policy, to recover what was due from the defendant and the other underwriters. At the same time, an action was commenced on the charter-party by Capt. *Bell*, to recover 2700*l.*, the full amount of the dead freight, and the 10*l.* per cent. thereon, amounting to 270*l.*; and the 105*l.*, his own gratification: amounting in the whole to 3075*l.* The plaintiffs, by their plea to that action, claimed a deduction equal to the amount of the freight received by Capt. *Bell*, from *Thorntons* and *Bayley*. While the last-mentioned action was pending, and before it came to trial, viz. in *June*, 1809, the following agreement was entered into between the attorneys for the plaintiffs and defendant.

<p>" <i>Puller</i> and Another } <i>v.</i> " The Underwriters on } " the ship <i>Resolution</i>. }</p>	<p>Settlement of policy for 4500<i>l.</i></p>
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<p>" Gross amount - - - - - " Allowed for freight and primage } " on the voyage home }</p>	<p>£ <i>s.</i> <i>d.</i> 5672 14 9 2156 10 9 <hr/> 3516 4 0</p>
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" If 5672*l.* lose
 " What will 400*l.* lose ?

" Answer, 61*l.* 19*s.* 8*d.*"

" We agree to the immediate payment by the underwriters of this per centage: and in case Messrs. *Puller* should not be able to obtain so large an allowance as 2156*l.* 10*s.* 9*d.* in respect of the freight paid by *Thorntons* and *Bayley* by reason of any demurrages or expences being allowed against the said freight, the difference shall be paid by further per centage, whether the same be settled between Messrs. *Puller* and the ship by arbitration, or by legal decision. The above sum of 61*l.* 19*s.* 8*d.* per cent. to be paid with the taxed costs of the several actions." (Signed) *Blunt* and *Bowman*.

The adjustment thereupon made upon the policy, upon which this per centage of 61*l.* 19*s.* 8*d.* was paid, was as follows:

London, 1st *June*, 1809.

" Paid a loss of 61*l.* 19*s.* 8*d.* per cent. on terms of agreement signed by Messrs. *Blunt* and *Bowman*."

61*l.* 19*s.* 8*d.*

T. HOLLIDAY.

The above per centage of 61*l.* 19*s.* 8*d.* was accordingly paid by the defendant and the other underwriters to the plaintiffs with the taxed costs of the several actions. On the last day of *Hilary* term, 1810, the Court of Common Pleas gave judgment in the cause of *Bell v. Puller and Another*, (a) and thereby directed

(a) *Bell v. Puller and Another*.

Where a ship was chartered to take a cargo of lead from *London* to *St. Petersburg*, and there immediately receive a return cargo from the freighters' agent, and bring it to *London*; with a proviso, that if political circumstances should prevent a return cargo from being loaded, the master, after waiting at *St. Petersburg* 40 running days, without the outward cargo being unloaded, and consequently without the return cargo being loaded, should be at liberty to return to *London*, or any port in *England*: held, that such political circumstances having occurred as hindered the unloading of the outward cargo at *St. Petersburg*, and the ship having waited the 40 running days there, the master was entitled to receive the freight of a homeward cargo, which he loaded on his own account upon the outward cargo, and brought home, in addition to the dead freight payable by the freighters according to the stipulations of the charter-party.

I have been favoured by one of the counsel in the cause with the following note of the judgment given in this case:

Sir JAMES MANSFIELD, C. J. This is an action on a charter party of a very singular

that the plaintiffs should pay to Capt. *Bell* the full sum of 3075*l.* without any allowance in respect of the freight earned by him from *Thorntons & Bayley*; they being of opinion that he was entitled to retain for his own use the 2156*l.* 10*s.* 9*d.* received on that account, and also to be paid his full dead freight with 10*l.* per cent. thereon, and 105*l.* as a gratification. That sum was accordingly paid to him: and the defendant with the other underwriters having refused to pay any further per centage, this action was proceeded in for the recovery of such further per centage as will pay the plaintiffs a total loss on the sum insured, being 190*l.* 1*s.* 8*d.* or 38*l.* 4*d.* per cent. on the defendant's subscription of 500*l.* The question was, whether the plaintiffs, under all the circumstances, were entitled to recover this further sum? If they were, the verdict was to stand: if not, then it was agreed that the money paid under the adjustment should be considered as having put an end to the action; and that a nonsuit was to be entered.

kind. The demand is for 2700*l.*, by a technical phrase called *dead freight*. The defendants insist they are not bound to pay the whole 2700*l.*, because the plaintiff acquired some freight for goods which he procured to be put on board at *St. Petersburg*, and brought to *England*: and the question is, Whether the defendants are entitled to make any such deduction; or whether the plaintiff is entitled to recover the whole 2700*l.*? The declaration states, that the plaintiff let the ship on a charter party to go to *St. Petersburg* from *London*. There is the usual covenant that the ship should be tight, &c.; and that she should take on board 150 tons of lead and carry the same to *St. Petersburg*, or as near thereto as she could get, and that she would there immediately receive on board a cargo of goods from the defendant's agents, and bring them to *London*. The ship was to lie at *St. Petersburg* 40 running days in the whole. The plaintiff is to be paid at the rate of 11*l.* 1*s.* per ton, with 10*l.* per cent. *primage*, and a gratification of 100 guineas to the captain. Then it is provided, that if political circumstances should occur to prevent a return cargo being put on board, the defendants were to be at liberty to detain the ship at *St. Petersburg* 40 running days after her arrival there, and that after the ship had lain 40 running days at *St. Petersburg*, without the cargo being unloaded, and consequently without the return cargo being loaded, the plaintiff should be at liberty to return to *London*, or any port in *England*; which is the extraordinary part of the case. It happened that the *Russian* government would not suffer the cargo to be unloaded, and that, after 40 running days were expired, the plaintiff became at liberty to return to *England*, and acquired an extraordinary freight. There is no covenant to bring back the lead to *London* in case of a non-delivery at *St. Petersburg*; though, I suppose, lead would be worth much less at an out-port than in *London*. 2700*l.* is to be paid on the ship's arrival at any port in *England*. The object of the voyage was the return cargo; and the freight upon that at 11 guineas per ton would have exceeded the dead freight. A cargo homewards not being to be obtained, the defendants, I presume, were to have their lead; and the reason, I suppose, why the deed is so inaccurately drawn, was, that it was inferred, that if there was no return cargo, the lead would come back on the same terms as the return cargo. But that is inconsistent with the other clause, that on arrival at any port in *England*, the dead freight was to be paid; for certainly there was no obligation to bring back the lead to *London*. This makes it a very extraordinary case. None of the cases cited from *Abbott* or elsewhere apply so as to afford a rule for the present case; because it amounts to nothing more than supposing the captain bound by his covenant to bring back the lead: it is nothing more than a contract to bring back a certain quantity of goods, not according to a certain freight or weight, but merely as a waggoner might agree to carry goods from *London* to *Exeter* or elsewhere. Now considering this as a mere contract to bring certain goods to *England*, I see no reason why the captain may not earn what else he can by taking goods on board for his own benefit. In common cases, there usually is a covenant that the freighter will supply a certain quantity of homeward freight at the foreign port; and if he does not, the ship owner has his action on the covenant against him. But suppose, instead of leaving the damages open, he stipulates, if I cannot provide a cargo for you, I will pay you so much: would not the owner in that case have a right to take goods on board for his own account? His ship is at full liberty to make any other profit; and in such a case he doubtless would insist on more or less liquidated damages, according as he foresaw what would be his chance of getting freight at the place where he was going: he would raise or lower his demand accordingly: and I see no reason in such a case why the charterer should not pay the liquidated damages stipulated, because the ship owner had made a profit by a cargo supplied by some other person. I was at first much staggered by the case in the *King's Bench*, *Puller v. Stainforth*, 11 East, 232, which appeared very similar to this: but there the captain did not bring home the lead, but instead thereof went to *Stockholm*, and there sold the lead, and got other goods and brought them home. The plaintiffs in that

Puller, for the plaintiffs, said, that two questions would arise; 1st, Whether the adjustment of *June*, 1809, by its terms precluded the plaintiffs from recovering the further per centage mentioned in the agreement: 2dly, Whether, supposing that adjustment not conclusive, the plaintiffs were not entitled to recover from the underwriters the sum they have paid as dead freight to Captain *Bell* under the judgment of *C. B.*? At the time when the agreement was made actions were pending in this court against the underwriters to recover a total loss; and an action was pending in *C. B.* by Captain *Bell* against the plaintiffs upon the charter-party, to recover the dead freight on the voyage to *St. Petersburg*, without allowing the freight earned by him on the voyage home. After the case of *Puller v. Staniforth*, 11 East, 232, upon a similar charter-party, it seemed to be of consequence that the freight earned on the voyage home would be allowed in reduction of the dead freight on the voyage out; and the agreement was entered into with a view to that expected consequence. [Lord *Ellenborough*, C. J. Whether the adjudication of the Court of *C. P.* in the case of *Bell v. Puller* were right or wrong does not appear to us to signify upon the construction of the agreement between these parties, if that legal adjudication have enlarged the plaintiff's claim to indemnity from the underwriters; we will therefore hear the other side.]

Scarlett, contra, contended that the same question was open upon the policy on which the action was brought, as if no adjustment or agreement had taken place: the questions therefore were, 1st, What were the rights of the parties when the adjustment took place? and 2dly, What effect the adjustment had upon these rights? The judgment of *C. B.* in the case of *Bell v. Puller* is not binding as between these parties. [*Bayley*, J. We must take it now, that the plaintiffs were compelled under that adjudication to make the full payment for the dead freight.] That was not an event insured against; and an assured may sustain a loss by such an event, which he is not entitled to recover against the underwriters. The decision of that Court, too, is rather at variance with the judgment of this Court in *Puller v. Staniforth*. Lord *Ellenborough*, C. J. We there considered that Messrs. *Pullers* had adopted the agency of the captain, in proceeding with the outward cargo from *St. Petersburg* to *Stockholm*, and disposing of it there, and bringing home a return cargo from thence, on which freight was earned.] It is still open to contend, that Messrs. *Pullers*, the freighters, are entitled to stand in the place of the owner all through the voyage; which is a view of the case that does not appear to have been sufficiently pressed on the Court of *C. B.*; for they hired the ship on the voyage to *St. Petersburg* and back; the captain therefore was to be considered as their agent during the voyage out and home. [Lord *Ellenborough*, C. J. The difficulty lies in finding any general terms of hiring in the charter-party: it rather seems to be a special hiring of the ship to carry

case called on the underwriters on a very singular insurance, not of ship, freight, goods, or voyage, but the underwriters had agreed to pay a total loss in case the ship was not allowed to load a cargo at *St. Petersburg*. That was in effect an insurance of the voyage: and there the *Pullers* demanded a sum of 2500*l.* thinking they were bound to pay that to the owner: but the Court held the underwriters were not obliged to pay the whole, but the whole minus the freight obtained by the captain at *Stockholm*. There is a strong difference between the two cases: there the lead was the property of the *Pullers*, and was not brought back, but was sold at *Stockholm*, for any thing that appears: for the only means the captain had of obtaining any freight at *Stockholm* might arise from the use he made of the lead at *Stockholm*: and therefore the *King's Bench* thought, that the captain who had done all this for his own benefit, should not be entitled to that, leaving the underwriters to pay the whole 2500*l.* But in this case, on the best consideration, we think the defendants are not entitled to deduct from the 2700*l.* the profit the captain made. Something has been said, that if a full return cargo had been put on board, the captain would have got more than he will now get by the 2700*l.* with this freight. It is said by the plaintiff, pay me what you would have paid if the whole return cargo had been put on board at *St. Petersburg*, and I will allow the return freight out of it. I do not know how that is; it is a matter of calculation; but the plaintiff is entitled to his 2700*l.*

Rule discharged.

out a certain cargo to *St. Petersburg*, and to receive a certain other return cargo there from the freighters' agents, with liberty to the captain to return home after waiting a certain time there without the outward cargo being unloaded there, and the return cargo loaded on board.] The argument for a general hiring upon the voyage out and home arises from the general view of the charter-party which is to put the charterers in the place of the owner during the whole time the ship is out upon the voyage: the particular terms and conditions merely regulate the manner in which the voyage is to be conducted: and admitting that the captain is not bound to do more than the particular acts covenanted for; yet if he do more, it must be taken to be for the benefit of the substituted owners contracting with him. [Lord *Ellenborough*, C. J. As the ship is only let for a particular purpose, we cannot extend the letting beyond the terms of the contract. If there had been a general hiring, it would have been different. Would a freighter hiring a ship for a particular voyage be liable for the act of the captain going upon a voyage entirely different?] Then 2dly, the intention of the parties in coming to the agreement stated was to put an end to the action, and then the question is the same as if the plaintiff had sued upon the agreement. The underwriters defend themselves upon the ground, that by the terms of that agreement they are only liable for a certain sum, which has been paid to the plaintiffs: and they only agree to pay a certain further per centage in case the plaintiffs should not be able to obtain so large an allowance as 2156*l.* 10*s.* 9*d.* in respect of the homeward freight *by reason of any demurrages or expenses* being allowed against the said freight. That was a good consideration for putting an end to the action; and if this action had been brought upon the agreement, as in effect it must be considered to be, the plaintiff must have declared, that in consideration that they would put an end to the action on the policy, and would receive 61*l.* 19*s.* 8*d.* the defendant promised to pay that sum, and such further sum as should be allowed for demurrage or expenses allowed against the freight paid by *Thorntons and Bayley*. And the contract having been made with full knowledge of the facts, but upon a misapprehension of the law, the parties would still be bound by it, according to *Bilbie v. Lumley*. (a)

LORD ELLENBOROUGH, C. J. Both parties expected that a certain sum would have been allowed to the plaintiffs for the freight earned on the voyage homewards, but they contemplated that certain allowances for demurrage and other expences might be set off against that freight; and they agreed, that if any thing were deducted on these accounts, the plaintiffs' loss should be balanced by a further payment by the underwriters. It turns out, that both parties were in this respect deceived: then are they not both remitted to their original rights? It appears that the assured were originally entitled to recover from the underwriters a total loss: and it was contemplated at one period, that the assured were to receive 2156*l.* 10*s.* 9*d.* minus certain allowances, as a probable diminution of that loss; they thereupon entered into the agreement stated, whereby in proportion as the allowances for demurrage and other expenses might lessen the sum of 2156*l.* 10*s.* 9*d.* expected to be received by them, the underwriters agreed to pay them a further per centage beyond the sum of 61*l.* 19*s.* 8*d.* per cent. which they were presently to receive. But it turns out that instead of their loss amounting only to 61*l.* 19*s.* 8*d.* per cent, it is now increased to a much higher amount in consequence of the adjudication of the Court of *C. B.* in the action against them by Captain *Bell*, in which they were found not to be entitled to receive any part of the 2156*l.* 10*s.* 9*d.* for the home freight. The loss of the plaintiffs, therefore, upon the policy, is now enhanced by the whole amount of that sum, and therefore they are entitled to recover it from the underwriters. By the charter-party there was nothing which gave to the plaintiffs the dominion of the ship for the whole voyage out and home,

(a) 2 East, 469, and vide *Stephens v. Lynch*, 12 East, 38.

but she was let to them for special purposes only. If there had been a general hiring, they might have been entitled to the home freight. In the former case of *Puller v. Staniforth* we considered that the acts of the captain, in carrying the outward cargo to *Stockholm* and disposing of it there, and earning a freight homewards, were done by him for the benefit of the plaintiffs, the freighters, and were adopted by them: and it was not suggested to us that their adoption of the master's acts was disputed; and then the consequence we drew from such adoption followed of course; but in the case decided in the Court of *C. P.*, a question was raised, whether the *Pullers* were entitled to any freight earned by the ship beyond the particular purposes for which she was chartered by them: and it has been decided that they were not. Here, then, the plaintiffs have in the event sustained a total loss, and are therefore entitled to recover the whole from the underwriters upon this policy.

GROSE, J. declared himself of the same opinion.

LE BLANC, J. The first question arises upon the interest of the plaintiffs; it is not an insurance on freight to be earned generally by the ship, but upon the particular adventure for which she was chartered. It was a particular and special interest in the freight under the terms of the charter-party, and not a general interest in any freight which should be earned by the ship. And this differs it from the former case of *Puller v. Staniforth* before this Court, where the captain had not refused to take in a homeward cargo on account of the freighters, when he found he could not unload the outward cargo at *St. Petersburg*, but had proceeded with the outward cargo to another port, and there disposed of it, and taken in another cargo in lieu of it, which he brought home. The Court there considered him as having acted for the best in pursuance of the original adventure under the circumstances which had occurred, and that his acts were recognized by the *Pullers*. But here the master, not having been allowed to unload the outward cargo, and having remained for the stipulated time at *St. Petersburg*, took in a homeward cargo which was stowed upon the other, and brought it home, upon his own account and risk: and in an action brought by him in the Court of *C. P.* against the present plaintiffs, that Court held, that he was entitled to the freight which the ship had earned on the homeward cargo. Then while that action was depending, these parties came to an adjustment and agreement in the terms stated: and that brings it to the question upon the terms of that agreement: which did not put an end to the action upon the policy, but went upon the grounds that there was a clear payment of 61*l.* 19*s.* 8*d.* per cent. due to the plaintiffs, and that the underwriters would make good the remainder if that sum should fall short of what the plaintiffs were entitled to recover from them after the judgment of the Court of *C. P.* in the action against them by the master should be known. Then that question having been decided against the present plaintiffs, their loss upon the policy is enhanced by so much the more, and there is nothing in the terms of the agreement between these parties that stands in the way of their recovering the amount of such further loss.

BAYLEY, J. The object of the insurance in question was to reimburse the plaintiffs all the loss which they should sustain, in case Captain *Bell* should not be allowed by the *Russian* government to unload the outward cargo; and upon the action brought against them by the master, it turns out in the event that they have been compelled by the judgment of the Court of *C. P.* to pay the master the whole amount of the dead freight, and the other sums stipulated for by the charter-party, amounting altogether to 3075*l.*, and that they are not entitled to any allowance for the freight earned on the homeward cargo. And I cannot say that the plaintiffs, who had money recovered against them by the judgment of a court of law, except in a case of fraud, have paid it wrongfully. If there were any doubt as to the propriety of that judgment I should still conceive that the plaintiffs, who have been compelled to pay it, would be entitled to recover it from the underwriters under this agreement:

but I think that the judgment of the Court of *C. P.* is right. In the case of *Puller v. Staniforth*, it does not appear but that the very circumstance of the captain's disposing of the outward cargo at *Stockholm* enabled him to bring home the other cargo from thence. Though if upon consideration it had appeared to me that our opinion had been wrong, I should have had no difficulty in saying so. Here, however, the captain, after waiting at *St. Petersburg* the stipulated time, without being permitted to unload his outward cargo, might think, that while he performed his contract with the freighters faithfully, by bringing home the outward cargo upon dead freight, there was no reason why he should not make any additional profit upon the homeward voyage consistently with his engagement with the freighters: and the plaintiffs having been compelled to pay him the whole of the dead freight under the judgment of the Court of *C. P.*, I think they are entitled to recover it from the underwriters.

Postea to the plaintiffs.

Shee v. Clarkson and Others.

12 East, 507. June 29, 1810.

The broker effecting a policy, being the common agent of the assured and of the underwriter, while the premium remains in his hands for the one party, and the policy for the other; and having received notice of events which entitle the assured to a return of premium before action brought by the underwriter to recover the full premium; is authorized to deduct such return, and only to pay over the difference to the underwriter.

THE plaintiff, an underwriter, brought *assumpsit* against the defendants, policy brokers, to recover a balance of 541*l.* 10*s.* 0*d.* due to him for premiums of insurance on divers policies subscribed by him. The defendants pleaded the general issue, gave notice of set off, and paid into Court 335*l.* 10*s.* 6*d.*: and at the trial in *London* before Lord *Ellenborough*, C. J. a verdict was taken for the plaintiff for 205*l.* 19*s.* 6*d.*, subject to the opinion of the Court on the following case.

The plaintiff, in 1808, had subscribed policies of insurance, which the defendants had effected as brokers, the premiums upon which amounted to 559*l.* 10*s.* 0*d.*, and had also settled and signed upon policies subscribed by him for them adjustments for returns of premiums amounting to 18*l.*, leaving a balance due to the plaintiff of 541*l.* 10*s.* 0*d.*; for which this action was brought. The defendants insist, that they are entitled to deduct or retain out of that sum, the sum of 205*l.* 19*s.* 6*d.*, being the amount of deductions for short interests and stipulated returns of premiums for convoy upon the same policies, for the premiums on which this action was brought, and which policies had always remained in the defendants' hands, and had not been handed over to their principals. There was no evidence, that the defendants had received the premiums from their principals, nor was there any evidence that the defendants had credited their principals with returns of premium for convoy and short interest claimed by them. The plaintiff has allowed the defendants in account all the returns on policies upon ships and goods in which they were personally interested, and also all the returns on policies which have been adjusted; and the set-off or deduction claimed of 205*l.* 19*s.* 6*d.* in dispute arises upon policies subscribed by the plaintiff, which the defendants have effected as brokers for others. The defendants did not act under any *del credere* agency or commission. The events entitling to the returns claimed had happened before the commencement of the present action: but it was not admitted by the plaintiff, that the defendants were thereby entitled to deduct or set off the returns claimed, that being the question for the opinion of the Court. The plaintiff insisted, that, upon the events happening, *the principals*, and *not the brokers*, were entitled to the returns claimed, unless such returns were adjusted by the underwriters with the brokers: and the defendants insisted, that, upon the events

happening, without any adjustment, or *del credere* commission, they as brokers, were entitled to the returns, as abatements out of the premiums. The question was, whether the defendants were entitled to deduct or set off the sum of 206l. 19s. 6d.? If not, the verdict was to stand for that amount: if they were so entitled, a verdict was to be entered for the defendants.

Richardson, for the plaintiff, insisted that the defendants were not entitled to deduct the sum in dispute. The assured and the underwriters are the real contracting parties, who contract through the medium of the broker. The premium is payable by the assured *instantly*, immediately before the policy is signed, as it is expressed to be in the policy itself; though in practice the money does not pass immediately, but an account is carried on through the broker: who, however, as between the assured and underwriter, is considered as having received the premium at the time when the policy is executed for the benefit of the underwriter; and the underwriter, who admits by the policy that he had received it, could not maintain an action for it against the assured. [The Court here interposed, and suggested, that the case might be more perfectly stated by finding the fact, upon which the merits of the case turned, whether or not the broker continued an agent of the assured for the purpose of adjusting and receiving returns of premium: and after some hesitation that fact was admitted.] But he contended, that the broker could not adjust returns of premium for the assured, without the consent of the underwriter, so as to bind him against his consent. [Lord *Ellenborough*, C. J. No doubt the underwriter may at any time determine the agency of the broker, as far as regards himself: and if the underwriter had put an end to the broker's agency for him after the premiums credited to him, and before the events happened on which the returns of premium were to be made, there might be some question: but while the agency on both sides subsists in the usual manner, and after the events have happened which entitle the assured to the returns, how can the underwriter recover the premiums against the broker, without allowing the returns? There is no difference in principle between the agency of the broker for settling *losses*, and his agency for adjusting and receiving *returns of premiums*; and in *Wilson and Others*, assigns of *Fletcher v. Creighton*, and *Another*, (a) it was held, that the defendants factors had no right to set off *losses* on policies underwritten by the bankrupt for their correspondents, though happening before the bankruptcy, against an action for premiums debited to the defendants by the bankrupt upon insurances on behalf of those correspondents; the assured themselves only being entitled to sue for such losses. And *Grove v. Dubois*, where the broker was held entitled to set off under the general issue such losses, turned expressly upon the fact of his having a commission *del credere* from his principal, the assured; which fact is negatived in this case. [Lord *Ellenborough*, C. J. The amount of the premiums, depending often upon contingencies, are to be liquidated in the events; and till those events are determined, the broker is the mutual agent for the one to pay, and for the other to receive: and if the agency be not put an end to by either party before the event, that ascertains what the true amount of the premium is, for which the underwriter ought to have been credited. There is no question between these parties about *losses*. [Bayley, J. Suppose it turned out, after a policy made as interest should appear on goods expected to be shipped, that there was no interest; could the underwriter after that was known, recover the premium from the broker, leaving it to be sued for and recovered back by the assured?] If there were no fraud, it should seem that such an action would lie by the underwriter against the broker. [Lord *Ellenborough*, C. J. Suppose a case where no broker intervened, and the underwriter, after the event, sued the assured for the full premium, he could only recover, subject to the deduction for return of premium.] That would be a different kind of

(a) Tr. 22 G. 3. B. R. cited in *Grove and Another, Assignees of Liotard, v. Dubois*, 1 Term Rep. 113, and in 1 Marshall on Ins. 204.

dealing; for as between those parties it is always understood to be a ready money dealing: the underwriter admits by the policy, that he has received the money from the assured. But that is not the case with the broker; and though he may be the agent of the assured for the purpose of paying the premiums, and making adjustments for and receiving returns of premiums; yet he is not the agent of the underwriter for the purpose of making such adjustments: for the underwriter always makes his own adjustments with the broker. The premium is money which the broker has received for the use of the underwriter, and it can be no answer for the broker in a court of law, that the underwriter owes his principal another sum. A debt must always be proved and averred in the name of the principal and not of the agent; and it is only in the case of the principal residing abroad that a remedy is provided by the stat. 49 G. 3. c. 121. s. 16, which enables the agent to prove the loss: but this is an attempt to do the same thing in effect for a principal at home.

Marryat, contra, after observing that the distinction between the case of loss, and that of a return of premium, was, that in the case of a loss the claim originated to the assured himself and not to the broker, was stopped by the Court.

LORD ELLENBOROUGH, C. J. That makes all the difference. The whole premiums sued for might have been stopped by the underwriter in the hands of the broker, and while the events on which the returns of premium depended were yet undecided, his agency on the part of the underwriter might have been determined, and he might have been ordered to pay over the money. But the broker is the common agent of both the assured and the underwriter; and the underwriter knows, that the broker is the trustee for the assured as long as the policy remains in his hands, to adjust and receive returns of premium for him when the events have happened on which they are to be made. Here then the brokers, having notice that the events had happened which entitled the assured to such returns before they had paid over the entire premiums to the underwriter, were entitled to deduct so much from the gross amount of those premiums.

GROSE, J. was of the same opinion.

LE BLANC, J. The difference lies between that which is due to the assured for losses, and what is due for returns of premium. Suppose a premium of 10 guineas per cent. is to be reduced to 5, if the ship sail with convoy; and before the money is paid over to the underwriter the event is known to have happened which reduces the premium to 5 guineas; what is the sum which the underwriter is entitled to receive? Clearly no more than 5. Then he can recover no more from the broker who is the common agent of the two.

BAXLEY, J. The underwriter suffers the full premium to remain in the hands of the broker, who is the agent also of the assured: and, in the mean time, the event happens which reduces the underwriter's claim in respect of the premium to a less sum than it was at first: it is then the justice of the case, and the law of the case also, that the broker should pay over to him only so much as remains due at the time. The broker is the agent for the assured, who has a right to give him notice not to pay over to the underwriter more than is then due.

Postea to the defendants.

Griffith v. Young.

12 East, 513. July 2, 1810.

A tenant having agreed with his landlady, that if she would accept another for her tenant in his place, (he being restrained from assigning the lease without her consent,) he would pay her 40*l.* out of 100*l.* which he was to receive for the good will, if her consent were obtained; and having received the 100*l.* from the new tenant, who was cognizant of this agreement; is liable to the landlady in an action for money had and received for her use; the consideration being executed, and therefore the case being taken out of the stat. of frauds, as a contract for an interest in land.

THE defendant occupied a house as tenant to the plaintiff under lease, and

being desirous of assigning over the premises to one *Pugh*, which he could not do without the leave of the plaintiff, he applied to her for that purpose; and it was finally agreed between the parties, that in consideration that the plaintiff would accept *Pugh* as her tenant at a certain rate, he should pay 100*l.* for the good will, out of which the defendant was to pay the plaintiff 40*l.* for her consent. *Pugh*, who was cognisant of this agreement, afterwards paid the 100*l.* to the defendant, who then promised that Mrs. *Griffith* should have her 40*l.* and that she might send for it and receive it: but when applied to afterwards on her behalf, the defendant refused to pay it over; and said, that there was no written agreement, and that words were but wind. At the trial before *Ld. Ellenborough*, C. J. at *Westminster*, the plaintiff, having failed upon a special count in *assumpsit* upon the agreement, resorted to the general count for money had and received: but was nonsuited upon an objection taken, that this was an agreement for an interest in land, and therefore ought to have been in writing by the 4th section of the statute of frauds, 29 Car. 2. c. 3.

Garrow and *Comyn*, in moving to set aside the nonsuit on a former day in this term, contended that money paid for *good will* was not for an interest in land, but collateral to it: but that, at any rate, if one agree to receive money for the use of another, which the defendant must be taken to have done in this case, (and *Pugh*, who paid the money, and was cognisant of the agreement, said at the trial, that he would not have paid the 100*l.* to the defendant if the latter had not promised to pay the 40*l.* to Mrs. *Griffith*;) it matters not on what account it is received, but it is recoverable as money had and received for the use of that person.

Park now shewed cause against the rule for setting aside the nonsuit: and admitting that the 40*l.* was received by the defendant to the plaintiff's use, insisted that it was still received on account of an interest in the land, which was to be made over by the plaintiff to *Pugh*, the payer. The consideration was the plaintiff's accepting *Pugh* as her tenant, which is giving him an interest in the land, under whatever name it may be called: and he referred to a case of *Smith v. —*, before *Rooke*, J. on the northern circuit, where an agreement to let in an undertenant for a certain sum which was to be paid, was held to be within the statute. [*Ld. Ellenborough*, C. J. I have no doubt that it would be within the statute, if the contract were executory; but when the contract is executed, and money has been actually paid by the succeeding tenant to the defendant in trust to be paid over by him to the plaintiff, shall he now gainsay that he received it for her use. *Le Blanc*, J. The consideration is past: *Pugh* is in possession, and has paid this money to the defendant for the very purpose of his paying it over to the plaintiff: it is clearly, therefore, money received for her use.] Not so, where the consideration is illegal and void by the statute.

LORD ELLENBOROUGH, C. J. If one agree to receive money for the use of another upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money, if indeed it were not absolutely immoral or illegal, the persons so receiving it cannot be permitted to gainsay his having received it for the use of that other. (1) I was misled at the trial by having my attention called to the statute of frauds, when, in truth, the question was wholly collateral to it.

(1) Assuming that *Pugh* in this case must be considered as a party to the agreement, and consequently that he paid the money into *Young's* hands for the use of Mrs. *Griffith*, the cases of *Tenant v. Elliott*, 1 Bos. & Pull. 3, and *Farmer v. Russell*, 1 Bos. & Pull. 296, would perhaps have warranted his Lordship in going a step further. According to those decisions, *Young* could not retain the money under such circumstances, against Mrs. *Griffith*, even if the consideration upon which it was paid had been illegal. It is clear that *Pugh* having parted with his money, upon a consideration executed, could not reclaim it. If Mrs. *Griffith* could not recover from *Young*, he would be allowed to apply to his own use money which he received for the use of another.

LE BLANC, J. It would have been a different question, if *Pugh* had not paid the money to the defendant, and the action had been brought against him. GROSS and BAYLEY, Justices, according;

Rule absolute.

Doe, on the Demise of Samuel Cotton v. Stenlake.

12 East, 515. July 3, 1810.

Under a devise to one and *her heirs*, (she having two children before, and a third born after making the will) *during their lives*; held that these latter words were repugnant to the others, and that she took an estate of inheritance.

THIS was an ejectment for land called *Moorhead Meadow*, in *Devonshire*, which was brought on two demises of *Samuel Cotton*; one laid on the 18th of *May*, 1807, the other on the 29th of *September*, 1809. At the trial at *Exeter*, before *Chambre, J.* a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

Edward Bowden was seised in fee of the premises in question, and had a son *Edward*, and a daughter *Phillis*, who, in 1755, was married to *James Cotton*, and had by him three children, *Samuel*, the lessor of the plaintiff, and two daughters. *Samuel* and *Edicle*, the eldest daughter, were born before the making of the will after mentioned, and one daughter was born after. *Bowden*, the elder, by his will dated 27th of *February*, 1773, duly executed and attested, devised (*inter alia*) as follows:—"Also, I give unto my daughter *Phillis Cotton*, and *her heirs*, *Moorhead Meadow during their lives*;" and on the 17th of *October*, died seised of the premises; leaving *Phillis Cotton* and his son *Edward Bowden* surviving him. *James Cotton*, in right of his wife, immediately entered on *Moorhead Meadow*, and occupied it; and after the death of *Phillis*, on the 31st of *October*, 1784, still continued to occupy it, without interruption, till 1789, when it was claimed by *Edward Bowden*, the son of the testator; to whom, after ejectments were delivered and some law proceedings had, *James Cotton* gave up the possession on the 12th of *February*, 1790. *James Cotton* died on the 17th of *May*, 1807, leaving *Samuel*, the lessor of the plaintiff, his eldest son and heir at law, and heir at law to *Phillis Cotton*. The defendant is in possession under the devisees of *Edward Bowden* the younger. If the plaintiff were entitled to recover, the verdict was to stand: if not a nonsuit was to be entered.

Dampier, for the plaintiff, having stated the question to be what estate *Phillis Cotton* took under the devise to her and *her heirs, during their lives*; Lord *Ellenborough, C. J.* asked the defendant's counsel, what objection there could be to rejecting the latter words, *during their lives*, which were repugnant to the devise to the daughter and *her heirs*?

Burrough answered, that *Phillis Cotton*, at the time when the will was made, had two children living; and that if by the word *heirs* the testator meant *children*, which seemed probable, the whole would be reconciled, and the mother and her two elder children would then take joint estates for their lives. [*Grose, J.* observed, that according to that construction the youngest daughter, born after the making of the will, though before the testator's death, would take nothing.] *Burrough* said, that he must so contend: but that the difficulty of doing so was less than that of rejecting words sensible in themselves, and not repugnant to the devise to *her heirs* in the sense he used them, as synonymous to *children*. In *Doe v. Laming*, 2 Burr. 1100, it was considered not to be of absolute necessity that the word *heirs* must be a word of limitation; but that it might be used as a word of purchase.

Lord ELLENBOROUGH, C. J. As the defendant's interpretation of the will would exclude the after-born child from taking, that alone is a sufficient reason against it. If the word *heirs* is to be understood either as *heirs generally*, or as *heirs of the body*, the lessor of the plaintiff is entitled; and he is not barred from maintaining this ejectment by lapse of time; for his father's possession was not adverse to him; and that continued down to the 12th of February, 1790; and this ejectment must have been commenced before the expiration of 20 years from thence. The words *during their lives*, after the devise to the daughter and *her heirs*, are merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit would enjoy the property; for whatever estate of inheritance the heirs of his daughter might take they could in fact only enjoy the benefit of it for their lives.

Per Curiam,

Postea to the plaintiff.

Blackett and Another v. Smith, Treasurer of the West India Dock Company.

12 East, 518. July 3, 1810.

The owner of a homeward bound ship entering the *West India Docks* is so leaky a condition as to require immediate unloading and assistance without waiting her turn to be quayed and unloaded in rotation in the import dock, in the manner required by the 59 G. 3. c. 69, is bound to bear the extra expenses of laborers for pumping the ship after the crew were discharged, and for delivering the cargo into lighters in the outward dock or basin; also for cooping previous to such delivery into lighters, and for the hire of such lighters; the company having afterwards unladen the cargo out of such lighters upon the quays in the import dock, and performed the requisite cooPAGE, &c. upon such unloading, in the same manner as they would have done if the cargo had been delivered out of the ship itself in its proper time and place.

THE plaintiffs declared in *assumpsit*, and stated, that they were possessed of a ship lately arrived in the river *Thames* from the *West Indies*, with a cargo of *West India* produce; and in consideration that they had caused her to enter the docks of the *West India Dock Company*, erected pursuant to the stat. 39 Geo. 3. c. 69, of the completion whereof due notice had been given, and also in consideration that the plaintiffs would pay to the company the rate or duty of 6s. 8d. per ton of the ship's burthen pursuant to the statute, the company promised that they would use due care and diligence about, and bear all charges of, the navigating, mooring, unmooring, removing, and management of the ship, from her arrival into the entrance of the docks at *Blackwall*, until she should be unloaded and moored in a certain dock of the company appropriated to light ships, and also in and about and of the unloading of her cargo within the docks, and the landing waiters' fees on account thereof, and also in and about and of the cooPAGE and hoops and nails, which the cargo might require in the course of such unloading thereof. That the plaintiffs paid the duty of 6s. 8d. per ton, amounting to 1011. 7s. 1d. That when the ship entered the docks she was leaky, and it was necessary for the preservation of the cargo that it should be unloaded, and the pumps kept at work; whereof the company had notice. Yet the company refused to unload the cargo, or to cause the pumps to be worked; by reason whereof the water flowed into the ship; and the plaintiffs, for the preservation of the cargo, were put to the expense of 169l. 0s. 6d. in pumping the ship and unloading the cargo, and in cooping and providing hoops and nails in the course of such unloading thereof. There was a second count for not lightening the ship; and the 3d and 4th were founded on promises to bear all the charges of the navigating, &c.; omitting the using due care and diligence. There were also the common money counts. The defendant pleaded *non assumpsit*; and at

the trial of the cause before Lord *Ellenborough*, C. J. in *Middlesex*, a verdict was found for the plaintiff for 169*l.* 0*s.* 6*d.*, subject to the opinion of this Court upon the following case.

Previous to *July*, 1809, the *West India* docks were completed in pursuance of the acts 89 Geo. 3. c. 69, and 42 G. 3. c. 113, and notice thereof was given as required by the latter of those acts. The defendant is the treasurer of the company. The ship, the *City of Edinburgh*, of which the plaintiffs are owners, arrived off *Blackwall*, in the river *Thames* from the *West Indies*, with a cargo of *West India* produce on board, on the 18th of *June*, 1809, and having applied to be admitted into the *West India* Docks, the printed regulations of *June*, 1809, signed by the secretary of the Dock Company, were delivered to the captain. [A copy of these printed regulations formed a part of the case, but nothing particular turned on them.] The ship entered the basin at the *Blackwall* end of the *West India* Docks on the 19th of *July*, 1809, with her captain, officers, and crew on board, and they were at liberty to remain on board so long as she remained either in the basin or in the outward dock. The whole of the cargo was duly entered at the custom-house, and the certificate thereof received at the dock offices on the 2d of *August*, 1809, previous to which time no part of her cargo could be landed. The ship was so leaky when she entered the basin that it was necessary for the preservation of the cargo to keep the pumps at work, and for that purpose either to retain the crew on board, or to hire labourers to work the pumps. The quays and wharves in the import dock are those assigned by the directors of the company for the discharging and landing of goods; and which import dock is inclosed within walls, as required by the act. The captain declined signing the printed declaration required by the company from the captains of ships to be unloaded in the import dock; which is in this form, and directed to the proper officer:

"Sir,

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The ship whereof I am master, is sufficiently tight, so as not to require pumping during the hours of intermission from business; viz. between 4 o'clock on Saturday afternoon and 8 o'clock on Monday morning. I request you to give an order to the dock master, *Blackwall* end, to take the ship into the import dock; holding myself responsible to the *West India* Dock Company for any injury that may arise therefrom."

After the entrance of the ship into the basin at *Blackwall*, notice was given to the company that she was leaky. And she was in fact so leaky, both previous and subsequent to her entering the basin, as to render it necessary to keep the pumps at work for the preservation of the cargo; and on that account it became requisite to unload the cargo into lighters, to be sent into the import dock, and there landed on the quays appropriated to the unloading of such goods. From the number of ships passing through the basin into the import dock after the ship entered the basin, it became inconvenient and unsafe for her to remain in the basin, and she was therefore, on the 31st of *July*, removed into the outward dock by the directions of the company's officers, where her officers and crew were at liberty to remain on board her the same as in the basin, and where her cargo could with more safety and convenience, and with equal dispatch, be unloaded into lighters. On the 27th of *July*, 1809, the plaintiffs sent the following letter to the Company: "Gentlemen. *London*, 27th *July*, 1809.—As owners of the ship the *City of Edinburgh*, we beg leave to request you will order your dock officers to furnish to-morrow morning lighters and proper assistants to discharge her cargo, which is now in the basin of the company's docks at *Blackwall*, or so much as may be considered necessary: but in case your officers continue to decline or refuse or neglect to provide such craft or assistance after this notice, we shall hire them ourselves, and charge the expense attending the same to the company, as we conceive they are obliged, under the 137th section of 39 Geo. 3. c. 69, to unload and discharge the

cargo of this ship, in consideration of the duty of 6s. 8d. per ton, which is imposed upon her burthen by that section of the statute." Signed, &c. The dock company refused to comply with the request contained in the above letter. The plaintiffs, on the 29th of *July*, hired lighters to unload the cargo, and the whole of it was unloaded into lighters, and sent into the import-dock, and there unloaded by the dock company upon the proper quays, after the entry of the cargo at the custom-house. On the 5th of *August*, it was the turn of this ship to be quayed in rotation, but the dock company began to unload the lighters containing the cargo on the 4th of *August*, and the cargo was completely unloaded on the 12th. The expenses of unloading the cargo into lighters were paid by the plaintiffs, as follows :

	<i>l.</i>	<i>s.</i>	<i>d.</i>
<i>J. M.</i> for coopering	-	-	-
<i>J. S.</i> for delivering the cargo, the crew having been discharged	21	5	6
<i>J. D.</i> for lighterage	26	10	0
	51	5	0
	<hr/>		
	99	0	6

In addition to the above expenses, the plaintiffs paid for the hire of labourers to pump the ship, after she entered the basin, and before the completion of her unloading, 70*l.* Previous to her entering the basin the pumps had been worked by the crew; but after their departure, viz. on the 10th of *July*, 1809, it became necessary to employ labourers to perform that service. Of each of the said sums of 99*l.* 0*s.* 6*d.* and 70*l.* a part was incurred before the time when the ship's turn to be quayed in rotation arrived, the amount of which, if material, it was agreed should be settled out of court. The whole cargo was landed by the servants of the dock company from the lighters upon the same quay, and placed in the same warehouses, as it would have been if the ship had discharged her cargo alongside the quay in the usual course. The cooperage required to be performed to the cargo upon the landing thereof from the lighters, and upon the same being deposited in the company's warehouses, was performed by the company. The duty of 6s. 8d. per ton upon the burthen of the ship, imposed by stat. 39 G. 3. c. 69. s. 157, was duly paid by the plaintiffs, on the 5th of *September*, 1809, and amounted to 101*l.* 7*s.* 1*d.* The plaintiffs gave due notice of the action. The question was, Whether the plaintiffs were entitled to recover the sums of 99*l.* 0*s.* 6*d.* and 70*l.*, or either of them, or any part thereof? If they were, then the verdict was to stand for such sum as the Court should direct: if they were not entitled to recover any part of their demand, then a verdict was to be entered for the defendant.

Harrison, for the plaintiffs, when this case was called on, was asked by Lord *Ellenborough*, C. J., whether he meant to contend, that a ship coming into the docks in the leaky condition of this ship, so as to require all these extraordinary precautions, was to be nursed and comforted by the dock company, as if the docks were to be considered as a hospital for infirm ships? To which he answered, that if she had not been compelled to go into the *West India Docks*, she might have gone to other places in the river where she could have procured the assistance she was in want of, without paying the dock rates. If it had not been considered that the company were at all events bound to bear all the charges of unloading her, application might in the first instance have been made to three commissioners of the customs, (a) for licence to permit the cargo to be landed at some other legal quay. But whatever the inconvenience or extra expense to the company may be from the unloading of ships which arrive in a leaky condition, it is an inconvenience and an expense which arise from the monopoly of the company, and they are bound therefore to provide the means of obviating or bearing it; and, till lately, they have done so.

(a) Vide stat. 39 G. 3. c. 69. s. 89.

In consideration of the rate of 6s. 8d., the company engage to pay, Sect. 137, "all charges and expences of the *navigating, mooring, unmooring removing and management* of the ship from her arrival at the entrance into the docks "at *Blackwall until such ship shall be unloaded and moored in the dock* for "light ships, and also of the *unloading or unshipping of her cargo* within the "said docks, &c. and the *cooperage, hoops, and nails* which such cargo may "require in the course of such unloading thereof," &c. [Lord Ellenborough, C. J. Is it not an implied condition, that the ship shall be in a navigable, moorable, and removable condition when she comes into the docks; otherwise the extent of loss may be incalculable which the company might incur in providing extraordinary means of performing those services for ships which were in such a crazy state as not to be capable of being navigated, moored, removed, and unloaded in the ordinary course.] The condition of the ship may be such as to require these services to be performed immediately on her entrance into the docks, without any default of the merchant or owner; and great loss may be incurred if she be obliged to wait for a certain turn before the company are bound to unload her. [It was observed by the counsel for the company, that the necessity of ships being unloaded in rotation, (a) and of their being unloaded upon the quays in the import dock, (b) was imposed by the acts of parliament; which for purposes of revenue as well as for the general protection of the whole mass of property landed within the docks, required the exclusion of all persons except during the appointed hours of business, when the revenue officers were to give their attendance.]

Lord ELLENBOROUGH, C. J. The law requires ships of this description to go into the docks: and if they be in such a state when they arrive there, that they cannot wait for their proper turn to unload, they must discharge their cargo at once; and if any inconvenience or loss ensue to the owners from not being able to do this in the manner prescribed by the acts, it must be attributed partly to the regulations of the acts, and partly to the leaky condition of the ship itself. It is a grievance, however, which the acts throw upon the owners, and not upon the company. It must not be forgotten, however, that there are some inconveniences on the other side to be guarded against; for if a ship just able to swim into the docks were to be provided for immediately by the company with all the accommodation and convenience which her situation might require, the company would not carry on a very gainful trade. The legislature, however, have provided a remedy for extreme cases by giving power to three commissioners of the customs to enable ships arriving with cargoes of *West India* produce to unload elsewhere than in the docks: If a proper case be laid before these commissioners, they will alleviate the hardship as far as they can; but that alleviation does not enable the company to break in upon the rotation required by the act in the unloading of ships within the docks. The inconvenience, therefore, which may in some instances happen from these regulations, must rest on the party upon whom it is thrown by the legislature. This is one of the fairest cases of defence for the company which has come before us upon the construction of these acts. The rate of 6s. 8d. per ton for ships, required to be paid to the company for the charges and expences of navigating, mooring, unmooring, removing, and management of such ships in the docks, and for the unloading their cargoes, &c. must be intended of the ordinary charges and expences of navigating, &c. for such ships as are in a reasonably navigable, moorable, unmoorable, removable, and manageable condition, and capable of complying with the requisitions of the acts; and it never could have been intended by the legislature that the company should be obliged, in consideration of that rate, to take upon themselves all the extra expences which ships in the state of infirmity in which this ship presented itself to them might require to enable her to discharge her cargo.

(a) Vide 42 G. 3. c. 113. s. 17.

(b) Vide 42 G. 3. c. 113. s. 3, 4, 5, 7, 8, 9, 10, 11.

GROSE, J. The construction contended for by the plaintiffs would be productive of much more inconvenience on the one side than it would obviate on the other. According to this, the company might, in a variety of instances, be called upon to pay more for the accommodation which they rendered than they were entitled to receive under the act of parliament. It would besides, open a door to very great frauds.

LE BLANC, J. That which has occurred in the present case is a possible inconvenience arising out of this establishment, which every body must submit to for the general benefit of the whole trade, which has been advanced by it.

BAYLEY, J. concurred.

Postea to the defendant.

East was to have argued for the defendant.

Allnutt and Another v. Inglis, Treasurer of the *London Dock Company*.

12 East, 527. July 3, 1810.

Where private property is, by the consent of the owner invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest or privilege conferred for their benefit. Therefore where the *London Dock Company*, having built warehouses in which wines were deposited, upon payment of such a rent as they and the owners agreed upon, afterwards accepted a certificate from the board of treasury under the general warehousing act of the 43 G. 3. c. 132, whereby it became lawful for the importers to lodge and secure the wines there, without paying the duties for them in the first instance; and it did not appear that there was any other place in the port of *London* where the importers had a right to bond their wines; (though if the exclusive privilege had been extended to a few others, it does not appear that it would have varied the case :) held that such a monopoly and public interest attaching upon their property, they were bound by law to receive the goods into their warehouses for a reasonable hire and reward; but whether, having accepted such certificate, they could afterwards repudiate it at pleasure. *Qu.*

THE declaration stated, that after the passing of the stat. 39 & 40 Geo. 3. c. 47, (the *London dock act*,) and the stat. 43 Geo. 3. c. 132, (the general warehousing act,) and the stat. 44 Geo. 3. c. 100, (the act for warehousing in the *London dock warehouses*,) and after the docks, quays, and wharves made by the *London dock company*, according to the first act, were fit for the reception of ships and landing of goods, and after 15 warehouses were erected by the company upon their premises, and in the judgment of the commissioners of the treasury the same warehouses were fit for the reception of goods described in the act, and the same goods might safely be deposited and remain there under the regulations and directions of the act, and after three of those commissioners, *by the permission and with the consent of the company*, had certified their approbation of such warehouses, and such certificate had been duly published as required by the act, the plaintiffs imported into the port of *London* 40 pipes of wine, being goods enumerated in table B of the act, and which might lawfully be secured in the said warehouses so certified, without the duties due being first paid on importation, according to the provisions of the act, with intent and for the purpose of securing the same in those warehouses, and thereby taking the benefit of those statutes; and with the same intent and purpose caused the same goods to be duly entered with the proper officer of the customs, and to be regularly landed, and duly entered with the proper collector of excise, &c. and did all things necessary and required to legalize the lodging of the said goods so imported by the plaintiffs in the said warehouses so certified: of all which premises the company had notice, and were required by the plaintiffs to receive the said goods into their said ware-

houses, and to permit the same to be there lodged and secured, without the duties due on importation being the first paid, according to the statutes, &c. *for reasonable hire and reward* in that behalf to be paid by the plaintiffs to the company, and then and at all times were ready and willing to pay the company such reasonable hire and reward, and tendered the goods to the company for the purpose aforesaid. And then the plaintiffs averred, that at the time of such importation and tender of the goods, and when the company were so required as aforesaid, there was sufficient room vacant in the said warehouses to have conveniently and lawfully lodged and secured the same goods, if the company had been minded to have received the same; *whereby it became and was the duty of the company* to admit and receive the said goods into the said warehouses, and to permit the same to be there lodged and secured as aforesaid. Yet the company, not regarding their duty in this behalf, did not when so required, or at any time, admit or receive the said goods into the said warehouses, or into any warehouses, or permit them to be there lodged or secured according to the said statutes, but then and at all times wholly refused so to do, and wholly rejected and excluded the same; *whereby the plaintiffs were deprived of the benefit which would otherwise have accrued to them from lodging and warehousing the said goods, without payment of the said duties*, and have been obliged to advance and pay the said duties thereon to the amount of 500*l.*, and have thereby lost the interest and profits they would otherwise have made of the said sum, and also their goods remained unhoused a long time, and were injured, &c.

The defendant, by his plea, protesting that the hire and reward offered by the plaintiffs to the company for warehousing the goods was reasonable, pleaded that before the time when the company was so required by the plaintiffs to admit and receive the said goods, and to permit the same to be lodged and secured as aforesaid, to wit, on the 1st of September, 1809, *the company published a table, containing the terms of hire and reward for which alone they would receive the goods of any person into their warehouses, or permit the same to be there lodged or secured; which terms of hire and reward exceeded the terms of hire and reward in the declaration mentioned:* of all which premises the plaintiffs had notice: and that the plaintiffs, at the time when they required the company to admit and receive the said goods, and permit the same to be lodged and secured as aforesaid, refused to pay and to agree to pay the company hire and reward in respect of the said goods according to the terms contained in the table so published: and because the plaintiffs refused so to do, the company refused to admit or receive the said goods into their warehouses, or permit the same to be there lodged or secured, as it was lawful for them to do in that behalf, &c. To this there was a general demurrer.

Richardson, for the plaintiffs. The reasonableness of the hire and reward offered by the plaintiffs to the company for the privilege of warehousing their goods in its warehouses, without the immediate payment of the import duties, is admitted: and the question is, whether the company were bound to receive the goods upon those terms. It is a general rule of law, that where a party has a monopoly granted to him for public purposes, he is bound to render the service or use of the thing to which his privilege is annexed for a reasonable compensation. Lord *Hale*, in his treatise *de portibus maris*, (a) says, "a man for his own private advantage may in a port town set up a wharf or crane, and may take what rates he and his customers may agree for cranes, wharfage, &c.; for he doth no more than is lawful for any man to do, *viz.* makes the most of his own," &c.—"If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods, as for the purpose, because they are the wharves only licenced by the queen, according to the st. 1 Eliz. c. 11, or because there is no other

wharf in that port as it may fall out where a port is newly erected; in that case, there cannot be taken arbitrary and excessive duties for cranes, wharfage, &c., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's licence or charter; *for now the wharf and crane and other conveniences are affected with a public interest*, and they cease to be *juris privati* only. As if a man set out a street in a new building on his own land, it is now no longer bare private interest, but it is effected with a public interest." [Lord Ellenborough, C. J. I suppose it is admitted on the part of the company, that as the law now stands, and has been acted upon, there is no other place in which these wines could have been bonded. *Le Blanc*, J. I take it that wines coming elsewhere than from the *East* or *West Indies* cannot, under the bonding act, be bonded in any other place in the port of *London* than in the *London* docks.] Unless the goods were protected by the second section of the st. 43 G. 3. c. 132, they would have been liable to forfeiture for non-payment of duty on importation, if warehoused elsewhere than in these warehouses. On the same principle of a monopoly, it is said in *Saville*, 14, that the properties of every ferry, are, to have an able ferryman, a present passage, and reasonable payment for the passage. And in *Bolt v. Stennett*, 8 Term Rep. 606, where the question was, whether the public had a right to use a crane erected on one of the public wharves in *London*; it was considered by this Court, and also by Lord C. J. *Eyre*, in a case between the same parties, Cited ib. 608-9, that the public had such a right on paying a reasonable satisfaction to the owner. Then under the warehousing act, the intent of the legislature was not merely to confer a benefit upon the *London* dock company, but to make them the instruments of a public benefit to the trade of *London*: and the company having accepted the monopoly *cum onere*, and knowing such to have been the intent of the legislature, they cannot now convert it into an engine to extort unreasonable rates. By the original *London* dock act, 39 & 40 G. 3. c. 47, no mention is made of *warehouses*, but authority is given to the company to make wet docks and wharves, for which certain rates are given to them by s. 59, as a compensation, which of course, the legislature must have intended to be reasonable: s. 67, gives them a monopoly for the landing of all wines not brought from the *East* or *West Indies*. Then came the general warehousing act, 43 G. 3. c. 132, allowing goods warehoused in these and other certain warehouses to be bonded, without immediate payment of duties; the object of which is resited in the preamble to be, that "it would greatly tend to the encouragement of the trade and commerce of *Great-Britain*, and to the accommodation of merchants and others," &c. The circumstance of these warehouses being surrounded by a wall facilitated the extension of the benefit to them, and thereby enable them to become the instruments of the general benefit; and s. 2, makes it lawful for the merchants to warehouse the goods enumerated in schedule B. of the act in these warehouses. If the clause had stopped there, it would clearly have been compulsory on the company to have received the goods; but the latter part of the clause renders that more doubtful; and it will be contended that the effect of the regulation is merely to protect from penalties the owners warehousing their goods there without first paying the duties: yet, taking the whole scope and view of the clause together, it would be illusory to make it lawful for the merchants to warehouse their goods there, if the company were not bound to receive them: for merchants might be induced by that privilege to speculate upon importing goods, the duties of which often amount to much more than the prime cost of the goods; and if they were obliged, by the refusal of the company to receive them into its warehouses, to pay the duties immediately, it would operate to the ruin of many. If then the company did not mean to dedicate their warehouses to the public use in this manner, they ought to have made their stand in the first instance, and should have declined taking the certificate of

the lords of the treasury, conferring the exclusive privilege, which issued with their own consent. And if this were otherwise, and the company could refuse to receive the goods of the merchants except upon their own terms, the act would be for the benefit of the company, and not of trade in general, which it would rather encumber. By s. 10, the king by order in council may extend the benefit of the bonding system to the outports, where proper warehouses are found for the security of the goods and of the revenue; and by s. 17, the expense of warehouse rent and charges shall in all cases be paid by the importer, proprietor, or consignee. And in case any warehouse shall be provided at the charge of the crown for the purposes of the act, the importer, &c. shall pay to the person appointed by the commissioners of customs to receive it "warehouse rent for such goods, &c. to be estimated according to the *usual rate* of such rent for the like articles paid at the port of importation." Now, it would be extraordinary that when the crown is restricted to take only the *usual rate* of warehouse room, which must be understood to be the *reasonable rate* of compensation, (for what is usual must be presumed to be reasonable,) this company should be left unrestrained: and this shews that the legislature must have conceived that the company were so restrained by the legal operation of the second clause extending the privilege of the bonding system to their warehouses.

Bosanquet, contra. Every person is entitled to make the best use of his own property, and the only exception to the rule is in cases where the owner has so entirely dedicated the use of it to the public, that he cannot resume the exclusive possession of it again; as in the instance of a highway, or ferry. So if one accept a grant from the crown of land on the sea-shore or the bank of a navigable river, in a public port, for the purpose of erecting a public wharf or quay, he cannot disuse it, but is bound to preserve it for its destined purpose. If a man open a public house, he cannot refuse to entertain travellers; if he set up as a public carrier, he cannot refuse to carry: but he may limit his engagement with the public, and then he is not bound to admit travellers in the one case, or to carry goods in the other, upon any other terms than those upon which he engaged. [Ld. *Ellenborough*, C. J. It must be recollected that in those cases there is a power in the public of increasing the number of public houses or of carriers indefinitely.] Admitting that to be so: it remains to be considered upon what the liability of the company to receive goods upon any other than their own terms rest; whether on the nature of the trade, or the particular privilege conferred, or on the particular provisions of the acts of parliament. The original act of the 39 and 40 G. 3. c. 47, constitutes the subscribers a company for certain purposes defined by the act, of which the receipt of goods in warehouses is not one. By s. 58, the property of all erections, &c. made by the company is vested in them; s. 54, specifies the only works they are bound to perform for the monopoly which is given to them; and that monopoly is by s. 67, confined to the landing of goods within the docks or on the quays or wharves belonging thereto, and they have no monopoly of warehousing: and s. 59, limits the tonnage rates they are to receive from vessels using the docks for certain enumerated services, and therefore all other rates not included in that list must stand upon the same footing as in the case of every other trading company, for which they are entitled to make their own bargain. The *London Assurance Company*, it is well known, contract at a premium rather higher than the ordinary rate of insurance. If this company had built counting houses instead of warehouses, might they not have let them for as much as they could get? [Lord *Ellenborough*, C. J. The business of insurances and of counting houses may be carried on elsewhere, and therefore such instances do not apply. The only question arises on the bonding act: shew us that wines may be bonded elsewhere.] Assuming, then, that before the warehousing acts, (43 Geo. 3. c. 132, and 44 Geo. 3. c. 100,) the company might have charged what they pleased for warehouse rent; the first act is

general, and not confined to this company, though s. 2, applies to them. Before that time, upon special application goods were permitted to be bonded in particular places: this act made a general provision for bonding in certain places then prepared, or to be prepared and certified. This was a boon given to the trade, and not by way of monopoly to this company; for there was no contract with the owners of any of the privileged warehouses that other warehouses should not be licensed: and there are in fact now other warehouses licensed for bonding wines besides those within the docks. [Lord *Ellenborough*, C. J. asked, whether the *London* dock company were not themselves the occupiers of those other warehouses?] And it was admitted that they were: but it was insisted, that as the crown is not restrained from licensing other warehouses, it cannot be considered as a monopoly in the company, so as to make the rule of law attach upon them. [Lord *Ellenborough*, C. J. If the privilege should be extended to other warehouses, it will only be a more extended monopoly in the company and in the owners of the other privileged places. The general power of the crown to license as many bonding warehouses as it pleases is not fettered by the act. S. 6, and 7 of the stat. 43 G. 3. c. 132, referring to a different class of goods in-schedule E. makes it lawful for the importer of any such goods to lodge them in any warehouses (i. e. private) to be provided and certified by the treasury under the joint locks of the crown and the merchant, without payment of the duties at the time; and many such are licensed. But wines and other liquors can only be warehoused in vaults under ground; for the heat and agitation of the building above would be too great for such commodities; and therefore the buildings must be previously adapted to them. The peculiar adaptation of the company's vaults for this purpose has led to the extension to them of the bonding system; but they have no monopoly granted to them, and therefore the laws of monopoly cannot attach on them. Then the stat. 44 Geo. 3. c. 100, for warehousing goods within these docks specifies (s. 12,) the rent to be paid for warehousing tobacco, but says nothing as to the warehouse rent for wines; from whence it may fairly be presumed, that the legislature did not mean to confine them in respect of any other commodity than tobacco. Under s. 6, of the same act, payment of the duties on all goods landed in the *London* Docks may be delayed for 37 days before they are liable to be taken and sold by the commissioners of customs or proper officer of excise for payment of the duties: and this might as well be said to confer such an exclusive privilege as would attach on them the law of monopoly. *Bolt v. Stennett*, 8 Term Rep. 606, was the case of a public quay, which having been originally granted by the crown for that purpose could not be resumed nor diverted to other purposes: but there is nothing to prevent this company from converting their warehouses immediately to other purposes, or from prostrating them.

Richardson, in reply, was desired by the Court to consider how far the company was pledged to continue to apply its warehouses to this purpose; and also how far the crown was restrained from licensing other warehouses in other hands in the port of *London* for the same purpose. He denied that the company, having accepted of this privilege to their warehouses for the benefit of the public as well as of themselves, could throw them up at their own pleasure, without reasonable notice to the crown; for if so, the public might be deserted just at the moment of need, and after the merchants have committed themselves, and incurred expense and risk upon the faith of the engagement between the crown and the company. It must be understood that when the company accepted the certificate conferring the exclusive privilege, they took it with all its burthens, and cannot withdraw from it: and while their term is running, the legislature declares that it shall be lawful for the importers, &c. of goods to warehouse them in the company's warehouses, without payment of the duties at the time, provided they are certified by the treasury; which has been done. But at any rate, supposing the company could with-

draw their warehouses from this use, with or without notice, it is sufficient in this case that they have not done so; and while they in fact enjoy the monopoly, they must take it *cum onere*. Then supposing other outlying warehouses have been licensed, the argument is not varied against the company under whose controul they are. And supposing others were also licenced, that would not destroy but only extend the monopoly.

LORD ELLENBOROUGH, C. J. The question on this record is, whether the London Dock Company have a right to insist upon receiving wines into their warehouses for a hire and reward arbitrary, and at their will and pleasure, or whether they were bound to receive them there for a reasonable reward only. There is no doubt that the general principle is favoured both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. The question then is, whether, circumstanced as this company is by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing? And according to him, wherever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf. Lord Hale puts the case either way; where the king or a subject have a public wharf to which all persons must come, who come to that port to unlade their goods, either "because they are the wharves *only licensed* " by the queen, or because there is *no other wharf* in that port, *as it may fall out*: in that case, (he says,) there cannot be taken arbitrary and excessive "duties for oranage, wharfage, &c.: neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled "by the king's licence or charter." And then he assigns this reason, "for now "the wharf and crane and other conveniences are affected with a public interest, "and they cease to be *juris privati* only." Then were the company's warehouses *juris privati* only at this time? The legislature had said, that these goods should only be warehoused there; and the act was passed not merely for the benefit of the company, but for the good of trade. The first clause(a) says, that it would greatly tend to the *encouragement of the trade and commerce of G. B., and to the accommodation of merchants and others*, if certain goods were permitted to be entered and landed and secured in the port of London without payment of duties at the time of the first entry: and then it says, that *it shall be lawful* for the importer of certain goods enumerated in table A. to secure the same in the West India dock warehouses: and then by s. 2, other goods enumerated in table B. may in like manner be secured in the London dock warehouses. And there are no other places at present lawfully authorized for the warehousing of wines (such as were imported in this case) except these warehouses within the London dock premises, or such others as are in the hands of this company. But if those other warehouses were licensed in other hands, it would not cease to be a monopoly of the privilege of bonding there, if the right of the public were still narrowed and restricted to bond their goods in those particular warehouses, though they might be in the hands of one or two others besides the company's. Here, then, the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by

(a) 43 G. 3. c. 133, the general warehousing act.

law confine themselves to take reasonable rates for the use of them for that purpose. If the crown should hereafter think it advisable to extend the privilege more generally to other persons and places, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly: but at present, while the public are so restricted to warehouse their goods with them for the purpose of bonding, they must submit to that restriction: and it is enough, that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord *Hale* in the passage referred to, which includes the good sense as well as the law of the subject. Whether the company be bound to continue to apply their warehouses to this purpose may be a nice question, and I will not say to what extent it may go; but as long as their warehouses are the only places which can be resorted to for this purpose, they are bound to let the trade have the use of them for a reasonable hire and reward.

GROSE, J. The company contend, that they may take what warehouse rent they please: but if they have a monopoly of the warehousing for this purpose, we cannot say that the legislature intended that they should take any price they chose to impose upon the importer; for if they could, it would violate the general intention of the act which was to promote and assist trade, and not to prejudice it, which the company would be enabled to do, if they could enhance their demand for warehouse rent to any extent they pleased. And if we attend to the principle of law by which monopolies are regulated, and apply to this case what is laid down by Lord *Hale* upon that subject, it is impossible to say that this company do not come within that principle.

LE BLANC, J. We can only look to the situation of the parties as they appear upon this record, and with reference to the acts of parliament. The company are proprietors of warehouses in the port of *London*, which they were not under any obligation to erect by the original act constituting them a company: they stood therefore before the passing of the general warehousing act in the same situation as other proprietors of warehouses. Then the warehousing act was passed, which is expressed to be for the encouragement of trade, and the accommodation of the merchants and others: and by the 2d section it is made lawful for the importer to secure these goods in the *London* dock warehouses without paying the duties upon entry; and it does not appear at present, that that privilege is extended either by act of parliament, or by any other competent authority, to any other than the warehouses belonging to the company. Then, admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance; yet having, as they now have, this monopoly, the question is, whether the warehouses be not private property clothed with a public right; and if so, the principle of law attaches upon them. The privilege, then, of bonding these wines being at present confined by the act of parliament to the company's warehouses, is it not the privilege of the public, and shall not that which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but only a reasonable rent? But upon this record the company resist having their demand for warehouse rent confined within any limit; and though it does not follow that the rent in fact fixed by them is unreasonable, they do not choose to insist on its being reasonable, for the purpose of raising the question. For this purpose, therefore, the question may be taken to be, whether they may claim an unreasonable rent? But though this be private property, yet the principle laid down by Lord *Hale* attaches upon it, that where private property is affected with a public interest, it ceases to be *juris privati* only; and in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable. That principle was

followed up in the case of *Bolt v. Stennett*: for there the quay being one of the public quays licensed under the statute of Elizabeth, it was held that the owner was bound to permit the use of the crane upon it, and could not insist, either that the public should not use the crane at all, or should use it only upon his own terms, but that he was bound to permit the use of it upon reasonable terms. Whether the company be bound to continue the use of their warehouses for this purpose may hereafter be material to be decided, but no question arises upon that at present: the warehouses are still applied to the purpose, and there was room sufficient to have received these goods at the time: and the only question was whether they were bound to receive them for a reasonable rent: this they refused to do, and in that refusal they were wrong.

BAXLEY, J. The question is, whether the company have a right to impose their own terms, whether reasonable or not, upon the importers of these goods who offered to deposit them in their warehouses upon the terms of the warehousing act? For if so, they might exclude particular individuals from the benefit of the act. Or the question may be stated to be, whether the public have not a right under that act to deposit and secure certain goods in the company's warehouses upon reasonable terms, and whether the company be not bound to receive such goods from all the public? Now, the act is declared to be passed for the benefit of the trade in general, and for the accommodation of the merchants: and it proceeds afterwards to say, that it shall be lawful for the importers, &c. (meaning all importers, and not particular individuals of them) to secure their goods of a certain description in the company's warehouses. But according to the argument now urged for the company, the act was not passed for the benefit of *all* importers, but of such only as choose to pay the company what they are pleased to demand for warehouse rent; for to this length the argument necessarily goes. It is said, however, that the company have not a monopoly of this privilege: but I am not aware of any act of parliament which gave the commissioners of the treasury any power to licence particular places for the bonding of *wines* before this act; though I know they had such a power with respect to sugar and coffee. But whether they had it or not, it is sufficient to say, that these were the only warehouses where the importer had a right to insist that his goods should be warehoused and bonded; for he certainly could not have obliged the commissioners to licence any other place for that purpose. As to the question whether the company may renounce the application of their warehouses to this use, I cannot add to what the Court have already said: but at least they cannot renounce it partially; and I think it would be deluding the public, if the company were able to renounce, at a moment's warning, the warehousing of the goods for this purpose, after they had agreed to accept the licence and monopoly.

Judgment for the plaintiff.

Chatland v. Thornley.

12 East, 544. July 3, 1810.

The plea of an attorney to an action sued against him by bill, stating his privilege not to be compelled to answer any bill exhibited against him in the custody of the marshal, &c. and concluding that the Court would not take *further cognizance of the action aforesaid, against him*, [Instead of praying judgment of the bill, and that it might be quashed] will not be taken as a plea to the jurisdiction, but only as objecting to the Court's taking cognizance of the action against one of its attorneys *in that form*; and therefore the Court will adjudge the bill to be quashed.

THE plaintiff brought "her bill against *Edoard Thornley*, being in the custody of the marshal of the Marshalsea, &c. of a plea of trespass, and proceeded to declare against him as acceptor of a bill of exchange, &c. To which the defendant in his own proper person came and said, that he is now,

and at the time of exhibiting the plaintiff's bill against him, and before, was one of the attorneys of the court of our lord the now king before the king himself (the said court being at *W.* in the county of *M.*) as by the roll of attorneys of this court here fully appears; and so he proceeded to plead his privilege, in the usual form, not to answer any bill exhibited against him in the custody of the marshal, &c., or in any other manner whatsoever, except by bill to be exhibited against him as an attorney of this court upon any pleas, &c.: and then concluded—wherefore he apprehends, that the court here will not and ought not to take further cognizance of the action aforesaid depending against him, &c.

To this the plaintiff demurred, and shewed several special causes, of which the only one spoke to was, that the conclusion of the plea was informal, inasmuch as it concluded with a suggestion that the Court would not take further cognizance of the action, instead of praying judgment of the bill, and that the same might be quashed, or praying judgment if the defendant ought to answer thereto.

And *Tindal* argued from this conclusion of the plea, that it must be taken to be a plea to the jurisdiction; being a proper conclusion only for such a plea: and that as a plea to the jurisdiction it would clearly be bad for want of giving another competent court. But,

The Court said, that it was not to be considered as a plea to the jurisdiction; it only objected to the Court's taking cognizance of the action against one of its attorneys in this form: it does not deny that the Court have jurisdiction in another form. Therefore, they gave judgment that the Court would not take further cognizance of the action in this form, and that the bill be quashed. (a)

Bowen for the defendant.

The King v. Topham.

12 East, 546. July 4, 1810.

Where the appellant disputed before the sessions the quantum of the rate, as well as the rateability of the property for which he was assessed, which was tithe rents and compositions under an inclosure act, it is not enough for the parish officers to shew, that he was in the receipt of such rents assuming the property to be rateable,) of the probable amount of which, as rated, they gave no evidence.

THE defendant appealed against a poor's rate made for the township of *Great Driffield* in the East Riding of the county of *York*, and the sessions confirmed the rate, subject to the opinion of this Court on the following case.

The defendant was rated as occupier of property of the annual value of 250*l.*, and he appealed against the rate, giving notice of the grounds of his appeal, 1st, that he had no rateable property in the parish: and 2dly, that he had not rateable property to the amount at which he was rated. On the part of the respondents it was proved, that the appellant was in the annual receipt of certain tithe rents originating in the *Driffield* inclosure act, (which act was admitted as part of the case) of the annual value of 6*s.* 8*d.* It was further proved, that certain other sums were received by him for such tithe rents, but there was no proof of their amount. Here the respondents closed their case; insisting that as they had proved the appellant to be in possession of some rateable property, it was incumbent on him to prove that in fact he had been overrated. The appellant, on the contrary, insisted that this composition or rent was not rateable at all. The sessions held that it was rateable. The appellant then contended, that as there was no proof of any specific sum having been paid beyond the 6*s.* 8*d.*, the rate ought to be amended by inserting that

(a) Vide *Le Bret v. Papillon*, 4 East, 502. *Charnley v. Winstanley*, 5 East, 271, and *Rez v. Shakespeare*, 10 East, 83.

sum instead of the 250*l.* The sessions held, that the proof of overrating lay on the appellant; and confirmed the rate generally.

The act referred to was one passed in the 14 G. 2. c. 11, for dividing and inclosing open fields, &c. in *Great and Little Driffeld*, and for settling certain yearly payments to the prebendary of *Driffeld* in lieu of tithes, pursuant to an agreement and award made for those purposes; it states that by an agreement tripartite made between the lord of the manor and owner of several lands, &c. the prebendary of *Driffeld* and his lessee, to which prebend the tithes of corn, grain, hay, wool, and lamb belonged, and the vicar and others named, owners and proprietors of lands, &c. the inclosure of these townships was to be made in the manner therein stated; and that a certain *composition in money* was to be paid by the land owners to the prebendary for the time being and his lessee, &c. in lieu of the tithes: and that for fixing and settling the said yearly rents and compositions in lieu of the tithes, all the parties had appointed certain referees, who had awarded to the prebendary of *Driffeld* for the time being and his successors, &c. "*as a yearly rent or composition in lieu of the tithes of corn, grain and hay therein, the rent or sum of 276*l.*, being after the rate of 1*l.* 10*s.* for every oxgang; and, in lieu of the tithes of wool and lamb, the yearly rent or sum of 30*l.*, &c.*" The act therefore proceeded to give effect to such agreement and award; and enacted, that *in lieu and satisfaction of the said tithes*, there should be the said several *yearly compositions, rents or sum of 267*l.* &c.* issuing out of the said inclosed lands, &c. to be paid by the owners and proprietors thereof in certain proportions to be ascertained by the commissioners. And that if the said *annual composition rents* should be in arrear, the prebendary for the time being, &c. might enter and distrain in the particular lands charged, &c. And that in all future rates and levies in the said townships the said *composition rents* should be assessed in the same proportion as the other landholders.(a)

Park and Holroyd were to have supported the order of sessions confirming the rate; but after the case was stated,

Lord ELLENBOROUGH, C. J. said—The question is whether a person, who, I will suppose for the present, is liable to be rated for something beyond the 6*s.* 8*d.*, can be rated to the amount of 250*l.*, and then left to pare down that assessment, upon an appeal, to the amount which it ought to be. He might as well have been charged to the extent of 50,000*l.* [*Park* said, that he could not pretend to argue that that could be done; but that here the act of parliament itself, which was before the Court, stated the amount of the tithe rents and compositions at more than the sum for which the appellant was rated. On which his lordship observed—] It is not stated as a fact in the case that the appellant was in the receipt of the rents and compositions to the amount of 150*l.* If the sessions have proceeded upon what the Court has said in some cases, that if the party rated have rateable property in the parish, they will not inquire into the quantum of the rate, they have egregiously mistaken what the Court meant. When the question before the sessions is upon the quantum of the rate, the officers making it must show to the justices some probable ground for the amount at which they charge the party in the rate. The mischief of any other rule would be enormous; a small occupier may be rated at once in the round sum of 1000*l.* and left to struggle his way out of that charge as he can.

Const, Richardson and Coultman, were to have argued for the appellant. The latter said, that the question made at the sessions was, whether the appellant should begin by proving his case, that he was overrated; or whether the parish officer should begin by proving a probable case for rating the appellant

(a) The appellant in this case was in fact the lessee under the prebendary, and disputed his liability to be rated for this property *as rents*, not being an actual inhabitant of the township; and gave the notice of appeal stated in the case. Vide *Rex v. Toms*, Dougl. 401.

at so much. On which *Le Blanc*, J. observed, that the Court would have no difficulty in dealing with that naked proposition whenever it should be brought nakedly before them.

Lord ELLENBOROUGH, C. J. then directed the case to be sent back to the sessions to be re-heard, re-considered and re-stated.

The King v. The Inhabitants of Maidstone.

12 East, 550. July 4, 1810.

The sessions stated the facts, that the pauper was hired on *Michaelmas-day*, 10th of *October*, 1797, for a year, ending on *Michaelmas-day*, 10th *October*, 1798, that he continued to serve till the 8th of *October*, when he married, and his master consented to his leaving his service, and paid him his full wages; and on the 9th, the pauper hired himself to and went into the service of another master: held by one Judge that these facts would have warranted the sessions in drawing a conclusion of fact that the master dispensed with the service for the remaining day of the year; but the sessions having impliedly drawn a different conclusion by quashing the order of removal, all the court held, that the case as stated showed a dissolution of the contract before the end of the year, and consequently that no settlement could be gained by such hiring and service. The husband being found to have gone beyond seas above two years before the birth of a child born by his wife, she remaining at home, the conclusion is irresistible that such child is a bastard.

TWO justices by their order removed *Ann* the wife of *George Langridge*, who had deserted her, and *Elizabeth* aged 9 years, *Frances* aged 2 years, and an infant male child not baptized, aged about 3 months, her children, from *Maidstone* to *Thurnham*, in *Kent*: the Sessions on appeal quashed the order, subject to the opinion of this Court on a case, which stated that the order of removal made was dated the 13th of *August*, 1808. That *George Langridge*, the husband of the pauper, previous to *Michaelmas*, 1797, was a settled inhabitant of *Bletchingly* in *Surry*, and at *Michaelmas*, 1797, hired himself at the wages of 12 guineas for a year to *S. Tompkin* of *Thurnham* to serve him as a waggoner; and entered upon his said service, and continued in it till the 8th of *October*, 1798, on which day he was married to the pauper, and his master consented to his leaving his service, and paid him his wages. A few shillings were deducted by his master for the loss of a skid chain of a waggon, and for the wages of a labourer who was employed in the place of *Langridge* for one day during his absence at an early period of the said service; but nothing was subtracted from his wages on account of leaving his master on the 8th of *October*. *Langridge* on the following day, the 9th of *October*, hired himself to and went into the service of one *Stone*. *Michaelmas* day fell on the 10th of *October* in the year 1797 and 1798. In 1803, *Langridge* entered into the *Sussex* militia, and having afterwards volunteered into the 35th regiment, embarked for *Sicily* in *April*, 1806, where he remained till he returned to *England* on the 4th *January*, 1808. *Elizabeth*, named in the order, was born on the 9th of *January*, 1806; and the child, not yet baptized, was born in the parish of *Maidstone* on the 5th of *May*, 1808. While the pauper's husband was thus absent with the regiment, the parish of *Thurnham* frequently paid her money for the support of her child, though she was resident during all the time either in *Maidstone*, (where the child was at nurse,) or in other parishes, but not in *Thurnham*. The maiden settlement of the pauper was in *Thurnham*.

It was also agreed upon the argument to be added as a fact to the case, that *Ann Langridge*, the wife, continued in *England* all the time that her husband was abroad with his regiment. And thereupon the Court all agreed, that the youngest child must be taken to be a bastard; and was therefore settled in the place of its birth: though for the present, it must go with the mother for nurture.

Gurney then contended, in support of the order of sessions, that the husband of the pauper *Ann* did not gain a settlement in *Thurnham* by the hiring and service stated; for in fact he served one day short of the year, having been hired on *Michaelmas-day* the 10th of *October*, 1797, and having quitted the service on the 8th of *October*, 1798, *Michaelmas-day* being on the 10th; and there was no dispensation of the service for the remainder of the year, but a dissolution of the contract, on occasion of the marriage of the pauper. There having been no deduction made, on account of the loss of the one day's service, in the payment of the wages, makes no difference in the case, according to *Rez v. Castlechurch*, Burr. S. C. 68; for it is not only stated, that the master consented to *Langridge's leaving his service* on the 8th; which is the common mode of describing a dissolution of the relation of master and servant; but the man on the 9th contracted with a different master, which was inconsistent with his former contract. He also referred to *Rez v. St. Peter of Mancroft in Norwich*, 8 Term Rep. 477, and *Rez v. Sudbrook*, 4 East, 356, as supporting the conclusion that this was a dissolution of the contract.

Berens and *Bolland*, contra, contended, that the facts stated only shewed a dispensation of the service by the master upon occasion of the marriage of his servant; and the subsequent act of the servant, in hiring himself to another on the last day of the year, could not convert the prior act of the master into a dissolution of the contract. They referred to *Rez v. Bray*, Burr. S. C. 682; *Rez v. Potter Higham*, *ibid*. 690, and *Rez v. Richmond*, *ibid*: 740. In the latter case, the wife of the servant leaving the service 13 days before the end of her husband's year, the master asked him whether he should not like to go too; to which the man assented, received his whole year's wages, and went away: and this was held to confer a settlement. [Lord *Ellenborough*, C. J. This case states expressly, that the master consented to the servant *leaving his service*: and how, upon that statement, can we say, that this was a mere dispensation of the service? If this opinion contradict the case of the *King v. Richmond*, which I do not mean to say that it does, I cannot help it: the statute, and the constructions which have been put on it, all concur in requiring that the relation of master and servant should continue for the whole year.] They admitted the critical force of these words as stated in the case; but said, that that was not the meaning of the parties in drawing it up. They then adverted to the relief stated to have been given by the parish of *Thurnham* to the pauper for her child while she resided in *Maidstone*, as evidence of their acknowledgment of her settlement in *Thurnham* independently of the other facts stated.

But Lord *ELLENBOROUGH*, C. J. said, that however in the absence of all other circumstances, such as those stated in this case, the inference of a settlement in the parish might be drawn from the fact of such relief; yet here no such inference was wanted to be made, the Court having all the facts before them of the hiring and service which was the foundation of the supposed settlement. The giving that relief amounts to more than shewing the *opinion* of the parish upon these facts, that the pauper was settled with them. His Lordship then continued:—

This was clearly a case of dissolution of the contract of hiring; and when the legislature has given us a rule to go by, it is better to abide by that. I should have been sorry in any case to have originated the question of dispensation of service; but it has been established to a certain extent by the decisions, and so far let it stand; but I will not extend it further. Here however, there is no authority, right or wrong, for extending it: for it is stated, that *the master consented to his servant's leaving his service*, and I know not in what stronger terms a servant could answer in a plea to an action by the master against him for deserting his service: the master would undoubtedly be bound by such a plea, and would not venture to demur to it. Then, though the opinion of the parties is not to be pressed, yet their acts are material upon the

question of dispensation or dissolution; and here it is stated, that after *Langridge* had left his first master's service on the 8th, he went on the following day, which was the day before *Michaelmas-day*, and hired himself into the service of a new master. Here then we have an express renunciation, on the part of the master, of his rights over the servant, two days before the end of the year: and the servant's assent to this, signified by his departure from the service, and contracting the next day an obligation to another master, into whose service he entered immediately, subject to all the rights of the new master over his service. How then can I say in the words of the statute of William, 8 and 9 W. 3. c. 30, that there was a *continuing and abiding* by the servant in the same service during the space of one whole year, when it appears that that period of service was abridged by the two last days of the year. It would, I think be contravening the clear commands of the legislature, if we did not hold this to be a dissolution of the contract.

GROSE, J. In two of the cases cited by the respondent's counsel, the whole year's wages were indeed paid: but here the servant, acting upon his master's consent that he should leave his service, entered into a new contract with a new master.

LE BLANC, J. Upon the facts of the case, as it appeared at the sessions, I think they would have been well founded in finding as a fact, that this was a dispensation of the service on the part of the master, and not a dissolution of the contract; for according to the cases, it is always a question for the sessions to decide, whether the consent of the master to the servant's leaving his service a few days before the end of the year for a particular purpose, but paying him his whole year's wages, be a dispensation of the service for the remainder of the year, or a dissolution of the contract. Here the servant wanted to marry, and one entire day before the end of the year; the master gave him leave to marry and go away from his service. It was a fair and reasonable conclusion to draw, that if the servant wished to go away one day before the end of his service for the purpose of marrying, the master would have no objection to dispense with his service, and give him a holiday for that one day; for it must be observed, that the service would have ended on the 9th, and the servant left his master's service on the 8th. But the sessions not choosing to draw this conclusion themselves, which I think they might have done, send the case to us upon the dry facts stated, and have not found that the master did consent to give his servant a holiday and to dispense with his service for the remaining day of the year: but merely state as a fact, that the master consented to his *leaving his service*. Under these circumstances I cannot say, that the sessions have done wrong in quashing the order of removal to *Thurnham*: though I think they might have drawn a different conclusion from the facts of the case.

BAYLEY, J. It appears to me, that the sessions have done right in quashing the order of removal as they have done. In order to constitute a case of dispensation of service, I think the master should have power to recall the servant to his service all through the year: but where the master agrees generally to let the servant go away from his service without reserving to himself the right of recalling him throughout the whole year, I think that puts an end to the contract of service altogether.

Order of sessions confirmed.

**The King v. The Chapelwardens of the Township of Haworth,
in the parish of Bradford, in the West riding of the County
of York.**

12 East, 556. July 4, 1810.

A rate to *reimburse* churchwardens such sums as they had expended, or might thereafter expend, on the parish church, would be bad on the face of it, as in part *retrospective*; and therefore the Court would not grant a mandamus to the chapelwardens of a township within the parish to make such a rate for raising their accustomed proportion of the whole: and their refusal to make such a rate, when demanded, applying as well to the form as to the substance of the demand, the Court would not grant the mandamus to raise the money in the common form of such a rate *prospectively*, out of which the churchwardens might repay themselves.

THIS was an application for a mandamus to these defendants to make a rate upon the inhabitants of their township for levying 50*l.* being 1-5th part of a church rate charged upon the parish at large, for *reimbursing* the churchwardens of the town of *Bradford* such sums as they had expended or might thereafter expend on the parish church of *Bradford*; and to pay the said 50*l.* when raised to those churchwardens. The relator's affidavit stated that the parish of *Bradford* consisted of 15 townships, of which *Haworth* is one, and that there is an immemorial custom in the parish, that each of the townships should contribute to the church rates in certain proportions stated, of which the proportion of *Haworth* was 1-5th. That at a vestry held in the parish church on the 4th of *April* last, after regular notice, it was ordered that the churchwardens of *Bradford* should collect the rate, in question of 250*l.* for *reimbursing* themselves such sums as they had expended or might thereafter expend on the parish church of *Bradford*: and then stated a demand and refusal of the proportion of the rate payable by the defendants.

Paley, in answer to the rule for the mandamus, objected, first, that any custom for fixing on a part of a parish a certain proportion of a church rate, which ought to be equally distributed on all the parishioners, was bad upon the face of it, as making that certain and invariable which in its very nature was variable and fluctuating; and however equally the proportions might have been distributed in the first instance, yet they had now by the fluctuations of population and property become unequal and unjust. This question, he said, was not decided in *Stead v. Heaton*, 4 Term Rep. 669, which turned on another point, as to the evidence of the custom. [Lord *Ellenborough*, C. J. We shall not decide this question upon affidavits, but shall for this purpose assume the custom to be good. The point however did not pass without consideration in *Stead v. Heaton*.] Secondly, he objected that no rate could be made to *reimburse* churchwardens; for they were not bound, nor ought they, to lay out money till they had collected it in hand: for otherwise they might lay out more than was allowed by the justices, and then charge the parish for the excess. And non constat that it is to reimburse them what they have expended within the same year: it may have been for expences incurred many years ago by other churchwardens for former inhabitants. And it makes no difference that this is a rate to reimburse the same churchwardens by whom the money was expended. He cited *Dawson v. Wilkinson*, And. 11, and Rep. temp. Hardw. 381, and *Tawney's* case there cited, which is reported in Lord *Raymond*, 2 Ld. Raym. 1009, both which negative the power of churchwardens to make a rate to reimburse either themselves or former churchwardens.

Park and *Walker* observed, that the rate was not merely to *reimburse* former, but also to provide for future expenditure. They said that this rate was made in the same form that had always been adopted in this parish without objection. That in *Tawney's* case it was admitted, that where money had

been properly laid out by parish officers, (which was not disputed in this case,) the Court would grant a mandamus to the justices to sign and allow a rate in the *general* form for the relief of the poor, though in fact made for the express purpose of reimbursing the parish officers: the objection was therefore more a matter of form than substance; and they urged the Court to grant the mandamus in the common form, without noticing the purpose of reimbursement.

Lord ELLENBOROUGH, C. J. The regular way is for the churchwardens to raise the money before hand by a rate made in the regular form for the repairs of the church, in order that the money may be paid by the existing inhabitants at the time on whom the burthen ought properly to fall. It will indeed sometimes happen that more may be required to be expended at the time than the actual sum collected will cover: but still it is admitted that the inconvenience has been gotten rid of in such cases by an evasion; for the rate has been made in the common form, and when the churchwardens have collected the money, they have repaid themselves what they had disbursed for the parish. But we cannot now grant the mandamus to make a rate in the common form; for the demand made upon the defendants was to make a rate in the form in which the rule is drawn up, to reimburse the churchwardens of *Bradford* for money which they had expended, as well as for what they might expend; and the refusal of the defendants to make such a rate applies to the form of the demand; and we cannot now qualify their refusal. At present it appears that the rate prayed for in this form would be bad, and therefore we cannot enforce it by mandamus.

Per Curiam,

Rule discharged.

The King v. The Mayor of St. Alban's.

12 East, 559. July 5, 1810.

The borough of *St. Alban's* having first received a recorder by a charter of Charles I. a subsequent charters of Charles II. after nominating *J. S.* to be the first and modern recorder under that charter, declared that it should be lawful *pro predicto J. S. moderno recordatore* to nominate a sufficient person *fore et esse deputatum suum in officio recordatoris*; et quod *hujusmodi* deputatus sic factus, &c. habeat et habeat ut ample power in the absence of the recorder *aforsaid*, as the recorder for the time being, by virtue of those or any former letters patent habet aut habere, et exercere possit et debet: held that this did not extend the power of appointing a deputy to the successors of *J. S.* in the office of recorder; and that this, which was the plain meaning of the words of the clause, was confirmed by another clause, "*Quod recordator pro tempore existens in perpetuum sit et erit justiciarius pacis*"; and by another clause, whereby power is given to *T. Richards* the town clerk et *cuiuslibet communi clerico successori* to appoint a deputy with the approbation of the mayor and aldermen: and also by the fact that no deputy had been appointed by any succeeding recorder after the first named, until a recent instance, before the present appointment: though this nonuser was attempted to be accounted for by shewing a by-law (admitted, however, to be bad) passed not long after the charter of Charles II. by which the recorder's appointment of a deputy was subjected to the approbation of the mayor and aldermen.

THE *Attorney-General* upon a former day applied for a mandamus to the mayor of *St. Alban's* to swear in (a) *Charles Wetherill*, Esq. into the office of deputy-recorder of the borough, upon the appointment of *Percival Lewis*, Esq. the present recorder. *St. Alban's* is an ancient borough, incorporated under charters of Ed. 6. and Charles I. and there formerly existed under that of Ed. 6. a weekly court of record held before the steward; but Charles I. gave a recorder to the corporation. Then Charles 2., by his charter of the

(a) It was observed by the Court, upon the motion for the mandamus, that as the deputy recorder was not a member of the corporation, but was merely to act for the recorder, the rule for the mandamus should be drawn up in this form, and not to *admit* and swear him in.

27th of July, 1664, upon which the question arose, new-modelled the corporation, and after nominating *John Simpson* to be the first and modern recorder under that charter, proceeded to give the power of appointing a deputy in these words:—

“Et ulterius volumus, et per presentes declaramus, quod bene liceat et licebit *ad et pro prædicto Johanno Simpson moderno recordatore burgi prædicti* constituere nominare et facere aliquem alium sufficientem et discretum virum in legibus Angliæ eruditum *fore et esse deputatum suum in officio recordatores burgi illius*; et quod hujusmodi deputatus sacrum suum corporale, coram majore burgi prædicti *pro tempore existente*, ad officium et locum illum bene et fideliter in omnibus juxta debitum officii et loci illius exequendum præstabit, in talibus modo et forma qualibus recordator ejusdem burgi sacrum suum præstare debet et tenetur. Et quod *hujusmodi* deputatus, sic factus nominatus et juratus, habeat et habebit tam plenam potestatem et auctoritatem, in absentia recordatoris prædicti, in omnibus et singulis officio *recordatoris illius* sive pertinentibus ad omnes intentiones et proposita *quam recordator burgi illius pro tempore existens*, virtute præsentium seu aliquarum aliarum literarum patentium aliorum progenitorum nostrorum in hac parte factorum, habet aut habere et exercere *possit* et debet. Et ulterius damus et concedimus major, burgi prædicti pro tempore existenti plenam potestatem et auctoritatem ad sacrum prædictum hujusmodi deputato dandum et prestandum per presentes. Volumus etiam quod *recordator burgi prædicti pro tempore existens in perpetuum* sit et erit justiciarius pacis et de le *quorum* hæredibus et successoribus nostris, infra dictum burgum et limites ejusdem, ad omnia facienda et exequenda quæ ad officium justiciarii pacis et de le *quorum* pertinent seu quovismodo spectant: quodque talis et hujusmodi recordator, antequam ad officium suum exequendum admittatur, sacrum suum sic ut præfertur coram majore burgi prædicti pro tempore existente prius præstabit.” The following parts of the same charter were also referred to in the argument.

“Assignavimus, constituimus, &c. *T. Richards* fore et esse primum et modernum communem clericum burgi illius, continuendum in eodem officio durante bene placito dictorum majoris et aldermannorum, ad faciendum et scribendum, &c. Volumus etiam quod bene licebit eidem *T. Richards et cuilibet communi clerico successori* officium illud per se vel per sufficientem deputatum suum exercere, quoties causa impotentie et alia causa legitima ad officium illud exequendum ipsi vacare non sufficit, per majorem et aldermannos burgi prædicti pro tempore existentibus vel majorem partem eorumdem approbandum.” And at the end of the charter is the following clause: “Et ulterius volumus, &c. quod major, aldermanni, capitalis senescallus, recordator, communis clericus, et omnes alii officarii et ministri nostri burgi prædicti, *et eorum deputati*, necnon omnes justiciarii ad pacem nostram hæredum et successorum nostrorum, &c. antequam ad executionem sive exercitum officii, &c. shall take the oaths of allegiance.

It appeared by the affidavits that *Mr. Simpson*, in the course of his recordership, appointed two deputies, the first of which was in 1672; but that he acted the greatest part of his time in person. That in 1667 certain by-laws were made by the corporation recognizing the right of the recorder for the time being to appoint a deputy, but stipulating that he should appoint such deputy as the mayor and aldermen should approve of: whose approbation was not required by the charter. That in the reign of James 2. when *Mr. Farringdon*, the immediate successor of *Mr. Simpson*, was recorder, a petition was presented to the crown for another charter with certain amendments, one of which was that the recorder might have power to appoint a deputy; but before that charter was perfected, the king withdrew from the realm. It did not appear that any other deputy recorder was appointed till 1782, when one was appointed upon the nomination of the present recorder; but that deputy acted only for a short time, and then resigned. The question now made was,

whether the power of appointing a deputy was by the charter of Charles 2. confined to Mr. *Simpson*, the first recorder, or whether it extended also to his successors in the office?

Dampier and *Copley* now shewed cause against the rule for a mandamus, and insisted that the power of appointing a deputy was confined by the words of the charter (on which they commented at large) to Mr. *Simpson*, and could not be extended by implication to his successors. The power was given to him by name to appoint a sufficient person to be his deputy. There might have been special reasons for confiding such a power to him, which might not ordinarily extend to his successors. The corporation might be satisfied from their personal knowledge of him that he would not put a deputy upon them who was not agreeable to them. As to the construction put upon the statute de circumspecte agatis,^(a) which, though naming only the bishop of *Norwich*, has been held to extend to all bishops; that was a remedial statute and was therefore to be liberally expounded: but the office of recorder is judicial, and it is against the policy of the law that such an office should be executed by deputy without an express warrant given to the principal to make such an appointment. They relied particularly on the word *posset*, which was only correct as applied to the then existing recorder; but if meant to be applied to any future recorder the word would have been *possit*, and that was the word applied throughout the charter to any future officer. They also laid stress on a prospective clause, which required the Court to be holden before the mayor and recorder, or in their absence before the two senior aldermen, not mentioning the deputy recorder, as it would have done if the framers of the charter had looked to the existence of such an officer: the deputy of the first recorder having the same power as the recorder himself.

The *Attorney-General*, *Lens*, *Serjt.*, *Warren* and *Nolan* contra, argued that the power was so intimately connected with the office, and so little with the particular person who should happen to fill it, that the fair presumption was that it was intended to be annexed to the office, and not to the individual officer who first held it; and the Court would therefore adopt that construction if by possibility the words of the charter would bear it. The crown must have intended that the inhabitants of the borough should be at all times governed in the same manner; otherwise it would be a power given to *John Simpson*, and not to the recorder as one of the corporation, nor for the benefit of the inhabitants. The deputy is to have as full power and authority in the absence of the recorder, as *the recorder for the time being*, by that or any former charter: that every future recorder: the words "are habeat *et* habebit tam plenam potestatem," &c., and as all recorders were to have the same powers, it was nugatory to say that the deputy should have the same powers as any recorder would have: the words *et habebit*, &c. give the deputy for the time being whatever power the recorder for the time being would have. They also referred to the words appointing the recorder for the time being a justice of the peace, and argued that the appointment of the deputy was given in similar terms. *Prædictus recordator* does not mean *John Simpson* but the modern recorder beforesaid: if the reference had been meant to apply only to the individual, it would not have stated merely his name of office. [Lord *Ellenborough*, C. J. *Prædictus* having been before applied to *John Simpson* the modern recorder; when in the same sentence *prædictus recordator* is used, must it not be understood that the whole description is to be brought down, and then it means not merely the aforesaid recorder but the aforesaid recorder *John Simpson*.] Instead of "et quod *hujusmodi* deputatus, &c." the language should have been *deputatus ejusdem Johannis Simpson*, or *hujus*, or *illius*, if it had been meant to confine the deputation to him alone: *hujusmodi* applies rather to the nature of the office: and

(a) 13 Ed. 1. Vide 2 Inst. 487.

if *recordatori illius* in the same sentence meant *John Simpson*, the words *pro tempore, existens*, which soon after follow, could not with any propriety be applied to him. Then if *posset* is to be relied upon, how does that accord with *debet*? The word *moderno* does not mean the same as *primo*, but only the modern recorder under that charter; and it is the same as if it had said that it should be lawful for the recorder created by this charter, who is now *John Simpson*, to make a deputy: and when *recordatoris* is immediately after mentioned, it is without any term of reference to *John Simpson*; and therefore when it recurs again with the adjunct *prædicti*, it must refer to the officer, the recorder, who is before mentioned alone, without reference to *John Simpson*. They referred to the Earl of *Shrewsbury's* case, 9 Rep. 46, b. And lastly they argued that if the words were even ambiguous, the reason of the thing ought to decide the construction in favour of the officer, as recorder: and that this construction was strengthened by the cotemporaneous usage, and by the evidence of the by-law; though that was bad in attempting, as it did, to fetter the power of the recorder by requiring the approbation of the mayor and aldermen: and the existence of that by-law, which made it doubtful whether such approbation were necessary, sufficiently accounted for the non-user of the power by the intermediate recorders.

LORD ELLENBOROUGH, C. J. We are called upon to put a construction upon the charter of Charles 2.; and the question is whether the power of appointing a deputy were by that character confined to *John Simpson* alone, the first modern recorder under it, or whether the same power extend to all future recorders? It is material to consider how the corporation was constituted in this respect before that charter. The recorder was a branch of the ancient office of steward, and had branched off in the name of recorder under the charter of Charles 1. by the terms of which the recorder was to execute the duties of his office in person. If that duty were to be relaxed upon the application for the new charter in the time of Charles 2., we must look for the alteration in the precise words of that charter, and we shall look at them with jealousy: we shall also compare them with the other parts of the same charter in which a power of appointing a deputy is given to the town clerk; and we find that those who drew the charter were well aware of the proper general words to be used in giving a general power to the officer for the time being to appoint a deputy, when such a general power was intended to be given. The words of that clause are "*volumus etiam quod bene licebit eidem T. Richards et cuilibet communi clerico successori,*" &c. to execute the office by himself or his deputy, &c.; but such deputy is to be approved by the mayor and aldermen for the time being or the major part of them. Now that clause names not only *T. Richards*, the then town clerk, but all his successors: and compare the terms of it with the words in which the power in question is given; and if there be no real doubt or ambiguity in them, I should be loth to refer to an extreme case of personal favour for their construction, when the crown has spoken plainly for extending the same power of appointing a deputy to all future recorders. Now the power is in terms given to *John Simpson*, personally named, and called the modern recorder of the borough; and that cannot by any construction refer to all future recorders, but it is a natural description of the person, and by his particular designation of modern recorder: and he is to make a sufficient person "*fore et esse deputatum suum,*" &c. Then it proceeds, "*et quod hujusmodi deputatus*" should take his oath; deputy of whom? of *John Simpson* the modern recorder: no other kind of deputy is mentioned before: such deputy then is to take his oath before the mayor for the time being: these latter words are relied on as looking prospectively to all future mayors; but *John Simpson* might live for many years, while the mayor would be changed every year; therefore the words of succession are there properly introduced as applied to the office of mayor before whom the oath was to be taken. Then the deputy is to take his oath in such mode and form as recorder ejusdem burgi

ought to do. Then follow the words which have been principally relied on in the sentence beginning: "et quod hujusmodi deputatus sic factus; &c. (that is, by *John Simpson*; for no recorder in general is before mentioned;) shall have as ample power in the absence "recordatoris *prædicti* (that is, of *John Simpson* the modern recorder; and if, instead of the words of reference, the term referred to be introduced, the sense will be quite clear;) to all intents and purposes as the recorder *for the time being* (which are the words principally relied on) by virtue of that or any former letters patent has or may and ought to have and exercise. That is a reference to the functions of the recorder, that is, of the modern recorder, *John Simpson*, or any of his predecessors. Full power is then given to the mayor for the time being to administer the oath hujusmodi deputato: but no other deputy was predicated than the deputy of *John Simpson*. Then follow words which throw a strong light upon the preceding clauses; for after having done with the particular recorder *John Simpson*, the charter proceeds to specify the general power of every power of every recorder, by providing "quod recordator burgi prædicti *pro tempore existens*," and then it uses the words "in *perpetuum* sit et erit (which are put in contrast with the *modernus recordator* before named,) *justiciarius pacis*," &c. But if any doubt could be made whether the words which have been commented upon had been accidentally used, there is in the same charter another clause giving power to the then town clerk *Thomas Richards*, and to every succeeding town clerk, to appoint a deputy; but then such deputy is to have the approbation of the mayor and aldermen. No such approbation is required for the recorder's deputy; which shews that the crown conferred the power of appointment on *John Simpson* from conviction of his personal fitness to judge of the sufficiency of his deputy. I do not bring in aid any materials of construction from the subsequent charter irregularly prepared in the time of James 2, nor from the opinions of any recorder as to the meaning of the charter of Charles 2; but I cannot refrain from observing that in fact no appointment of a deputy has been made by any other than the first recorder down to the year 1782, when the present recorder named a deputy who acted for a short time: and that is the only extrinsic circumstance I would refer to in aid of the construction of the charter; which, however, I think, requires no such aid upon the present question.

Grose, J. The question is whether the power of appointing a deputy were given to *John Simpson* alone, the modern recorder named in the charter, or were meant to be extended to his successors in the same office. It is said that there could be no reason for giving such a power to him in particular; but looking attentively at the words of the charter, it appears to be given to him by name, describing him also as the *modern* recorder. Then looking to other parts of the charter, we find that where the power of appointing a deputy was meant to be given generally, as the instance of the town clerk, it is given to him and each of his successors. This is an argument which I confess I am not prepared to answer: and therefore I feel inclined to adopt my Lord's construction of the charter. And though I cannot assign any satisfactory reason why the power should have been confined to the first recorder under that charter, yet it is safer to abide by what we find expressed in the charter than to proceed upon conjecture of what might more probably have been intended; especially where the other construction has never been adopted in practice till a very recent instance. I therefore agree that the mandamus ought not to go.

Le Blanc, J. If the words of the charter appear to us to be plain, we ought not to look to what we might consider as the motive which should have governed the crown. What were the motives for giving this power to the then recorder only, we cannot now conjecture; but if we collect from the words that the crown did so intend, we must give effect to that intention so expressed. Now it appears that when the crown meant to give a power of appointing a

deputy generally, it has given it to the then town clerk and all future town clerks in express words. But when power is given to the recorder to appoint a deputy, it is not given to the recorder generally, but the crown declares that it may and shall be lawful "*pro prædicto Johanno Simpson, moderno recordatore*" to make a sufficient person "*deputatum suum*" in the office of recorder. It is argued that this is to be understood as a grant of the power to the modern office of recorder then filled by *John Simpson*, as if his name had been introduced merely by way of instance, and not as one to whom the power was given personally. But when we find that in every other part of the charter where the crown meant to give a power generally to be exercised by the officer for the time being, it is so expressed, we cannot suppose that the like words would have been omitted in this part, if the power in question had been intended to be given generally. An argument has also been raised upon the words of the clause giving power to the *mayor for the time being* to administer an oath to the deputy so appointed; but that was at all events necessary, the mayor being an annual officer. It also relied on, "*quod hujusmodi deputatus*," so made, nominated, and sworn, shall, in the absence of the recorder aforesaid, have the same power in all things "*quam recordator burgi illius pro tempore existens*," &c. : by which, it is said, must be understood that the deputy *for the time being* was to have the same power as the *recorder for the time being*. But I do not know how else it could be properly described: it could not properly have said that the deputy should have the same power as was before given to *John Simpson*; for he was to exercise all the powers which had been before given to the office of recorder by virtue of any former letters patent as well as by that charter. It appears therefore upon an attentive examination of the charter, that the original clause conferring the power in question does not contain any ambiguity which should lead us to pick out the meaning of the crown from other parts of the same charter; though as far as we can recollect its meaning from other parts, it falls in with the natural meaning of the words used in that clause: and that those expressions which have been relied on as warranting a more extended construction of the power may all be explained: there is therefore no such doubt upon the meaning of the charter as should induce the Court to grant the writ for the purpose of putting the defendant to make a special return.

BAYLEY, J. The true construction of the charter is that the right of appointing a deputy was meant to be confined to *John Simpson*, the modern recorder under the charter, and not to be extended to his successors. There might be motives weighing with the crown for conferring such a special power: he had been recorder for some time, had been tried and approved, and reliance might be placed on his personal judgment and discretion in the exercise of such a power: he was appointed by the crown under the new charter; but future recorders would be appointed by the corporation, and the crown might not intend to give future recorders the same power of putting a deputy upon the corporation whom they might not approve. And in fact since the death of *John Simpson* there has been no deputy recorder appointed till the time of the present recorder. It is not necessary that there should be a power of appointing a deputy for such an office; and if the crown had meant to give the power generally, it would not have used the special and restrictive words which it has done in the clause conferring it. It is also to be remarked, that there are two other clauses in the charter giving powers to officers in general terms which extend to their successors; which would naturally have led the crown to have used the same general words in this clause, if it had meant to extend the power in like manner. One of them is that which makes it lawful for *Thomas Richards* the town clerk, and for *every succeeding town clerk*, to appoint a deputy with the approbation of the mayor and aldermen: the other is, where power is given to the recorder *for the time being for ever after* to be a justice of the peace, which extends to all future recorders. The change of

phrase in these instances from that used in the clause in question shews a change of intention in the giver of the power; and therefore, without further criticising and commenting upon the words of the clause, I agree with the Court upon the general construction of it.

Rule discharged.

The King v. The Justices of Staffordshire.

12 East, 572. July 5, 1810.

No appeal lies to the sessions against a conviction and commitment in execution for three months of a collier under the stat. 6 G. 3. c. 25, for absenting himself from his master's service; the clause of appeal in that statute excepting an order of commitment, and the order of commitment in question containing a conviction of the collier for an offence within the act.

A MANDAMUS was applied for, commanding the defendants to cause continuances to be entered upon the appeal of *Joseph Thompson* against a record of conviction of him as a hired servant to *E. Sheldon* for having absented himself from the service of his master, without his consent, down to the next general quarter sessions to be holden for the county of *Stafford*; and at such sessions to hear and determine the matter of such appeal. The affidavits set out the instrument itself at large, viz. "County of *Stafford*—To the constables, &c. and to the keeper of the house of correction at *Stafford* in and for the said county—Whereas, *Joseph Thompson*, a hired servant to *E. S.* of the parish of *Tipton* in the said county, collier, is this day brought before us, two of his majesty's justices of the peace for the said county, and is lawfully convicted, as well by the oath of the said *E. S.* as otherwise, of being his lawful hired servant, and of having absented himself from his service in the said parish of *T.* &c. without his consent, before the expiration of the term of his contract to serve—These are therefore in his majesty's name to charge and command you the said constable to take and convey the said *J. T.* to the house of correction aforesaid, and deliver him to the keeper; and you the said keeper to receive the said *J. T.* into your custody and safely him there keep two months from the date hereof. Given under our hands and seals this 29th of *January*, 1810." (Signed and sealed.) That *Thompson* immediately upon or soon after such conviction, and before he was conveyed to the house of correction under that warrant, gave notice in writing to *Sheldon*, and also to the convicting magistrates, of his intention to appeal to the next sessions against such conviction, and offered to enter into a recognizance before one of the same magistrates with sufficient surety conditioned as in the statute is directed; which was refused. That notices were again given to the magistrates and the prosecutor on the 23d of *April* last, more than six days before the sessions, that *Thompson* would appeal against the conviction; and he also entered into a recognizance before another magistrate to appear at and abide the order, &c. of the court. That he entered his appeal at the sessions on the 3d of *May*, and proved his notice of appeal and recognizance; but when the appeal was called on, the clerk of the peace informed the Court that no conviction, order, or determination of the magistrates against *Thompson* had been returned to the sessions; for which cause, and no other, the appeal was dismissed without trial.

Jervis and *Petit* opposed the rule, contending that the warrant of commitment of the 29th of *January*, 1810, was a commitment in execution under the stat. 6 Geo. 3. c. 25. This statute was passed in extension of the stat. 20 Geo. 2. c. 19, in pari materia; and the 4th sect. provides that if any artificer, collier, &c. shall contract to work with any person for any time, and shall absent himself from his service before the term of his contract shall be completed,

or be guilty of any other misdemeanor, any justice of the peace of the county or place, on complaint made upon oath by the master, &c. may issue his warrant for the apprehension of such collier, &c. and examine the complaint; and if it shall appear to the justice that such collier, &c. shall not have fulfilled his contract, or hath been guilty of any misdemeanor, it shall be lawful for the justices to commit him to the house of correction for any time not exceeding three months, nor less than one. By s. 2, of the former act the imprisonment was confined to one month. And by s. 5, of both acts the appeal, which is given in other cases within the two acts, is denied in this case: for it provides, "that if any person shall think himself aggrieved by such determination, order, or warrant of any justice of the peace as aforesaid except an order of commitment, every such person may appeal to the next general sessions, &c. giving six days notice &c. and entering into a recognizance within three days after such notice, &c. with sufficient surety conditioned to try his appeal," &c. This then must be taken to be an order of commitment within the meaning of the act, excepting it out of the clause giving the appeal: which clause will still operate upon other cases within the two acts; such as orders for composing differences and respecting wages between the masters and servants there named, and for determining the amount of satisfaction for loss of service. It is a conviction and an order of commitment of the offender in the same instrument: it is not therefore open to the objection taken in *The King v. Rhodes*,^(a) where the defendant was committed in execution under the vagrant act, 17 G. 2. c. 5, without any previous conviction for the offence. And though it was said by *Buller, J.* in *The King v. Eaton*, 2 Term Rep. 285; that justices of peace ought in every instance to return a conviction to the sessions, whether an appeal be or be not given; yet the reason assigned was that the crown might not be deprived of its share of the forfeiture; which does not apply to a case of this sort. But supposing the Court were of opinion that there ought to have been a separate conviction returned to the sessions, against which the party might have appealed, and that the appeal is only restrained in the case of a simple order of commitment in execution, as distinct from such conviction; yet the two months' imprisonment having long since expired, the court would not now do a nugatory act, by granting a mandamus to the sessions to receive and enter continuances on an appeal, from which no effect could ensue.

Gaselee, contra, contended that the conviction and the commitment in execution were two distinct things in their nature, and could not in legal contemplation be united by being blended together in the same instrument: and that the latter only being excepted out of the appeal clause by the designation of an order of commitment, an appeal lay against the conviction, under the general terms of the 5th clause, "that if any person shall think himself aggrieved by such determination, order, or warrant of any justice of the peace, (except an order of commitment,) he may appeal." If this clause do not extend to convictions under the 4th clause, there will be little else for it to operate upon in the statute; for the only other power to be executed by justices of the peace is under the first clause; where an apprentice shall absent himself from his master's service, and shall refuse to serve him for a further time in proportion to the loss of service during the contract, or to make compensation to his master for it; in which case a justice of peace, on complaint, of the master, may determine what satisfaction shall be made to the master, and may commit the apprentice to the house of correction not exceeding three months, if he do not give security to make such satisfaction. [*Bayley, J.* The appeal clause will operate upon the determination or order of the justice as to the amount of the satisfaction to be paid to the master by the apprentice under the latter act, if

(a) Term Rep. 220, and vide *Rex v. Cooper*, 6 Term Rep. 509. And *Massey v. Johnson*, ante, 67.

he do not serve out his lost time.] It is difficult to suppose that the legislature meant to give an appeal against an order for a further service of perhaps 24 hours, or for the payment of a few shillings in satisfaction of the loss of service, and yet to deny it in the case of a conviction, to be followed up by three month's imprisonment. [Lord *Ellenborough*, C. J. To what else than this order of commitment can the words of exception in the appeal clause apply? *Le Blanc*, J. This is a conviction and a warrant of commitment in execution at the same time; the act does not separate them; and to give the exception in the appeal clause any effect it must operate on both. Under the vagrant act the conviction and commitment are always in the same instrument.] There must be a conviction before there can be a commitment. [*Bayley*, J. There must be a conviction in the warrant of commitment. The objection in *The King v. Rhodes* was, that the warrant of commitment did not include a conviction: it only stated that he was charged before the justice with being a rogue and a vagabond: and it did not proceed, as it ought to have done, to adjudge the defendant to be guilty of the offence charged.] Unless the appeal lies in this case, to get rid of the conviction, although the period of imprisonment has expired, the party grieved is without redress; for so long as the conviction remains in force, it will be an answer to any action of trespass.

LORD ELLENBOROUGH, C. J. It is not for us to say whether it may be convenient and proper to provide a remedy by appeal for a party grieved by a commitment in execution under this act: we can only declare what the legislature have said in this case: and when by excepting an order of commitment out of the appeal clause, they have said that there shall be no appeal against such an order, and when the commitment must for this purpose be taken to be one and the same thing with the conviction, we have no discretion left to exercise upon the subject; and it does not become us to scan the wisdom of the provision which the legislature have enacted.

Per Curiam,

Rule discharged.

White and Others v. Parkin and Others.

12 East, 578. July 6, 1810.

The plaintiffs having contracted by charter-party sealed to let a ship, then in the *Thames* to freight to the defendants for eight months, to commence from the day of her sailing from *Gravesend* on the voyage there stated, and having covenanted that she should sail from the *Thames* to any British port in the English channel, there to load such goods as the freighters should tender, and sail to the *West Indies*, and bring back a return cargo to *London*; afterwards agreed by parol with the defendants, that the ship, instead of loading at some port in the channel, should load in the *Thames*, and that the freight should commence from her entry outwards at the custom-house: held that this subsequent parol contract was distinct from and not inconsistent with the contract by deed, being anterior to it in point of time and execution, and might therefore be enforced by action of *assumpsit*.

THE plaintiffs, as owners, brought *assumpsit* against the defendants as freighters of a ship, and the declaration contained a special count, stating the charter-party of affreightment after mentioned; and that the defendants, in consideration of the plaintiffs permitting the ship to take in her goods in the *Thames*, instead of her loading at a port in the English channel promised to pay for such use of the ship, after the rate in the charter-party mentioned; and that the pay should commence and be accounted from the day the ship should be entered outwards at the custom-house. There were also general counts for the use and detention of the ship. At the trial in *London* before Lord *Ellenborough*, C. J. a verdict was taken for the plaintiffs for 397l. 16s. 8d. subject to the opinion of the Court upon the following case.

By charter-party of affreightment, under seal made the 15th of *November*;

1808, the plaintiffs, as owners of the ship *Sir Sidney Smith*, then lying in the *West India* docks, let her to freight to the defendants by the month, for 8 calendar months, *to begin and be accounted from the day of the ship's sailing from Gravesend on the voyage after mentioned*, and for such further time as might be necessary to complete the same, upon these terms. The owners covenanted with the freighters that the ship should with the first opportunity of wind and weather sail from the *Thames*, and proceed direct, agreeably to the instructions of the freighter, *to any one British port in the English channel*, and on her arrival there should be made tight and strong, and in every respect seaworthy, and be manned, armed, and equipped as therein mentioned, &c.; and should thereupon take on board at such her ordered port all such lawful goods as the freighters should tender, &c., and sail therewith from her loading port, and proceed direct to *Barbadoes* for orders, whether to unload at *Hayti* or *Martinique*, &c. and take in a return cargo, and return therewith direct back to the port of *London*, and there make a true delivery of the cargo to the freighters. In consideration whereof, the freighters covenanted to provide the king's licence and other necessary documents for the voyage, and to load the ship at a *British* port in the *English* channel, and to despatch her to *Barbadoes*, &c. and to unload the outward and bring the homeward cargo at and to the places and in the manner described, and also to pay to the owners for freight during the said voyage and employ at the rate of 40s. per ton of the ship's register tonnage, per calendar month, for 8 calendar months certain, *to begin and be accounted from the day of her sailing from Gravesend in the outward voyage*, and at the like rate for such further time as the ship should be continued in the service and employ of the freighters, until the final discharge of her homeward cargo at the port of *London*.

After the execution of the charter-party, upon the application of the defendants, it was agreed between them and the plaintiffs, that the ship, instead of loading at some port in the channel, should take in her cargo in the *Thames*, and that the pay of the ship should commence from the time of her being entered outwards at the custom-house. The charter-party however was not waived, but was to stand in all other respects. In consequence of this agreement, the ship took in a cargo in the *Thames*, was entered outwards at the custom-house on the 30th *November*, and sailed from *Gravesend* on the 27th of *January*, 1809, and went to *Falmouth*, where she took in some pilchards. She afterwards proceeded to *St. Domingo*, (*Hayti*), delivered her outward cargo to the orders of the defendants, took in a return cargo on their account, and returned back to *London*. All the freight due according to the charter-party, computed from the vessel's departure from *Gravesend*, has been paid: the sum for which this action is brought is the additional sum for the pay, computed from the entry outwards at the custom-house, according to the agreement above-mentioned for the ship's loading and detention in the *Thames*. The question was, whether the plaintiffs were entitled to recover it? If they were, the verdict was to stand: if not, a nonsuit was to be entered.

Taddy, for the plaintiffs, said as there was a good consideration for the promise laid in the declaration, the plaintiff would be entitled to recover in this action the additional freight for the hire and use of the ship from her loading and entry outwards in the *Thames* until her departure from *Gravesend*, from which time she proceeded under the charter-party, unless that deed stood in the way. But he contended that the new promise would support this action either as a substitution in lieu of the original contract contained in the deed, or as an addition to it. It has been settled since *Blake's* case, 6 Rep. 44, that accord and satisfaction is a good plea in every case of a specialty where damages only are to be recovered for a wrong or default subsequent to the deed, though not where a sum certain is due upon the face of the deed. Now here, after the ship has been loaded by the freighter in the *Thames*, under the new agreement, of which he has derived the benefit, he cannot object that she was

not loaded in the channel : though the agreement to load in the river could not have been pleaded in bar of an action on the specialty ; for after the parol contract has been carried into effect, a new cause of action arises, and the rights of the parties under the specialty are varied, not by the parol agreement to vary them, but by what has been done and accepted between the parties. In the case of *Hotham v. The East India Company*, Dougl. 272, it was doubted whether facts of this kind could be set up in defence by way of plea to an action of covenant on the charter-party, and therefore the questions between the parties were tried in feigned issues ; but Lord *Mansfield* said, " he had no doubt but that if the delivery of the cargo at *Margate* was in the contemplation of the parties substituted for a delivery at *London*, it might have been averred in an action of covenant." And *Buller*, J. said, " there could be no doubt on the subject of the first issue, if the parties had gone on in the usual way by an action of covenant on the charter-party. If an act undertaken to be done be dispensed with by the other party, it is sufficient to state it on the record." But, 2dly, at any rate this new contract may be superinduced upon the other : [Lord *Ellenborough*, C. J. that is, if it do not contradict the terms of the specialty contract.] There can be no contradiction between them, inasmuch as the parol contract is for an antecedent period to the other ; and there could have been no remedy on the specialty for the use and detention of the ship up to the period of her departure from *Gravesend*. He referred to *Fenner v. Mears*, 2 Black. Rep. 1260, where the assignee of a respondentia bond recovered in an action of *indebitatus assumpsit* against the obligor, upon a collateral promise made by such obligor by an indorsement upon the bond, engaging to pay the amount to any assignee of the obligee ; no action being maintainable on the bond itself by the assignee in his own name. [Bayley, J. observed, that that case had since been doubted.](a) In *Foster v. Allanson*, 2 Term Rep. 479—482, where articles of partnership under seal were entered into between the parties, containing a covenant to account yearly, and make a final settlement at the end of the partnership ; and on the dissolution of it, they accounted, and struck a balance, which was in favour of the plaintiff, including items not connected with the partnership, which the defendant promised to pay ; the Court held, that *assumpsit* lay on such promise : and *Buller*, J. said, that it would have been the same though such account had not included any other than partnership items.

Scarlet, contra. If this could be considered as a new contract substituted in part for that under seal, it would shew, that the plaintiff might have sued on the specialty for the breach of it ; but that could not be, there being no covenant in it for the additional freight : and the doctrine of accord and satisfaction cannot apply ; for that can only be a good plea after the covenant is broken. Nor does the principal of waiver apply : for as in a case of a forfeiture, though the party injured may waive the forfeiture, he does not waive the covenant itself. Then the question is, whether where parties have contracted under seal for the use of a certain thing they can by parol super-add other terms and conditions to the covenant. And when it is said, that this agreement is consistent with the charter-party, the distinction is more in words than effect ; for the same thing may be said in every case where a new term is introduced by parol into a sealed contract, which before was silent upon the subject. [Lord *Ellenborough*, C. J. The parol agreement was for the use of the ship for a different period of time from that in which the charter-party attached. Until the period covenanted for arrived, might not the plaintiff have let his ship out to any other person ; and if so, why not to the defendants ? It is only by blending in the special count the two contracts, that any difficulty appears to arise ; for if the case had stood upon the common count for the use and hire of the ship for the antecedent period before her arrival at *Gravesend*,

(a) This was by Lord *Kenyon*, C. J. in *Johnson v. Collins*, 1 East, 104.

no answer could have been given to it on account of the existence of a charter-party, which did not attach till her departure from thence.] The antecedent contract went to affect the execution in part of the contract under the charter-party, by which latter the ship was to proceed to some port in the *English* channel, and there take in her loading; she therefore sailed as upon a different voyage under the new contract. He then cited a case of *Leslie v. Dela Torre*, tried at the sittings after *Trinity*, 1795, before Lord *Kenyon*, C. J., where the declaration was in debt upon a charter-party against the freighter, and also contained the common counts in debt. The defendant had chartered the ship of the plaintiff to carry corn to *Barcelona* in *Spain*, and 65 running days were to be allowed for waiting for convoy at *Portsmouth* and *Ferrol*, and so much per day was to be paid for demurrage. The defendant, finding that the ship was likely to wait at *Portsmouth* a long time for convoy, and that the *Spanish* convoy was at *Corunna*, persuaded the master to go to *Corunna* and wait for the convoy there; but in fact after going to *Corunna*, he waited there for the convoy much beyond the 65 running days; and when the action was brought against the defendant for the demurrage, he defended himself upon the letter of the charter-party. The plaintiff, on the other hand, set up the agreement to substitute *Corunna* for *Portsmouth*. Lord *Kenyon* objected, that there were no specific damages agreed upon for which debt would lie. The plaintiff's counsel then suggested that he was entitled to a verdict on the count for a *quantum meruit*. But his lordship decided, that the agreement by charter-party being under seal, the plaintiff could not set up a parol agreement inconsistent with it, and which in effect was meant in a certain extent to alter it.

LORD ELLENBOROUGH, C. J. Here there is no conflict between the charter-party and the subsequent agreement. It is true, that where there is a contract under seal, the parties cannot dispense by parol with the performance of any of the covenants in it. But here the agreement to load the ship in the *Thames*, before she proceeded to *Gravesend*, was for a period before the charter-party attached. Then what objection can there be to give an earlier reward for an earlier inception of the service than that which was covenanted for under the deed. The parol agreement merely borrowed some of the terms of the charter-party by reference to it, but does not contradict or dispense with it. If there had been less ingenuity exerted in framing the special count in the declaration, and the plaintiff had stood upon the common count for the use and hire of the ship at a time anterior to that of the charter-party, there would not only have been no repugnance, but not even the appearance of any, between the two contracts. There is however no real repugnance between them, but the two may well subsist together: therefore this action may well be maintained.

GROSE, J. The contracts are separate, and one is to operate before the other.

LE BLANC and BAYLEY, Justices, assented.

Postea to the plaintiffs.

Brackenbury and Others v. Pell and two Others.

12 East, 585. July 6, 1810.

To an action on a replevin bond, conditioned for the defendant to prosecute his suit below with effect, and alleging a breach in his not prosecuting it according to the tenor and effect of the condition, but therein failing and making default, it is a good defence to plead that the defendant did appear at the next county court and there prosecuted his suit which he had there commenced against the now plaintiff, and which suit was still depending and undetermined: and such plea is not avoided by replying that the defendant did not prosecute his suit as in the plea mentioned, but *wholly abandoned the same, and that the said suit is not still depending*; without shewing how it was determined and ceased to depend.

THE plaintiffs declared, as assignees of the sheriff, in debt upon a replevin bond; which was conditioned to be void if *Pell*, the defendant, appeared at the then next county court, &c. and there prosecuted with effect her suit commenced against the now plaintiffs, for the taking and detaining the goods, &c.: and they averred, that afterwards, at the next county court session the 29th of April, 1807, the defendant *Pell*, levied her plaint in the said court against the plaintiffs for the taking, &c.; but notwithstanding such proceedings, the defendant *Pell* did not prosecute her said suit in the said condition, &c. mentioned, according to the tenor, effect, intent, and meaning of the said condition, but therein failed and made default: whereby the said writing obligatory, became forfeited, &c.; and the sheriff afterwards, on the 16th November, 1807, assigned the same, &c. to the plaintiffs, according to the form of the statute, &c.: and then they alleged non-payment, &c.

Pleas, 1st, that the defendant *Pell* did appear at the next county court holden, &c. next after the making of the said writing obligatory, and there prosecute her suit which she had there commenced against the now plaintiffs for the taking, &c. according to the form and effect of the said condition, &c. 2dly. That the defendant *Pell*, after the levying of her aforesaid plaint, did prosecute her said suit in the said condition mentioned, and which said suit is not still depending or undetermined. The replication to both pleas, admitting that the defendant *Pell* did appear at the next county court, &c. and did there prosecute her said suit as in the first plea mentioned, alleged that afterwards, and whilst the said suit was depending in the said county court, the defendant *Pell* did not prosecute her said suit as in the said plea is mentioned, but wholly abandoned the same, and the said suit is not still depending or undetermined.

To this the defendants demurred, and assigned for special causes, that the replication, so far as it relates to the first plea, admits that the defendant *Pell* performed the condition of the writing obligatory; and does not shew that the said suit was legally determined; or in what manner the defendant *P.* abandoned the same; or that the same was discontinued by her; or that any judgment of *non pros*, or otherwise, was given therein against her in the county court.

Yates was to have supported the demurrer, but the Court desired to hear

Courthope, contra: who abandoned the replication, upon a strong intimation of the opinion of the Court, that it could not be maintained, as not shewing how the suit once pending was determined. But he contended, that the pleas were bad, inasmuch as they did not shew that the suit had been prosecuted with effect, according to the condition of the bond: and that it lay upon the defendants to shew that, in order to get rid of their obligation. If a party undertake to convey an estate, it is not enough to state generally that he has conveyed it, but he must shew by what deed he conveyed it. (a) If he engage to discharge an obligation, he cannot plead generally that he did discharge it,

(a) Vide *Pudsey v. Newsam*, Yelv. 44, and 5 Bac. Abr. 410.

but he must shew how. So here, it is not sufficient to state that the defendant *Pell* did prosecute her suit and that it is still depending, but the plea should have set forth how far it was prosecuted, or at least that it was prosecuted *with effect*. [*Le Blanc*, J. What is prosecuting *with effect*: what else can it mean than that it was prosecuted to judgment? But here it is shewn by the pleas that the suit was prosecuted, but that it is still depending. *Bayley*, J. The suit being averred to be still depending, if the plaintiffs recover in this action, the defendants may afterwards recover on the replevin bond.] He referred to *Morgan v. Griffith*, 7 Mod. 381, that the plaintiff below must prosecute the suit to a successful decision, otherwise it is no compliance with the condition of the replevin bond: and also to *Lane v. Foulk*, Comb. 228; *Dias v. Freeman*, 5 Term Rep. 195; *Cooper v. Priz*, 1 Sid. 294, and 1 Rol. Abr. 337, pl. 5, & 2 Bac. Abr. 485. K. which collects the cases upon recognizances to prosecute writs of error with effect: and 5 Bac. Abr. 410, 411, which lays down the rules of pleading and collects the cases, that where covenants are to do a matter of law, performance must be pleaded specially; because, being matter of law, it ought to be exhibited to the Court who are judges of the law, to see if it be well performed, and not to the jury, who are judges of the fact only. And so where the covenants are matters of record, the performance must be shewn specially; because it must appear to be done by the record, and is not to be tried by the jury on the general issue.

Lord ELLENBOROUGH, C. J. This is an action on a replevin bond, which is conditioned to prosecute the suit in the sheriff's court with effect; and the breach assigned is, that the defendant did not prosecute her suit below according to the tenor and effect of the condition, but therein failed and made default. The defendant pleads, that she did appear at the next county court, and did there prosecute her suit according to the form and effect of the condition, and also that that suit is still depending and undetermined. What more had she to allege in order to save the condition of the bond, unless it were shewn in reply that the suit was legally at an end. The general principle of pleading is, that where a party relies on a varying state of things from that which has been shewn to have existed on the other side, it is incumbent upon him to shew the variation. Here the suit shewn by the defendant to have been instituted and prosecuted by her, and to be still pending and undetermined; we must presume that things exist in the same state, and that the suit is still continuing, unless the contrary be shewn: it lay therefore upon the plaintiffs to shew that it was legally determined, so as to establish the breach alleged, that it was not prosecuted with effect. The plaintiffs have indeed replied, that the defendant did not prosecute, but wholly *abandoned* the suit; but I do not know what is meant in legal understanding by *abandoning* a suit: and though it be also added, that the suit is not still depending or undetermined: yet the plaintiffs should have shewn how it ceased to depend; and not having done that, the replication is open to the objections stated upon special demurrer.

Per Curiam,

Judgment for the defendants.

Doe, on the several Demises of the Earl and Countess of Cholmondeley v. Maxey.

12 East, 569. July 6, 1810.

Where a testator devised all his real estate except at S., to the head of his family for life, and then to several of the junior branches, in succession, to each for life, with remainder to his first and other sons in tail male, with the ultimate remainder to *his own right heirs*: and then he devised his estate, at S. to some, by name, of the junior branches, but not to all of those to whom he had devised the first estate, and varying the order of succession, to each for life, with remainder to his first and other sons in tail mail;

and then devised that "for default of such issue," the estate at *S.* should go "to such person and persons, and for such estate and estates as should at that time" (i. e. on the death of the last tenant for life named without issue male) "and from time to time afterwards entitled to the rest of his real estate "by virtue of and under his will:" held that the ultimate remainder in fee of the estate at *S.* vested by descent in the person who was the testator's heir at the time of his death, and did not remain in contingency under the will till the death of the last tenant for life without issue male who was named in the devise of that estate.

IN ejectment for a moiety of a certain real estate in the parish of *Swinstead* in the county of *Lincoln*, which was tried before *Bayley, J.* at *Lincoln*, a verdict was taken for the plaintiff, subject to the opinion of the Court on the following case.

The Hon. *Albemarle Bertie* being seised in fee of the several estates hereinafter stated, by his will of the 19th of *October, 1741*, duly executed and attested, devised all his lands, tenements, and hereditaments in the county of *Lincoln*, to his nephew the Duke of *Ancaster* for life, charged with several annuities; remainder, as to one moiety, (except the estate at *Swinstead*) charged with half the annuities, to the testator's nephew Lord *Vere Bertie* for life; remainder (with like charges and exception) to trustees to preserve contingent remainders; remainder to the first and other sons of Lord *Vere* in tail male. And as to the other moiety, after the decease of the said Duke (except his estate at *Swinstead*) to his nephew Lord *Montagu Bertie* for life, charged with the other moiety of the annuities; remainder (except *Swinstead*) to trustees, &c.; remainder to the first and other sons of Lord *Montagu* in tail male. And on failure of such issue male of either *Ld. Vere* or *Ld. Montagu*, the testator devised the moiety of him who should first die without issue male, to Lord *Brownlow Bertie* (youngest son of the said Duke) for life, (charged as before;) remainder to trustees, &c.; remainder as to the said moiety, charged as aforesaid, to the first and other sons of *Ld. Brownlow* in tail male: but in case of the failure of the issue male of both *Ld. Vere* and *Ld. Montagu*, the testator devised the other moiety of the one who should last die without issue male, to *Ld. Brownlow Bertie* for life, (charged as aforesaid;) remainder to the trustees, &c.; remainder to the first and other sons of *Ld. Brownlow* in tail male. But in case *Ld. Brownlow Bertie* should die in the lifetime of either *Ld. Vere* or *Ld. Montagu Bertie*, should have issue male, then the testator devised his whole real estate (except *Swinstead*) to such of them, *Ld. Vere* and *Ld. Montagu*, who should have issue male then living, for his life, (charged as before); remainder to trustees, &c.; remainder to the first and other sons of such of them, *Ld. Vere* and *Ld. Montagu*, as should have issue male as aforesaid, in tail male. And on failure of issue male by *Ld. Vere* and *Ld. Montagu* and *Ld. Brownlow Bertie*, he devised all his said real estate (except *Swinstead*) charged as aforesaid, to *Ld. Albemarle Bertie*, (second son of the said Duke of *Ancaster*) for life, charged as aforesaid; remainder to trustees, &c.; remainder to the first and other sons of *Ld. Albemarle* in tail male; and for default of such issue, then to *Peregrine Marquis of Lindsey* (eldest son of the said Duke) for life; remainder to trustees, &c.; remainder to the second son of the body of the Marquis, and to the heirs male of the body of such second son; and for default of such issue to the third and other the younger sons of the body of the Marquis successively in tail male; remainder as to all the premises to his (the testator's) own right heirs for ever. And the testator devised to *Ld. Albemarle Bertie*, after the death of the said Duke, all his estate, lands, &c. at *Swinstead* for life; remainder to trustees, &c.; remainder to his first and other sons in tail male; remainder to *Ld. Montagu Bertie* for life, sans waste; remainder to trustees, &c.; remainder to his first and other sons in tail male; remainder to *Ld. Brownlow Bertie* for life, sans waste; remainder to trustees, &c.; remainder to his first and other sons tail male: and for default of such issue, the testator devised the estate at *Swinstead* to such person and persons, and for such estate and estates, as should, AT THAT

TIME, and from time to time afterwards, be entitled to the rest of his real estate by virtue of and under his will. And the will contained a proviso, that in case *Ld. Albemarle Bertie*, or the heirs male of his body, should ever be Duke of *Ancaster*, then and from thenceforth the said devise of his estate at *Swinstead* to *Ld. Albemarle Bertie*, and to his first and other sons in tail male, should cease and be void; and in such case, and from thenceforth, the testator devised all his said estate at *Swinstead* unto the next person and persons, severally and successively, in remainder one after another, and for such estate and estates, as should, AT THAT TIME, and from time to time, be entitled thereto by virtue of the several other limitations in that his will, as in case *Lord Albemarle Bertie* were then actually dead, without issue male. And the testator gave several annuities therein mentioned, and appointed his nephew the Duke of *Ancaster* sole executor of his will. By a codicil to his will, dated 4th Jan. 1741, the testator, after noticing the death of the Duke his nephew, appointed his nephews *Ld. Vere* and *Ld. Montagu Bertie* his executors.

On the testator's death, 8th Feb. 1741, the will and codicil were proved by *Lord Vere* alone. *Lord Albemarle* died May 16th, 1765, without having ever been married: and *Lord Montagu* died 12th Dec. 1753, without having ever had any male issue; and *Lord Vere* died 13th Sept. 1768, without leaving any male issue him surviving. Upon the death of *Lord Vere*, *Ld. Brownlow* entered into possession of all the devised estates, including the *Swinstead* estate, and upon the death of Duke *Robert*, in 1779, became Duke of *Ancaster*. *Peregrine*, Duke of *Ancaster*, called in the said will Marquis of *Lindsey*, and who was the heir at law of the testator, by his will dated 11th Jan. 1775, devised to his wife *Mary* Duchess of *Ancaster*, and to certain other persons, all his lands, &c., not in settlement, and all his real estate, freehold and copyhold, and all his personal estate, &c., in trust to and for his son *Robert* Marquis of *Lindsey*, his heirs and assigns for ever, subject to the payment of debts, funeral expences, and legacies, &c. And in addition to the portion of 5000*l.* each to his two daughters *Priscilla Barbara Elizabeth Bertie*, and *Georgiana Charlotte Bertie*, provided by act of parliament, he directed 5000*l.* more to be paid to each at their ages of 18 years, or days of marriage. And in case his son *Robert* Marquis of *Lindsey* should die before he attained the age of 21, and without issue, and the said testator should leave no other son, he devised all his real estates to his two daughters, as tenants in common, and to the heirs of their bodies; subject to the payment of his debts, &c.: and in default of such issue, he gave the whole of his said estates, subject as aforesaid, to his wife in fee, and appointed her sole executrix. *Peregrine*, Duke of *Ancaster* died on the 12th of August, 1778, leaving his only son *Robert* Marquis of *Lindsey* his heir at law, who upon his decease became Duke of *Ancaster*, and his said two daughters, him surviving. Duke *Robert* having attained the age of 21, and being the heir at law of *Albemarle Bertie*, the first testator, by his will of the 29th of May, 1779, after giving his leasehold house in *Berkley-square* and some furniture to the duchess, his mother: as to all the rest and residue of his personal and real estate, by virtue of all powers and authorities to him appertaining, he devised the same in manner therein mentioned. And then the case set out so much of the will of Duke *Robert*, (which was set out for another purpose in the former case of *Doe on the Demise of the Earl and Countess of Cholmondeley v. Weatherly*, 11 East, 323,) as shewed that the estates in question, including the *Swinstead* estate by name, were devised by his grace, (if it were competent for him to do so) to his sister the now lady *Willoughby de Eresby* for life, and to her sons and daughters successively in tail male, in strict settlement, with remainder to his other sister, the now Countess of *Cholmondeley*, for life, with remainder to her sons and daughters successively in tail male; remainder to his own right heirs for ever. The case then stated the death of Duke *Robert* on the 8th of July, 1779, without having ever been married; leaving the Lady *Priscilla* now Baroness Wil-

loughby of Eresby) and the Lady *Georgiana* (now Countess of *Cholmondeley*), his sister and co-heiresses at law him surviving, who are also the heirs at law of *Albemarle Bertie*, the first named testator: and Lord *Brownlow Bertie* thereupon became Duke of *Ancaster*, and died in *February*, 1809, without having ever had any male issue. The case also stated the death of Lord *Robert Bertie* on the 10th of *March*, 1782, who was mentioned in the will of Duke *Robert*, without ever having had any issue male. The question reserved was, whether the plaintiff were entitled to recover the moiety of the *Swinstead* estate in the declaration mentioned; Lady *Willoughby* and Lady *Cholmondeley* being the heiresses at law of the Hon. *Albemarle Bertie*, the first testator, at the time of the death of *Brownlow Duke of Ancaster* without issue, or whether the remainder of the whole of the said estate vested in Duke *Peregrine*, as his heir at law at the time of the decease of *Albemarle Bertie*, and passed under the will of Duke *Peregrine* and that of Duke *Robert* to Lady *Willoughby*.

Scarlett, for the plaintiff, stated the question in substance to be, whether Duke *Peregrine* or Duke *Robert* of *Ancaster* had a vested remainder in the estate at *Swinstead*; if either of them had, it passed under his will. But he contended, that the devise of the *Swinstead* estate, upon the death of Lord *Brownlow Bertie* without issue male, "to such person and persons, and for such estate and estates as should, at that time, and from time to time afterwards, be entitled to the rest of the testator's real estate by virtue of and under his will," was a contingent, and not a vested remainder in the person who should be so entitled at the death of Lord *Brownlow* without issue male. The testator, as to this estate, departs from the order of succession established as to the other. The person who was to take on failure of issue male of Lord *Brownlow* could not be ascertained till the event took place: it is limited to the person who at that time should be entitled to the other estate, and for such estate, &c.; which is quite inconsistent in the terms of it with the notion of an interest vested before in any person. There were several persons who might be entitled at the happening of that event: as if, on the death of Lord *Brownlow* without issue male, Lord *Vere* had been living, he would have been entitled for life, with successive remainders in tail male to his first and other sons; or if Lord *Vere* had been dead, leaving a son, that son would have been entitled in tail male. But if the whole line had failed, then the next entitled would have been such person as was then heir at law to Lord *Brownlow Bertie*. Now, one of the first qualities of a contingent remainder is the uncertainty of the person who is to take under particular description before the event happens. [Lord *Ellenborough*, C. J. Is it not the same as if the testator had repeated the words of limitation to his own right heir?] That would depend upon what he meant by this description: and he seems to have intended to prevent the estate from going to the heir at law and being swallowed up in the dukedom, as long as he could, and till he had exhausted every other line. He did not mean that the *Swinstead* estate should go in the same line as he had before chalked out for the other estate; for he begins with a different order of succession. [Lord *Ellenborough*, C. J. The same persons are to take, though in a different order: and after having carried the estate through the particular persons named, did he not intend by the concluding general words, that it should perform the same revolutions through the same descriptions of persons whom he had before mentioned for the other estate, only he appears to have got tired of repeating the same words. *Bayley*, J. The plaintiff's argument is founded upon a supposition that the testator meant the two estates to go different ways.] It is so, until they were ultimately to unite on failure of the particular lines to which the *Swinstead* estate was limited. A vested remainder must vest either when the particular estate is created, or at least before it expires; but if a remainder be made to depend upon an event at the expiration of the particular estate, that is a contingent remainder. [Lord *Ellenborough*, C. J. Though the union of

the estates in possession was not to take effect till the death of Lord *Brownlow Bertie* without issue male, yet the remainder might vest before.] It could not be ascertained *till that time* who was to take. Then if this remainder were contingent, the ultimate remainders must also be contingent. And if the estate were not conveyed away by the wills of Duke *Peregrine* and Duke *Robert*, the Countess of *Cholmondeley*, and Lady *Guyder*, would be the persons entitled to take under the limitation in the will of Lord *Albemarle Bertie* the testator.

Dampier, contra. It is contended, that the limitation in question is a description of the person who is to take the *Swinstead* estate upon the death of Lord *Brownlow Bertie*: but a person who takes as *right heir* of the testator (for under that description of person Lady *Cholmondeley* must take the moiety of *Swinstead*, if at all,) does not take under the will, but by descent. It would have been the same under a deed. The whole of the real estate, excepting *Swinstead*, was limited after the deaths of Lord *Vere*, Lord *Montagu*, and Lord *Brownlow Bertie*, and on failure of issue male of all the three, to Lord *Albemarle Bertie*, for life; remainder to his first and other sons in tail male; remainder to *Peregrine Marquis of Lindsey* for life; remainder to his second and other younger sons in tail male; remainder to the testator's own right heirs. Then he devised the *Swinstead* estate successively to three of the persons by name, and their first and other sons in tail male, to whom the residue of the estate had been first devised, only in a different order of succession; namely, first to Lord *Albemarle*, next to Lord *Montagu*, and then to Lord *Brownlow*: and then follow the words of reference. Now, supposing that the testator had expressed his meaning as to the *Swinstead* estate at length, instead of by reference to the dispositions of the other estate in the former part of the will, it would have stood thus; remainder to Lord *Vere Bertie* for life; remainder to trustees, &c.; remainder to his first and other sons in tail male; remainder to the Marquis of *Lindsey* for life; remainder to trustees, &c.; remainder to his second and other younger sons in tail male; with the ultimate remainder to the testator's own right heirs; in which case here could have been no question but that such remainder would have vested on his death in those heirs as undisposed of by the will. But it is said, that the words *at that time*, annexed to Lord *Brownlow Bertie's* dying without issue, vary the descent of the ultimate estate, and make it a contingent remainder in the person or persons, who at the time of that event, was or were the testator's heir at law. There ought, however, to be a strong intent shewn to warrant such a construction; and no such intent appears. Suppose Lord *Albemarle Bertie* had come to the dukedom, were there to be two contingencies? It is clear upon the proviso, that the testator meant no more than to remove Lord *Albemarle* and his male issue out of the order of limitations on his accession to the dukedom; and he does nothing more as to the subsequent limitations on failure of all the special limitations expressed. It is not material to consider whether the remainders to Lord *Vere* and to his first and other sons, and to Lord *Lindsey* and his second and other younger sons, were vested, or contingent; though it seems they were vested. [*Bayley, J.* They were vested as to those *in esse*: contingent as to those not *in esse*.] After the limitation of the duke, his nephew, the testator wished to keep his estates in the male line, and not to have either of them joined with the dukedom while there were others of the family to take them to keep *Swinstead* severed from the rest for a time; but afterwards his intention was, that all should go together. The words *at that time* will not be inoperative by his construction: for they may be referred to the persons to whom he had before given the particular estates: otherwise the following words *and from time to time*, can have no operation; for the latter words cannot refer to the death of Lord *Brownlow* without issue. It was certain that the ultimate remainder would take effect in possession immediately on failure of issue male of Lord *Brownlow*; Lord *Vere* might have left sons, and Duke

Peregrine more sons than one. But there is one decisive reason against construing the ultimate remainder to be contingent; for the person to whom it is supposed to be limited must be one who takes the rest of the testator's real estate *under and by virtue of his will*. Now, his *right heirs* cannot take his real estate under his will: the remainder to them is undisposed of, and they take the reversion by descent.

A limitation to the heirs of a third person may operate as a contingent remainder: (a) but a limitation by deed or will to the right heirs of the grantor or deviser (he having no previous freehold in the case of a deed) is only the old reversion. And it is a vested interest notwithstanding it may be preceded by contingent limitations to persons not *in esse*, as the fee is not disposed of, ib. 338. The plaintiff's construction therefore cuts out of the will the words "*by virtue of and under the will*," and substitutes "and as to the reversion in fee in *Swinstead*, to such person who will be my heir at the death of Lord *Brownlow* without issue male;" which person would take nothing under the will in the rest of the estate, and might be a different person from him in whom the reversion of the rest of the estate not passing under the will might then be vested: and this construction would go to disjoin the estates which the testator in those events meant to be joined.

Scarlett, in reply, as to the contingency of the remainder "to such person and persons, &c. as should at *that time*, &c. be entitled to the rest of his real estate," put the case, if the limitation had been in terms to one of the younger sons of the Marquis of *Lindsey*, "*if at that time he should be entitled to the other estate*," and so to every other person who might be so entitled at that time: it could not be doubted but that it would be a contingent remainder; for Lord *Vere* might be living at that time, and yet not entitled to take the other estate under the will. The defendant's construction rejects the words *at that time*, &c. [*Le Blanc*, J. Must not the words *at that time*, have been implied, if they had not been inserted?] The words are coupled with the right of possession of the other estate; and if he meant that the *Swinstead* estate was not to vest in interest till vested in possession re-united to the other estate, he could not have used more effectual words. [*Bayley*, J. But how is it shewn, that Lady *Willoughby* and Lady *Cholmondeley* would take the rest of the estate *under the will*?] It must be admitted, that they would take by descent, that being their better title: but still, where the question is upon the intention of the testator, if the intent appear that the heir should take at a certain time and in a certain event, the argument is not affected by that consideration; for the rule of law would not alter the testator's intention, which was, that the heir at law should not take an immediate vested interest, but that it should be suspended and contingent till the death of Lord *Brownlow Bertie* without issue. In *Doe v. Saunders*, Cowp. 420, a devise of the reversion of a certain estate to the testator's right heirs, though they would still take by descent, was held operative to shew his intention that such reversion should not pass by a devise of the residue of his real estate to another in fee. Suppose the devise had been to the heir of a stranger, would it not have been the person who was heir at the time when the estate was to go over? [*Bayley*, J. That would have been the same thing. If the devise over had been to the heir of *A.* who was then living, and *A.* then had a son who would have taken under that description, as a *descriptis persona*; (b) and that son had died before Lord *Brownlow Bertie*; the person who would take upon Lord *Brownlow's* death as the heir of *A.'s* son would take by descent, and as no purchaser under the will.]

LORD ELLENBOROUGH, C. J. Upon the construction of this will I have not been able to form any doubt: it has always presented to my mind one clear,

(a) Vide *Fearne's Cont. Rem.* 66, 4th edit.

(b) Vide *Burchett v. Durdant*, 2 Vent. 311, and *Darbishon v. Beaumont*, 1 Pr. Wms. 129.

distinct, and very intelligible purpose. The testator, having several estates, first disposes of all but *Swinstead*, and gives them successively to the Duke of *Ancaster*, for life : and then in moieties to Ld. *Vere* and Ld. *Montagu Bertie* for life, and to their several first and other sons in tail male ; remainder as to each respective moiety to Ld. *Brownlow Bertie* for life, and to his first and other sons in tail male : but in case Ld. *Brownlow* should die in the lifetime of Ld. *Vere* or Ld. *Montagu* without issue male, and only Ld. *Vere* or Ld. *Montagu* should have issue male, then the whole of the other estates, except *Swinstead*, was to go to which ever of them, Ld. *Vere*, or Ld. *Montagu*, should have issue male then living, for life : remainder to his first and other sons in tail male : and on failure of issue of all the three, Ld. *Vere*, Ld. *Montagu*, and Ld. *Brownlow*, he devised the whole of the other real estates, except *Swinstead*, to Ld. *Albemarle Bertie* for life, and to his first and other sons in tail male : remainder to *Peregrine*, Marquis of *Lindsey*, for life, and to his second and other younger sons in tail male ; with the ultimate remainder to the testator's own right heirs for ever : which latter it was unnecessary for him to devise, for it remained notwithstanding in him as an undisposed reversion, and descended to his own right heirs. Then with respect to *Swinstead*, he adopts a different course : after the death of the Duke, he first takes Ld. *Albemarle* and his sons, next Ld. *Montagu* and his sons, and then Ld. *Brownlow* and his sons ; and then he directs that, on failure of male issue of Ld. *Brownlow*, that estate shall go " to such person and persons, and for such estate and estates, as should, at that time, and from time to time afterwards, be entitled to the rest of his real estate by virtue of and under his will." Who then are those persons who might be entitled to the rest of his real estate under his will ? Ld. *Albemarle* and Ld. *Montagu*, and their male issue, had preceded Ld. *Brownlow* in the limitations of the estate : and there remained, of those mentioned in the first devise, the Marquis of *Lindsey* and his younger sons : therefore, as *verba relata hoc maxime operantur per referentiam, ut in eis inesse videntur* ; (a) it is the same as if he had repeated the same limitations as in the former devise. But he says nothing of the reversion in fee in *Swinstead*, and therefore it would go, as in the devise of the former estate is expressed, to his own right heirs. And the only operation of such a devise in terms is to exclude a conclusion that any other person was intended to take it ; for certainly his heirs would take by descent, and not by the will. The terms of reference amount to no more than if the testator had said—without further specification, let *Swinstead* estate go after failure of issue of Ld. *Brownlow* in the same manner as the rest of the estate had been before limited. It seems therefore clear, that this reversion, which was undisposed of by the will, descended to and vested in interest in *Peregrine* Duke of *Ancaster* as heir at law, and from him passed to Duke *Robert* ; and that on the exhaustion of the line of Ld. *Brownlow Bertie*, who had become Duke of *Ancaster*, it was well vested under the will of Duke *Robert* in Lady *Willoughby*.

GROSE, J. declared himself of the same opinion.

LE BLANC, J. By the first part of the will the real property, excepting the *Swinstead* estate, is given to the several persons of the family, and to their first and other sons in tail male, in the order enumerated, with the ultimate remainder to the devisor's own right heirs. Then as to the *Swinstead* estate, having limited it to some of the persons before named, though in a different order, he devises it on failure of male issue of Ld. *Brownlow* in general terms of reference, to " such person and persons, and for such estate and estates, as should, at that time, and from time to time afterwards, be entitled to the rest of his real estate by virtue of and under his will." The argument is, that the words at that time operate upon all the persons who might take the other estates, including the devisor's own right heirs, and that his heir would take under the

(a) Vide Co. Lit. 359, a.

will. Now supposing the deviser to have contemplated that his heir would take the ultimate remainder in fee under the devise in the first part of his will, it would still be the same in this case; for the ultimate remainder in fee would still vest on his death in the same person who was then his heir at law. But I consider that his meaning, in adverting in the second part to the person and persons who should *at that time* be entitled to the rest of his estate, was with reference only to the particular persons of his family who were before enumerated; and then the ultimate remainder would still go to the deviser's own right heirs, and that would vest in the person who was right heir at the time of the deviser's own death, and it would vest by descent.

BAYLEY, J. It is a settled rule not to read a limitation in a will as being a contingent remainder, unless such appears clearly to have been the intention of the testator; but if it will admit of being considered as a vested remainder, the Court will always read it as such; because a contingent remainder is always liable to be defeated, and the intention of the testator thereby frustrated. Now, an ultimate remainder to a person's own right heirs looks to nobody in particular, and is generally considered as merely leaving the remainder of the estate in the testator, for the purpose of descent; and such probably was the actual intention of this testator on the limitation of the first estate in the will: but if he did look to any person in particular, it would only be to the person who would be his heir at the time of his death. Then it is not likely, if he looked to his next immediate heir in the first clause, that he should be looking in the clause in question to such person as would be his heir at the time of the death not merely of Lord *Brownlow Bertie*, but of Lord *Brownlow Bertie without male issue*; which is looking to an indefinite period; for the remainder to such person and persons, &c. is not limited for default of issue at Lord *Brownlow's* death, but for default of issue male of his first and other sons. It is not likely that the testator should have looked to so indefinite a period for the vesting of this remainder. The other estate had been before limited to several persons successively for life, with successive estates in tail male to their sons; and when the testator, in devising this estate at *Swinstead*, after naming some of those persons, gave it, on failure of the issue male of Lord *Brownlow*, to such person and persons as should *at that time* be entitled to the rest of the estate under his will, he was looking to the estates for lives and in tail which he had devised in the rest of the property, and was not probably looking further. But he could not be contemplating the lessor of the plaintiff: for if he meant any particular person by the designation of his own right heirs it must be taken to be the person who would be his right heir at the time of his death.

Postea to the defendant.

Forster and Another v. Surtees and Others.

12 East, 605. July 6, 1810.

Where by agreement between the plaintiffs, bankers at *Carlisle* and the defendants, bankers at *Newcastle*, the plaintiffs were weekly to send to the defendants all their own notes and the notes of certain other banking-houses; and the defendants were in exchange to return to the plaintiffs their own notes and the notes of certain other bankers, and the deficiency, if any, was to be made up by a bill drawn by the defendants in favour of the plaintiffs at a certain date; held that the notes so sent by the plaintiffs to the defendants constituted a debt against them, which the defendants might pay by a return of notes according to the agreement, but if they made no such return, or a short return, and gave no bill for the balance, such balance remained as a debt against them, which was proveable by the plaintiffs under a commission of bankrupt issued against the defendants, on an act of bankruptcy committed after the time when the bill for

the balances, if drawn, would have been due and payable; and that the plaintiffs could not maintain an action to recover damages as for a breach of contract against the defendants who had obtained their certificates.

THE plaintiffs declared in *assumpsit*, and stated that, before the making of the promise by the defendants after-mentioned, the plaintiffs were bankers at *Carlisle*, and the defendants were bankers at *New-Castle-upon-Tyne*; and that it was the usage and practice agreed upon between them for their mutual accommodation and advantage, that the plaintiffs should weekly on *Saturday* forward to the defendants for their use all the bank notes issued payable on demand by the defendants as such bankers, or by any other banking house in *New-Castle-upon-Tyne*, *Northumberland*, *Durham*, *Yorkshire*, or *Berwick-upon-Tweed*, which should in the week next preceding such *Saturday*, or on that day, have come to the plaintiff's possession: and that the defendants having received such notes, should on or before *Friday*, weekly forward to the plaintiffs for their use all the bank notes issued payable on demand by the plaintiffs as such bankers, or by any other bankers carrying on that business in *Cumberland* or *Westmoreland*, which should on such *Friday*, or other earlier day of forwarding the same, be in the defendant's possession: and if on such *Friday*, or earlier day, the bank notes so to be forwarded by the defendants to the plaintiffs for their use should amount to a less sum than the bank notes forwarded on the *Saturday* next preceding to and received by the defendants for their use, deducting from such amount any sums for which the plaintiffs might have or had, in stating their account on such *Saturday* with the defendants, made themselves debtors to the defendants as hereafter mentioned, there was a further usage and practice agreed upon and observed as aforesaid, for the ends aforesaid, that the defendants should, together with the last-mentioned bank notes, if any, on such *Friday* or earlier day to be forwarded, and forwarded by them as aforesaid, forward to the plaintiffs a bill of exchange drawn by the defendants upon any banker in *London*, for payment of the difference between the respective amounts, to the plaintiffs or their order, or to the order of the plaintiffs, in 20 days after date; such bill being dated on the *Tuesday* preceding such *Friday*: or if no such bank notes were on such *Friday* or earlier day in the defendants' possession, to forward to the plaintiffs on such *Friday* or other earlier day, another bill of exchange drawn and dated as aforesaid for the payment of the amount of the bank notes forwarded on the *Saturday* next preceding by the plaintiffs to the defendants, deducting as aforesaid: and if the bank notes forwarded on any *Friday* or earlier day by the defendants to the plaintiffs were for a larger amount than the bank notes forwarded on the *Saturday* next preceding by the plaintiffs to the defendants, deducting as aforesaid, then there was a further usage and practice agreed upon and observed as aforesaid, for the ends aforesaid, that the plaintiffs should, in stating their account on the *Saturday* next following with the defendants, in respect of the bank notes by them on such *Saturday* forwarded to the defendants, make themselves debtors to the defendants for the difference of the amounts; or, if that difference should exceed the amount of the last-mentioned notes, to forward, together with those notes, to the defendants a bill drawn by the plaintiffs upon any bankers in *London* for payment of the excess to the defendants or their order, or to the order of the defendants, in 20 days after date; such bill being dated on that *Saturday*. And then the count proceeded, that on the 25th of *June*, 1803, in consideration that the plaintiffs (not being made nor being debtors to the defendants for any difference or otherwise howsoever in respect to bank notes by the defendants on the *Friday* or other day next preceding, or at any other time forwarded, according to the usage and practice aforesaid, to the plaintiffs for their use, or in any other manner,) at the defendants' request, had, according to the usage aforesaid (*inter alia*) forwarded to the defendants on that day, being *Saturday*,

for their use, divers bank notes issued by the defendants for payment on demand of divers sums amounting, to wit, to 500*l.*, also other bank notes, &c., (mentioning the amount of bank notes of different bankers falling within the description agreed upon,) which said sums collectively amounted to 1984*l.* 17*s.* 0*d.*, being all that in the week preceding had came to the plaintiffs' possession; and that the defendants had received the same; the defendants promised in return, according to the usage aforesaid, to forward on or before the *Friday* then next to the plaintiffs, for their use, all the bank notes issued payable on demand by the plaintiffs, as bankers, or by any other bankers in *Cumberland* and *Westmoreland*, or either of them, which should then be in the defendants' possession; or if the same should not be payable for sums amounting to 1984*l.* 17*s.* 0*d.*, to forward on such *Friday* or other earlier day, together with such notes, if any, to the plaintiffs, a bill drawn by the defendants upon bankers in *London* for payment of the difference between the amount and the 1984*l.* 17*s.* 0*d.* to the plaintiffs or their order, or to the order of the plaintiffs 20 days after date, the same being dated on the *Tuesday* preceding the *Friday*; or if no such bank notes should be in the defendants' possession, to forward on the same *Friday*, or other earlier day, to the plaintiffs a bill drawn and dated as last aforesaid for the said 1984*l.* 17*s.* 0*d.* And then it alleged, as a breach, that although on or before such *Friday*, divers bank notes as last aforesaid were in the defendants' possession, yet the defendants did not nor would on or before that *Friday*, or afterwards, forward to the plaintiffs, or to any other for their use, all those bank notes or any part thereof, or any other bank notes, or a bill for the said 1984*l.* 17*s.* 0*d.* or any part thereof. There was another special count laying the promise more shortly: and other common counts upon an *indebitati assumpserunt* for money paid, money had and received, and upon an account stated. To all which the defendants pleaded, 1st, the general issue; 2dly, that after the making of the promises in the declaration mentioned, and before the exhibiting of the plaintiff's bill, to wit, on the 1st of *June*, 1806, the defendants became bankrupts, within the statutes, &c.; and that the several causes of action accrued to the plaintiffs before the said bankruptcy; 3dly, the defendants pleaded a special plea of their bankruptcy; in which it was averred, that after the causes of action stated in the declaration, and after the expiration of 20 days and 3 days from the times mentioned in the first and 2d counts to have been appointed for dates of the bills of exchange therein mentioned, and which were to be forwarded by the defendants as therein mentioned, and after the times when those bills of exchange according to their tenor and effect would have been due and payable, the defendants became and were bankrupts within the intent and meaning of the statutes, &c.: and so proceeded to shew by formal averments, that they became bankrupts, and obtained their certificates: concluding that the causes of action accrued to the plaintiffs against the defendants before the time, and more than 23 days before the time, when they so became bankrupts as aforesaid. To these special pleas the plaintiffs demurred generally.

This case first came on to be argued in the last term, before the last special plea of bankruptcy was added. But when in the course of the argument upon the general question, whether the plaintiffs could waive their claim as for a debt arising upon the contract, and sue for damages as for a tort in the breach of it, and thus avoid the effect of the defendants' certificates, stress was laid upon its not appearing distinctly but that the bankruptcy might have happened before the expiration of the 20 days and 3 days of grace, for which the bill for the weekly difference was to be given: during which time the defendants might be considered as entitled to a credit *sub modo*; (though it was observed, that the general plea of bankruptcy stated the causes of action to have accrued to the plaintiffs before the bankruptcy of the defendants:) the Court to avoid all doubt, gave leave to amend by adding the special plea of bankruptcy which

was warranted by the facts of the case. It now came on to be argued distinctly upon the general question.

Holroyd, for the plaintiffs, contended, that the breach of contract set forth in the declaration, for which they sought to recover a compensation in damages, did not constitute a *debt* proveable under the defendants' commission at the time of their bankruptcy. But that though the plaintiffs might have treated their claim as a debt; yet this was one of the many cases where the party has an option to waive his claim as a debt, and proceed to recover the amount in damages, as for a tort: like as in *Goodtitle v. North*, Dougl. 584, where a plea of bankruptcy and certificate was held to be no bar to an action of trespass for mesne profits; though it was admitted, that it would have been to an action for use and occupation; taking the rent there as the certain measure of damages. And the same principle was established in *Utterson v. Vernon*, 3 Term Rep. 539, and 4 Term Rep. 570, and again in *Parker v. Norton*, 6 Term Rep. 695. In *Utterson v. Vernon and others, Assignees of Tyler*, the plaintiff had lent stock to the bankrupt before her bankruptcy, which was to be replaced on request; and no request having been made before the bankruptcy, it was held that he could not prove his debt under the commission; and yet there the sum due was capable of being ascertained by reference to the value of the stock at the time of the bankruptcy: but the Court considered it only as a breach of contract for which the party was to be recompensed in damages. Here then if the plaintiffs can make out their claim to rest in damages, as for a breach of contract, they are not bound to treat it as a debt, however certain the measure of damages may be. The agreement was not only for the sending of the defendants' own notes to them, but the notes of other persons also; and they were not *debtors* for the amount to the plaintiffs, but the defendants were to return to the plaintiffs the notes of the latter, and those of other *Cumberland* and *Westmoreland* bankers, on or before a future day, all which the plaintiffs would have been bound to receive; and it was only in case of any deficiency of such notes to be returned that the defendants were to give a bill payable *in futuro* for such deficiency. *Non constat* that the defendants had not bankers' notes in their hands at the time of the action brought, which they ought to have returned to the plaintiffs; and therefore the cause of action is not merely for the not giving the plaintiffs a bill of exchange for the difference, but for not returning the notes and giving the bill for the balance; and the payment by such notes would have been good, though the notes were worth nothing. The cases of *Mussen v. Price*, 4 East, 147; *Miller v. Shaw*, ib. 149, and *Dutton v. Solomonson*,^(a) do indeed shew that where goods are to be paid for by a bill at a certain credit, *after* the period of credit is expired, *indebitatus assumpsit* will lie; and therefore it must be admitted, that *indebitatus assumpsit* would have lain after the 23 days in this case; but still the party may elect to treat it as a breach of contract, and bring his action for damages, and if he do, the certificate is no bar; for no such bill having been given, the plaintiffs may rest upon the promise to send a bill payable *in futuro*; but such a promise is not proveable as a debt: and the stat. 7 Geo. I. c. 31. s. 1, is confined to debt on bonds, bills, and notes, and other personal written securities,^(b) payable *in futuro*, which are made proveable under a commission of bankrupt.

Richardson, contra, was stopped by the Court.

Lord ELLENBOROUGH, C. J. When a bankrupt is discharged by his certificate from a debt in one form, how can be charged by the creditor in another form of action for the same debt. This is substantially the subject-matter of a debt, and not the case of a mere breach of duty for which the plaintiffs could have declared for, or recovered, any special damage ultra the debt for

(a) 3 Bos. & Pull. 582, and vide *Brooke v. White*, 1 New Rep. 330.

(b) Vide *Parslow v. Dearlove*, 4 East, 438, and *Hoskins v. Duperoy*, 9 East, 498.

which the bill was to be given. And could not the defendants have paid the money into Court? The privilege of returning other bills in payment of the defendants' bills before sent to them by the plaintiffs was a stipulation in favour of the defendants. The transaction is this; the plaintiffs send to the defendants notes of their own and of other bankers to a certain amount, which constitutes a debt against them; against which the defendants may exchange other notes of the plaintiffs and of other bankers in reduction of the balance: but if the defendants do not make any such return, they must be considered as having turned the notes sent by the plaintiffs into cash, and they consequently remained debtors for the amount, and are chargeable as such.

GROSE, J. The not sending a bill for the balance was nothing more than the neglect or refusal to pay that which was a debt against the defendants in the manner which by the agreement they were privileged to do: as much as was not paid in the stipulated manner remained as a balance of debt due to the plaintiffs.

LE BLANC, J. This was only a debt payable in a particular way, if the party availed himself of the agreement to do so.

BAYLEY, J. The amount of the sum which the plaintiffs would have a right to demand in any case for a breach of the agreement would be liquidated damages. Supposing the defendants had had notes which they might have returned, but did not choose to return them, would they not still be debtors for the amount of those which they had received?

Judgment for the Defendants.

Whitehouse and Others, Assignees of Townsend, a Bankrupt, v. J. Frost and L. Frost, Dutton, and Bancroft.

12 East, 614. July 6, 1810.

A. having 40 tons of oil secured in the same cistern, sold 10 tons to *B.* and received the price, and *B.* sold the same to *C.* and took his acceptance for the price at four months, and gave him a written order for delivery on *A.*, who wrote and signed his acceptance upon the said order; but no actual delivery was made of the 10 tons, which continued mixed with the rest in *A.*'s cistern; yet held, that this was a complete sale and delivery in law of the 10 tons by *B.* to *C.*; nothing remaining to be done on the part of the seller, though as between him and *A.*, it remained to be measured off: and therefore, that the seller could not upon the bankruptcy of the buyer, before his acceptance became due, countermand the measuring off and delivery in fact of the then buyer: nor were the goods *in transitu*, so as to enable the seller to stop them.

IN trover to recover the value of some oil the property of the bankrupt, which was tried at *Lancaster* in *March* last, a verdict was found for the plaintiffs for 390*l.*, subject to the opinion of the Court on the following case.

The plaintiffs are assignees of *John Townsend*, late a merchant at *Liverpool*: the two *Frosts* are merchants and partners in *Liverpool*; and the other defendants *Dutton* and *Bancroft* are also merchants and partners in the same town. On the 7th of *February*, 1809, *Townsend* purchased from the defendants *J.* and *L. Frost* 10 tons of oil at 39*l.* per ton, amounting to 390*l.*, for which *Townsend* was to give his acceptance payable 4 months after date; and a bill of parcels was rendered to *Townsend* by the *Frosts*, a copy of which is as follows—" *Liverpool*, 7th *Feb.* 1809—Mr. *John Townsend*, bought of *J.* and *L. Frost*, ten tons *Greenland* whale oil in Mr. *Staniforth's* cisterns, at your risk, at 39*l.* - - - - - £390

Cr.

1809. *Feb.* 14. By acceptance - - - - - £390
For *J.* and *L. F.* Wm. Pemberton."

The said 10 tons of oil at the time of this purchase were part of 40 tons of oil lying in one of the cisterns in the oil house at *Liverpool*, the key of which

cistern was in the custody of the other defendants *Dutton* and *Bancroft*, who had before that time purchased from *J. R. and J. Freme* of *Liverpool*, merchants, the said 40 tons of oil in the same cistern : and upon such purchase received from the *Fremes* the key of the cistern. Afterwards, *Dutton* and *Bancroft* sold 10 of the 40 tons they had so bought (being the 10 tons in question) to the defendants, the *Frosts*; who sold the same in the manner before stated to *Townsend*. On the 7th of *Feb.* the day on which *Townsend* bought the 10 tons of oil, he received from the defendants *Frosts* an order on *Dutton* and *Bancroft*, who held the key of such cistern, they having other interest therein as aforesaid, to deliver to him *Townsend* the said 10 tons of oil : a copy of which is as follows—"Messrs. *Dutton* and *Bancroft*, please to deliver the bearer, Mr. *John Townsend*, 10 tons *Greenland* whale oil, we purchased from you 8th *Nov.* last. (Signed) *J. and L. Frost*." The order was taken to *Dutton* and *Bancroft* by *Townsend*, and accepted by them upon the face of the order as follows; "1809.. Accepted 14th *Feb.* *Dutton* and *Bancroft*." *Townsend*, according to the terms of the bill of parcels, namely, on the 14th of *Feb.* 1809, gave to the defendants *Frosts* his acceptance for the amount of the oil, payable 4 months after date; but which acceptance has not been paid. *Townsend* never demanded the oil from *Dutton* and *Bancroft*, who had the custody of it. The oil was not subject to any rent; the original importer having paid the rent for 12 months and sold it rent free for that time, which was not expired at *Townsend's* bankruptcy. On the 23d of *May* 1809, about 3 months after the purchase of the 10 tons of oil, a commission of bankrupt issued against *Townsend*, under which he was duly declared a bankrupt, and the plaintiffs appointed his assignees. At the time of the purchase, and also at the time of *Townsend's* being declared a bankrupt, the oil was lying in the cistern mixed with other oil in the same : and some time afterwards the defendants refused to deliver the same to the plaintiff, notwithstanding a demand was made for the same by the assignees, and a tender of any charges due in respect thereof. When the whole of the oil lying in any of the cisterns of the oil house is sold to one person, the purchaser receives the key of the cistern ; but when a small parcel is sold, the key remains with the original owner ; and the purchaser is charged, in proportion to the quantity of oil sold, with rent for the same, until delivered out of the oil house ; unless such rent be paid by the original importer, as was the fact in the present case. If the plaintiffs were entitled to recover the verdict was to stand : if not, a nonsuit was to be entered.

There was a similar action by the same plaintiffs against *J. R. Freme* and *J. Freme, Dutton* and *Bancroft*, the circumstances of which were in substance the same.

Js. Clarke, for the plaintiffs, contended, that there was such a constructive delivery of the 10 tons of oil to the bankrupt before his bankruptcy, as was sufficient to vest the property of it in him. The oil was at the time in the hands of third persons, who had the key of the warehouse ; and therefore the vendors could not make an actual or manual delivery of it, or of the key of the warehouse but they did that which was equivalent : for they gave to *Townsend* an order of delivery upon their immediate vendors, who continued to retain the actual custody of it blended with the remainder, their own property ; and by their acceptance of that order, they must be taken to have agreed to hold the 10 tons as bailees of the vendee. In *Rugg v. Minett*, 11 East, 217, Lord *Ellenborough* said, that "every thing having been done by the sellers which lay upon them to perform, in order to put the goods in a deliverable state in the place from whence they were to be taken by the buyers, the goods remained there at the risk of the latter : " and that distinguishes this case from *Hanson v. Meyer*, (a) where the vendor gave a note to the vendee addressed to

(a) 6 East, 614, and vide *Zagury v. Farnell*, 2 Campb. N. P. Cas. 240.

the warehouse-keeper, directing him to *weigh* and deliver to the vendee all his starch: there, something remained to be done, namely, the *weighing* by the warehouse-keeper, before the property passed. But here, it is expressly stated in the bought and sold note of the 7th of Feb. that the 10 tons in Mr. Staniforths cistern were at the risk of Townsend, the purchaser. So in *Harman and Others, Assignees of Dudley, a Bankrupt v. Anderson*, 2 Camp. 243, the purchaser of goods having received from the vendor an order for the delivery of them addressed to the wharfinger in whose warehouse the goods lay, the lodging of such order with the wharfinger by the purchaser was held by this Court to be a complete delivery to him, so as to take away the vendor's right to stop the goods *in transitu*. And in *Chaplin v. Rogers*, 1 East, 192, which was the case of a sale of a haystack, Lord Kenyon said, "where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other indicia of property." And *Elmore v. Stone*, 1 Taunt. 458, is strong to the same effect; for there the agreement of the vendor himself to keep the horses at livery which he had sold to the vendee was held to be a sufficient delivery to take the case out of the statute of frauds. [Lord Ellenborough, C. J. The general doctrine will not be disputed, that there may be a symbolical delivery of goods.(1) It was lately held in a case in the House of Lords, that there might be an executed delivery of goods without any change of place of them. The only argument I presume will be, that the 10 tons of oil, before they were measured out from the whole quantity, were not in a deliverable state, and that till that was done they were not capable of delivery: I do not mean to say, what the value of that argument is.] The drawing of that off from the rest was not to be the act of the vendors, but of the vendee; and that is the distinction, that nothing here remained to be done by the vendors.

Scarlett, contra, relied on the circumstances, that the 10 tons till measured off were not in a deliverable state in fact, and if so there could not be a symbolical delivery of them. No specific 10 tons were vested in the *Frosts*, and therefore none such could be conveyed to the bankrupt: in such a case the measuring off must of necessity precede the vesting of the property. [*Grose, J.* Supposing a third person had taken the whole 40 tons tortiously, could not the vendee have brought his action of trover for the 10 tons.] As against a wrong-doer perhaps the Court would not regard the actual condition of the property. But suppose 30 of the tons were tortiously taken, how could it be told whether the 10 which remained were or were not the specific tons belonging to the vendee. [*Le Blanc, J.* The same objection might be made if the vendee had paid for the 10 tons. Lord Ellenborough, C. J. Suppose the whole had been distrained for rent due from *Dutton*, and *Baneroft*, whose share would cover the rent, and *Townsend* had brought replevin, and recovered; would the sheriff have to measure out the 10 tons? I throw it out for consideration: perhaps he would incidentally have the power of dividing it, the quantity being certain. It is a different case where the goods remain in the same hands, as the bailee of the vendee, or as the original seller: in the former case the vendor holds them in a new character.] Here there was nothing to discriminate the specific 10 tons from the rest.

Lord Ellenborough, C. J. This case presents a difference from the ordinary cases which have occurred, where the sale has been of chattels in their nature several, and where the transfer of the property from the vendor by means of an order for delivery addressed to the wharfinger, or other person in whose

(1) Vide *Wilkes & al. v. Forris*, 5 Johns. 335.

keeping they were, and accepted by him, has been held to be equivalent to an actual delivery; the goods being at the time capable of being delivered. Here, however, there is this distinguishing circumstance, that the 10 tons of oil till measured off from the rest was not capable of a separate delivery; and the question is, whether that be a distinction in substance or in semblance only. The whole 40 tons were at one time the property of *Dutton* and *Bancroft*, who had the key of the cistern which contained them; and they sold 10 tons to the *Frosts*, who sold the same to *Townsend*, the bankrupt, and gave him at the same time an order on *Dutton* and *Bancroft* for the delivery to him of the 10 tons. To that order *Dutton* and *Bancroft* attorn, as I may say; for they accept the order, by writing upon it "accepted, 14th of Feb. 1809," and signing their names to it. From that moment, they became the bailees of *Townsend* the vendee: the goods had arrived at their journey's end, and were not *in transitu*: all the right then of the sellers was gone by the transfer, and they could no longer controul that delivery to which they had virtually acceded by means of their order on *Dutton* and *Bancroft*, accepted the latter. The question of stopping *in transitu* does not arise, taking the *Frosts* to be the original sellers, as between them and the bankrupt; the oil had never been in the hands of the *Frosts*: they only assigned a right to it in the hands of the common bailees, which before had been assigned to them.

Grose, J. There can be no doubt that at the time of *Townsend's* bankruptcy the 10 tons of oil in the cistern were at the risk of the bankrupt. All the delivery, which could take place between these parties, had taken place. *Dutton* and *Bancroft*, who had the custody of the whole in their cistern, had accepted the order of the sellers for the delivery to the bankrupt, and it only remained for *Townsend* together with *Dutton* and *Bancroft* to draw off the 10 tons from the rest.

LE BLANC, J. *Dutton* and *Bancroft* had sold the ten tons of oil in question, (which was part of a larger quantity, the whole of which was under their lock and key) to the *Frosts*, who sold the same to *Townsend*; and there is no claim on the part of the defendants *Dutton* and *Bancroft* to detain the oil for warehouse rent. The *Frosts* never had any other possession of the oil than through *Dutton* and *Bancroft*; but they gave to *Townsend* an order on these latter to deliver it to him; and after the acceptance of that order *Dutton* and *Bancroft* held it for his use. But something, it is said, still remained to be done, namely, the measuring off of the 10 tons from the rest of the oil. Nothing however remained to be done in order to complete the sale. The objection only applies where something remains to be done as between the buyer and seller, or for the purpose of ascertaining either the quantity or the price; neither of which remained to be done in this case; for it was admitted by the persons who were to make the delivery to *Townsend*, that the quantity mentioned in the order was in the cistern in their custody; for they had before sold that quantity to the *Frosts* of whom *Townsend* purchased it, and had received the price. Therefore, though something remained to be done as between the vendee and the persons who retained the custody of the oil, before the vendee could be put into separate possession of the part sold, yet as between him and his vendors nothing remained to perfect the sale.

BAXLEY, J. There is no question of *transitus* here: the goods were at their journey's end. When therefore *Dutton* and *Bancroft*, who were then the owners of the whole, sold 10 tons of the oil to the *Frosts*, those 10 tons became the property of the *Frosts*; and when they sold the same to *Townsend*, and gave him an order upon *Dutton* and *Bancroft*, for the delivery of the 10 tons purchased of them, the effect of that order was to direct *Dutton* and *Bancroft* to consider as the property of *Townsend* the 10 tons in their possession, which before was considered as the property of the *Frosts*: and by the acceptance of that order, *Dutton* and *Bancroft* admitted that they held the 10 tons for

Townsend, as his property, and he had a right to go and take it, without the interference of the *Frosts*.

Postea to the Plaintiffs.(1)(2)

Havelock v. Geddes.

12 East, 622. July 7, 1810.

Upon a writ of error, prosecuted by the party in person, to reverse an outlawry in a civil action, for a common law error, the recognizance of bail is to be taken in the common alternative form, to pay the condemnation money or render the principal, and not absolutely to pay the condemnation money, as in case of reversals of outlawry upon the stat. 31 Eliz. c. 3, for want of proclamations, or upon the stat. 4 & 5 W. & M. c. 18. s. 3, on appearance by attorney and by motion.

THE plaintiff sued the defendant by original, and made an affidavit of debt; and the defendant having been outlawed afterwards came in, and brought a writ of error to reverse the outlawry, and assigned an error in fact, that he was beyond sea at the time of the outlawry; which fact, on issue joined, was found for him by the jury: and on *Wednesday* the 30th of *May*, in the last term, being personally present in court, and having brought in the *postea*, he prayed by his counsel, that the judgment of the outlawry, pronounced against him in this cause, might be reversed. This was opposed on the part of the plaintiff, because the defendant's bail would not enter into a recognizance to satisfy the condemnation money, as required by the stat. 31 Eliz. c. 3, but only into the common recognizance of bail, which gives them the option to render their principal: and the question was, whether such a recognizance of bail were sufficient to entitle the defendant to the judgment of reversal. In support of that

Marryat and *Abbott* shewed these reasons to the Court. The defendant does not seek to reverse the outlawry for any defect of proclamations, and therefore he does not want the aid of the stat. 31 Eliz. c. 3, which requires him not only to put in bail to appear and answer to the plaintiff, but also to satisfy the condemnation money, before the outlawry is reversed for want of any proclamation required by that statute. Neither does he appear by attorney, and move the Court upon the stat. 4 & 5 W. & M. c. 18. s. 3, to reverse the outlawry; but he prays such reversal in person, on account of a common law error in fact, found for him: and neither of these statutes subject the party to any new imposition to which he was not liable at common law, and where he does not claim the conditional benefit of either. Before the passing of the stat. 31 Eliz. there is no entry in the books of requiring bail on the reversal of an outlawry by writ of error, or suggestion entered on the roll, or by plea. *Netus lib. Intras.* 78. 79. *Co. Entr.* 689. et. seq. *Rast. Entr.* 285, b. 286, a. 287. Error in Outlawry, pl. 2, 4, 5, 6 & 7, which latter were subsequent to the stat. 6 H. 8. c. 4, as being reversals for want of proclamations, but prior to the 31 Eliz. And though pending the proceedings in several of these cases mancaptors are found, who undertake to surrender their own bodies if the party outlawed do not attend the court from day to day, as day is given to him; yet no recognizance of bail is entered to the action upon the reversal. And there is no instance in any of the modern precedents, where a party has prosecuted his writ of error in person, (and not by attorney) and has not sought the benefit of the stat. 31 Eliz., that a recognizance of bail as required by that

(1) Vide *Lansing & al. v. Turner & al.* 2 Johns. 13.

(2) [But see contra, *Austen v. Craven*, 4 Taunt. 644. 1 Marsh, 4, n. *White v. Wilks*, 5 Taunt. 176. *Shepley v. Davis*, do. 617. And see *Pritchett v. Jones*, 4 R. 260. *Dusk v. Davis*, 2 M. & S. 397. *McDonald v. Hewett*, 15 Johns. 349. *Hague v. Porter*, 3 Hill. 141.—W.]

statute has been taken. Hearne's Pleader, 834, contains a precedent of the reversal of an outlawry, for the insufficiency of the return to the writ of exigent, without bail: and that, though not a reversal upon the stat. 31 Eliz., must have been subsequent to that statute, because it mentions the date of 1646, in the course of the record of the proceedings. There is one entry in Brown's Ent. 359, (2d edit.) of a reversal of an outlawry by writ of error, without bail: and another (p. 361,) where the outlawry was avoided for the insignificance of the words in the return to the exigent; in which the recognizance of bail is in the alternative, to render in execution, or pay, and not to pay the condemnation money at all events. This last might have been upon the award of the Court, on the inspection of the return and finding it bad. By the date of the entries, before and after, it should seem that these were between the stat. of Eliz. and that of W. & M. But where the party has prosecuted his writ of error for want of proclamations on the stat. 31 Eliz., there the recognizance of bail has been taken to pay the condemnation money: otherwise not: as in Lill. Entr. 458, and 461. The same form of recognizance has been taken where the party has availed himself of the provision of the stat. 4 & 5 W. & M. to appear by attorney. In *Matthews v. Erbo*, 10 W. 3. 1 Ld. Ray. 349, and Carth. 459, it appeared that the party outlawed was a foreigner who never was in *England*; and he came in by attorney to reverse the outlawry, without bail; which was denied: but the Court said, that he might bring a weight of error and reverse the outlawry if he pleased. The report in Carthew says he was compelled to bring a writ of error, and put in bail to the action, according to the new statute (4 & 5 W. & M.) and then the plaintiff consented to the reversal of the outlawry. There he did not appear in person. *Sercole v. Hanson*, (a) in H. 16 G. 2, is to the same effect. No intervening case appears in print till *Philips v. Warburton*, Mich. T. 1785, Imp. Pract. 7th edit. 611, and *Berwick v. Parkin*, E. 31 G. 3, (b) in both of

(a) 1 Wils. 3. Vide S. C. 2 Stra. 1178. *Serecold v. Hampson*, Bart. and 1 Salk. 496.

(b) Referred to by *Laurence, J.* in *Matthews v. Gibson*, 8 East, 527.

The following is a more full note of the same case from Mr. *Skott's MS.*, a gentleman of the bar at that period.

Serecold v. Hampson, M. 16 G. 2. B. R.

Error assigned, that the party was beyond sea at the time of the exigent proclaimed is sufficient.

Hil. 16 G. 2. On reversal of the outlawry on writ of error for such error assigned in a case where special bail was required on the original action, the Court will direct the recognizance of bail in answer to the new action to be taken in the alternative, to pay the condemnation money, or render the principal, and not absolutely to pay the condemnation money.

THIS was a writ of error to reverse an outlawry. The error assigned was, that Sir G. Hampson (the plaintiff in error) was beyond sea *tempore promulgationis* of the exigent.

Draper, for the plaintiff in error, cited 2 Rol. Abr. 804. Cro. Jac. 464.

Lacey, for the defendant, cited 2 Rol. Rep. 11. Co. Lit. 259, b. 261, b.

Curia. It has been determined that, as to the whole process of outlawry, it is not material in the assignment of error to shew that the party was out of the realm during the whole time; but if he were abroad at the time of the exigent, that is sufficient; for that is the substance. Skin. 16. So this assignment is sufficient. If the fact were, that he was within the realm during the process of outlawry, and went abroad by way of covin at the time of the exigent, that should be replied.

The outlawry being reversed, it came now before the Court upon the question, whether the defendant should be obliged to put in special bail? and the cases cited were Lit. Rep. 301. Salk. 496. Carth. 459. 12 Mod. 545. *Wilbraham v. Doley*, T. 13 W. 3, and a case in *C. B.* when first *Willes, C. J.* came there, where it was resolved that special bail should be put in.

Lxx, C. J. By stat. 31 Eliz. c. 3, bail is to be given to a new action, and to satisfy the condemnation money where the reversal is for want of proclamation; but here the assignment of error is, that the defendant was beyond the sea at the time, and not for want of proclamation. There is no case cited where bail may not be taken on reversal of an

which the recognizance of bail was taken to answer the condemnation money only, and not in the alternative, to pay it or render the body. But it does not appear whether those outlawries were reversed for want of proclamations, on the stat. 31 Eliz. And the only other case is *Matthews v. Gibson*, 8 East, 627, which came on upon motion, and where it seems to have been taken for granted, that the point was established in the two last-mentioned cases which were referred to. The statute of W. & M. was made for facilitating reversals of outlawries, which will not be answered by imposing the necessity of a higher security of bail in a case where at common law the party was not liable to such a requisition; and the Court will not in their discretion impose an obligation upon the bringing of a writ of error at common law, which is not imposed by the statute. Here the defendant came in and offered to surrender, though by the indulgence of the plaintiff he was not committed to custody; but he attends the court in person from day to day given to him, and therefore is in effect in custody, being within the instant reach of the process of the court. And he asks no indulgence, or conditional benefit given by statute, but only insists on his common law right to shew that the first action was erro-

outlawry for other cause than that in the stat. 31 Eliz. By the case in *Salk*. it does not appear what the assignment of error was, but there special bail was taken. But the case of *Wilbraham and Doley*, which I cited from a manuscript note, but which is reported in cases in King William's time, (12 Mod. 545) fully warrants the requiring special bail: for there it was held, that the stat. 31 Eliz. only related to error for want of proclamation, and in that case only that statute requires bail; but yet though the statute did not extend to the case then before the Court which was []* they ordered bail to be taken to render the body or answer the condemnation money. But we are now upon the stat. of King Wm. 4 & 5 W. & M. c. 18, which plainly supposes a power in the Court to order special bail where it is required in the original action; for it says, the defendant may appear by attorney and reverse the outlawry in all cases, *except where special bail shall be ordered by the Court*. Therefore, when it appears in the original action, that the plaintiff was entitled to have special bail, the Court is fully authorized to order it, as upon the commencement of a new action. Nor are we precluded by the late statute, 12 G. 1, by which the affidavit of the debt to hold to special bail must be filed before the process issues: because here cannot be a compliance with it; nor is there any writ to issue; but we have it in our power to order special bail to pay the condemnation money, or render the body, as was done in the case of *Wilbraham and Doley*.

WRIGHT, J. In *Matthews v. Erbo*, Carth. 459, which was an outlawry against a foreigner, he was obliged to put in bail according to the new statute, which was the 4 & 5 W. 3, and that was not for want of proclamations. As to *Salk*. 496, that a recognizance was taken according to the stat. 31 Eliz. c. 3, that was a mistake. Therefore I am of opinion, that as here is an affidavit of above 350*l*. due, special bail ought to be given before the outlawry be reversed.

DENNISON, J. The practice in *C. B.* before the statute of W. 3, was, as appears by a rule of Trin. 2 Jac. 2, that on reversal of the outlawry, and before the supersedeas, *special bail in the ordinary way was required to answer the condemnation or render the body*, if the sum on which the exigent was awarded was 10*l*. or upwards; but then the party outlawed appeared in person. The statute of King William was to dispense with that; and it says, that it may be done by attorney, unless the Court require special bail, which is when the debt is above 10*l*. As to the stat. 12 G. 1, this case is not within that statute; for there is a difference between proceeding to an arrest, and an outlawry; for where it is to an outlawry, it is not by way of an arrest. That statute says, you shall not proceed to arrest but where there is an affidavit that the debt is 10*l*. or upwards; but this being an outlawry by special original, it is not an arrest; and so it was not the intention of the act that in this case the affidavit of the debt should be in the first instance, and before any process issues. And this is no hardship to the defendant: for if it appear that the plaintiff's demand is above 10*l*. he ought to have special bail. In *Martin v. Duckett*, there were many errors assigned; and one was for want of proclamation: and there special bail was ordered to be put in. Though the present case is not for want of proclamation, yet it is expressly within the statute of W. 3, which is only to enforce that which was the law before, according to that rule in the common bench.

LEE, C. J. Let the rule to shew cause why the outlawry should not be reversed on filing common bail be discharged, and upon filing special bail to pay the condemnation money, or render the body (not absolute bail,) let the outlawry be reversed.

* There are some words wanting here: the printed reports state that the assignment was of an error in law, not for want of proclamation.

neously prosecuted against him, without being obliged to provide bail who shall be at all events answerable for the condemnation money in the new action.

Holroyd, (a) contra, contended that bail was requisite at common law in all cases upon the reversal of an outlawry, not only for want of proclamations upon the stat. 31 Eliz. c. 3, but in all cases, whether the party appeared in person or by attorney. It does not follow, because there is no entry of bail in the old entries of reversals of outlawry, that none was given; where the party had from day to day given to him, he must have continued in custody if bail were not given from day to day, and when judgment of reversal was pronounced, there was no occasion to make any entry of bail on the roll, though it might be required that he should give it. Some bail was clearly requisite in cases which required special bail; and the course of the Court, for a long period back, has been to require bail to answer the condemnation money absolutely. He referred to *Leighton v. Garnons*, Cro. Eliz. 706, and 5 Rep. 88, and Sty. Prac. Reg. 271, to shew, that by the outlawry, the process in the original action is at an end: and if the outlawry be after judgment, the party taken upon the *capias utlagatum* is in execution for the plaintiff in the civil suit: if before judgment, the plaintiff is put to a new action; and unless the defendant were compelled to put in special bail to answer such new suit, the plaintiff might in some cases be deprived of his remedy. This case is much stronger for requiring the bail to engage at all events for the condemnation money than the want of proclamations as required by the stat. 31 Eliz.; for there the plaintiff is himself guilty of a fault in not giving the party who has a known place of residence that notice which he is entitled to receive under the statute; *a fortiori*, therefore, in cases like the present where the plaintiff is in no default. And this provision of the statute confirms the probability that special bail was required at common law upon the reversal of an outlawry; and that it had been used to be taken in the form now required. The cases which have been mentioned as examples of the existing practice are also confirmatory of that inference. It would be extraordinary to require it in cases where the error is so apparent, as to induce the Court to set the outlawry aside upon motion; and yet to deny it upon writ of error, where prosecuted in person. In *Wilbraham v. Dowley*, 12 Mod. 545, upon error brought to reverse an outlawry for an error in law, (not for want of proclamations on the stat. 31 Eliz.) though Lord Holt and the rest of the Court are first made to say, that there needed no bail in such a case; yet they directed the party outlawed to put in bail to answer the condemnation or render his body. But Lord Holt afterwards says, "that special bail to reverse an outlawry must be simply to answer the condemnation; but other special bail is to answer condemnation, or render his body: and it was agreed "that if the party were taken up upon the *capias utlagatum*, he must give bail "to reverse the outlawry." [*Bayley*, J. referred to a *dictum* in *Cooke's Cas.* of Prac. in C. B. 29 Anon. M. 12 G. 1. It was said by the Court, that upon or before the allowance of any writ of error, or reversing any outlawry, the defendant must still enter into a recognizance, with condition to satisfy the condemnation money, according to the stat. 31 Eliz. c. 3. s. 3.] He observed that that was stated generally, and not confined to the case of want of proclamations. And in *Serecold v. Hampson*, as reported in 2 Str. 1178, where the error assigned was the same as in this case, and the question made was upon what terms the outlawry should be set aside, the Court declared their opinion that they had a discretionary power to require it or not. And that though the stat. 31 Eliz. was the only act that expressly required bail; yet it was not to be inferred from thence, that in other cases it ought not to be insisted on; for that act makes a new error, and the bail upon it is absolutely to pay the

(a) Having been obliged to leave the Court soon after this argument commenced, I have this account of it from the hand of a friend.

condemnation money. Then if the taking of bail at all or not be in the discretion of the Court, the form in which the recognizance shall be taken must also be in their discretion. He also referred to *Campbell v. Doley*, 3 Burr. 1920, which lays down the rule, that special bail must be put in upon appearing to an outlawry, where special bail was originally required; because it would be unreasonable that the defendant should gain an advantage by standing out till process of outlawry. But, he observed, that if the defendant were only to put in the same bail at last as he would have done at first, he would gain an advantage by the delay. [In answer, however, to a question by the Court, in what form the recognizance was there taken, *Marryat* said, that it was in the alternative.] He finally relied on *Mathews v. Gibson*, 8 East, 527, and the cases there cited; and observed, in answer to the argument, that a writ of error was a writ of right, that it was only so upon such terms as the law required: and if bail might be required by the Court at common law in this form, the party was not entitled to his writ of error without complying with such requisition when made.

Cur. adv. vult.

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court.

The question in this case was, whether upon the reversal of an outlawry, the bail should enter into a recognizance to satisfy the condemnation money: or whether they should have, as in ordinary cases, the power of rendering the principal. The error assigned was, not the want of proclamations, but a common law error, the defendant's absence beyond sea; so that the case is not within the act 31 Eliz. c. 3: and the defendant appeared in person; so that the case is not within the stat. 4 & 5 W. & M. c. 18. s. 3. The reversal therefore, is a common law reversal for a common law error; and in such a case, the Court thinks it has no power to require more than an ordinary recognizance, which leaves the bail at liberty to render. Where the outlawry is reversed, as at common law, it seems to us, that the reversal is so far matter of right, that no terms can properly be imposed upon the defendant when it is pronounced. If terms could be imposed, it might be expected they should be noticed upon the record; and yet in no one entry that can be found does the record appear to have noticed them. Where the reversal is under the statute of Eliz., the record does notice them; and this furnishes a strong argument that they would be noticed on common law reversals, if on such reversals they could properly be required. In none of the cases cited for the plaintiff, where the bail were required to answer the condemnation money, does the reversal appear to have been by writ of error at common law. In *Serecoid v. Hampson* it was not; because the outlaw appeared by attorney; and in *Mathews v. Gibson* the reversal was *by motion*: and if a party ask of the Court to interfere by motion, where he has no right to their interference but only upon error brought, they may in that case (*i. e.* of reversal by motion) impose upon him what terms they think just. In *Philip v. Warburton*, and *Berwick v. Parkins*, it does not appear, nor upon inquiry can we discover, in what manner, or on what ground, the outlawries were reversed. As there is no authority, therefore, pointing to the case of a common law reversal in a civil action; and as such reversal seems to us to be in general a matter of right; we are of opinion that no terms can be required upon the reversal, and that the recognizance should therefore be in the ordinary form; giving the bail the power of rendering.

Vernon v. Keys.

12 East, 632. July 7, 1810.

The plaintiff being desirous to dispose of his interest in certain buildings, trade, and stock, in which trade he was engaged with the defendant, pending a treaty between them for the purchase by the defendant, the latter falsely and deceitfully represented to the plaintiff, that he was about to enter into partnership in the same trade with other persons whose names he would not disclose, and that *those persons would not consent to his giving the plaintiff more for his interest than a certain sum*: whereas in truth neither *A.* and *B.*, with whom he was then about to enter into partnership, nor any other intended partners of his, had refused to give more than that sum, but had then agreed with the defendant that he should make the best terms he could with the plaintiff, and would have given him a larger sum, and in fact the defendant charged them with a larger price in account for the purchase of the plaintiff's interest. Held that an action on the case did not lie for this false and deceitful representation by the bidder of the seller's probability of getting a better price for his property; for it was either a mere false representation of another's intention, or at most a *gratis dictum* of the bidder, upon a matter which he was not under any legal obligation to the seller to disclose with accuracy, and on which it was the folly of the seller to rely. But that at any rate, the count was bad, in not shewing that the plaintiff had been damaged by such false representation; inasmuch as it was not alleged that the other intended partners of the defendant would have bid at all *without him*, or that *he* would have joined in giving the additional price.

THE plaintiff declared in case, and stated that he was desirous to dispose of the share and interest which he had in a certain trade and business in which he was engaged at *Stone*, in the county of *Stafford*, with the defendant, in certain buildings, stock in trade, fixtures, &c., and implements of trade belonging to the said business; and that a treaty was pending for the purchase of the same by the defendant: yet the defendant, knowing the premises, but contriving and fraudulently intending to deceive and defraud the plaintiff, while the said treaty was depending, on the 29th of *August*, 1803, at *Stone*, &c. falsely, knowingly, and deceitfully represented to the plaintiff, that he (the defendant) was about to enter into partnership, in the said trade or business, with divers other persons, *whose names the defendant would not then and there disclose*, and that *such persons* would not consent to the giving a larger sum to the plaintiff, as the price of his share and interest, than 4500*l.*; whereas, in fact, although the defendant was then and there about to enter into partnership with *J. E.* and *J. J.*, yet the said *J. E.* and *J. J.* had not, nor had any other intended partners of the defendant, refused to give more than the said sum: and whereas the said *J. E.* and *J. J.* had then and there consented and agreed, and were then and there consenting and agreeing, that the defendant should make the best terms he could with the plaintiff, and would have given him a larger sum, to wit, 5291*l.* 8*s.* 6*d.* for the same: and whereas the defendant then and there charged to the said *J. E.* and *J. J.* in their said partnership at and after a larger price, viz. 7291*l.* 8*s.* 6*d.* for the same: by reason of which said false representation of the defendant, the plaintiff was induced to accept and receive, and then and there did accept and receive, the smaller sum of 4500*l.* as the price of his said interest, and was then and there induced to convey and did convey the same for the said price of 4500*l.*; by means whereof the plaintiff lost and was defrauded of a large sum, to wit, 791*l.* 8*s.* 6*d.*, which he otherwise might have gotten for the same.

After verdict for the plaintiff upon this, which was the third count of the declaration, at the trial before *Lawrence, J.*, at *Stafford, Williams*, Serjt. moved in the last term for a new trial, and to arrest the judgment; and the rules were supported on a former day in this term by him, and by *Abbott and Peake*, and were opposed by *Dauncey, Wigley*, and *Fuller*. The Court were of opinion at the time of the argument, that there was no foundation for the objection to the verdict upon the evidence stated; but they then reserved giving

their opinion upon the rule for arresting the judgment, till further consideration. The cases cited by the defendant's counsel on the point of law were *Bayley v. Merrell*,^(a) where upon an agreement to carry goods at so much per cwt., it was held that an action would not lie against the owner for falsely affirming that a load of madder contained a less quantity of cwts. than in fact it contained; because the plaintiff might have detected the falsehood of the affirmation by weighing it. And 1 Rol. Abr. 801, pl. 16; "If a man, having a term for years, offer to sell it to another, and says that a stranger would give him 20*l.* for it; by means of which assertion the other buys it, when in truth he was never offered 20*l.* for the term; though he be deceived in the value, yet in truth no action on the case lies. M. 40 and 41 Eliz. B. R. adjudged." And the same point is stated in *Leakins v. Clissel*, 1 Sid. 146. On the other side, they relied on the dictum of Croke, J. in *Bayley v. Merrell*, 3 Bulstr. 95, that where fraud and damage concur, an action lies for the deceit. And on *Ekins v. Tresham*, 1 Lev. 102, where the plaintiff and defendant, being in treaty for the sale of a messuage, the defendant falsely and fraudulently affirmed, that it was let at 42*l.* per annum; on the faith of which the plaintiff gave him 500*l.* for it; whereas in truth it was only let at 32*l.* per annum. And though it was urged that the plaintiff might have informed himself of the truth from the tenant; yet it was held, that the action lay for the deceit; for perhaps the tenant would not inform the purchaser what rent he gave. And on *Lesney v. Selby*, 2 Ld. Ray. 1118, which is to the same effect. And they referred generally to *Pasley v. Freeman*.^(b) At the end of this term,

Lord ELLENBOROUGH, C. J. declared the opinion of the Court.

This case stood over, that the Court might consider the sufficiency of the third count of the plaintiff's declaration, on which alone he had obtained a verdict. The substance of that count was this, that the plaintiff was desirous to dispose of his share and interest in a certain trade and business in which he was then engaged with the defendant, and in certain buildings, stock in trade, fixtures, utensils, tools, and implements of trade, and other matters of and belonging to the said business; that a treaty was pending for the purchase of the same by the defendant; that while such treaty was depending, the defendant *falsely represented* that he was about to enter into partnership in the said trade or business with certain persons whose names he would not disclose, and that *they* would not consent to the giving more for the plaintiff's share and interest than 4500*l.*; whereas, in truth and in fact, although the defendant was about to enter into partnership with one *Emery* and one *Jenkinson*, neither they, nor any other intended partners of the defendant, had refused to give more than 4500*l.*: and whereas *Emery* and *Jenkinson* had consented that the defendant should make the best terms he could with the plaintiff, and would have given him 5291*l.* 8*s.* 6*d.*: and whereas the defendant charged to the said *Emery* and *Jenkinson* in their said partnership a larger price, viz.

(a) Cro. Jac. 386. This and other cases were relied on by *Grose*, J. in *Pasley v. Freeman*, 3 Term Rep. 55, whose opinion was also relied on.

(b) 3 Term Rep. 51. The two other leading cases upon the same subject, which have occurred since *Pasley v. Freeman*, are *Eyre v. Dunsford*, 1 East, 318, and *Haycraft v. Creasy*, 2 East, 92. In the first of these, there was an allegation of the knowledge of the defendant at the time, that the facts affirmed by him were false; which averment was not made in the latter case: and it was also omitted in one of the counts in a subsequent case of *Hatchman v. Jackson*, M. 45 Geo. 3, B. R. where the verdict had been taken generally: upon which it was moved to arrest the judgment, as well as for a new trial on the merits of the whole case. But the Court, after sustaining the verdict on the merits, finally discharged also the rule for arresting the judgment: the counsel for the plaintiff not thinking it worth while to move on the Judges' notes to enter the verdict on the other counts only. And *Laurence*, J. said that both in *Pasley v. Freeman*, and *Haycraft v. Creasy*, the cause of action was considered as complete by the fraudulent and false assertion of the defendant, and the injury therefrom to the plaintiff; and it was immaterial whether the defendant *knew* it to be false at the time or not.

7291l. 8s. 6d.; by reason of which false representation the plaintiff was induced to take 4500l. for his said interest, and to convey it for that price: and by means thereof he was defrauded of 791l. 8s. 6d., which it was alleged he might otherwise have gotten for the same. The defendant insists, that this count is bad in law: and on that ground the Court has granted him a rule nisi for arresting the judgment: and upon consideration, we think that the count cannot be sustained, and that the judgment ought to be arrested.

To support the action there must be a fraud clearly alleged to have been committed by the defendant, and a damage resulting from such fraud to the plaintiff. The fraud must consist in depriving the plaintiff, by deceitful means, of some benefit, which the law entitled him to demand or expect. In the present case, the fraud is made to consist in the defendant's alleging that his undisclosed future partners "*would not consent to give more than 4500l.*" for the subjects of the treaty of purchase. But the words, "*would not consent to give more than 4500l.*" may be understood to signify either, that such partners *then* would not: which is the same as saying, with reference to the time present, they *will* not; thereby implying that they had *already* refused: and in which sense the words were not true: or, that they *would not thereafter* consent; in which latter prospective sense the words might happen to be true, or not, as they might be thereafter induced to refuse their consent, or not: and if the meaning of the word is thus equivocal, the alleged falsehood of the representation, (upon which the action depends,) is not made out with its proper certainty. Besides, if an action be maintainable for such a false representation of the will and purpose of *another*, with reference to the purposed sale, should not an action be also at least equally maintainable, for a false representation of the party's own purpose? But can it be contended, that an action might be maintained against a man for representing that *he* would not give, upon a treaty of purchase, beyond a certain sum; when it could be proved that *he had said* he would give much more than that sum. And supposing also he had, upon such treaty, added, as a reason for his resolving not to give beyond a certain sum, that the property was in his judgment damaged in any particular respect; and supposing further, that it could be proved he had, just before the giving such reason, said, he was satisfied it was not so damaged; would an action be maintainable for this untrue representation of his *own purpose*, backed and enforced by this false reason given for it? And in the case before us, does the false representation, made by the defendant, of the determination of his partners amount to any thing more than a *falsely alleged reason for the limited amount of his own offer*? And if it amount to no more than this, it should be shewn, before we can deem this to be the subject of an action, that in respect of some consideration or other existing between the parties to the treaty, or upon some general rule or principle of law, the party treating for a purchase is bound to allege truly, if he state at all, the motives which operate with him for treating, or for making the offer he in fact makes. A seller is unquestionably liable to an action of deceit, if he fraudulently misrepresent the quality of the thing sold to be other than it is in some particulars, which the buyer has not equal means with himself of knowing; or if he do so, in such a manner as to induce the buyer to forbear making the inquiries, which for his own security and advantage he would otherwise have made. But is a buyer liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity, than the price which such proposed buyer offers? I am not aware of any case, or recognized principle of law, upon which such a duty can be considered as incumbent upon a party bargaining for a purchase. It appears to be a false representation in a matter merely *gratis dictum* by the bidder, in respect to which the bidder was under no legal pledge or obligation to the seller for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own indiscretion to rely; and for the consequences of which reliance, therefore,

he can maintain no action. But if the objection above stated were less tenable than it is, still it is at any rate, essential to the action, that the plaintiff should have sustained some damage. The particular damage alleged is in his "not getting 791*l.* 8*s.* 6*d.*, which he might otherwise have gotten for the same." But as it does not appear by any allegation on the record, that the other intended partners would have brought at all *without the defendant*, or that the defendant would have joined with them in giving the price of 5291*l.* 8*s.* 6*d.*, the supposed foundation of the action, in the loss of a price which the plaintiff might otherwise have gotten, fails also. The consequence is, that the judgment must be arrested. (1)

Usher v. Noble.

12 East, 639. July 7, 1810.

The rule for estimating any loss of goods insured by an open policy is to take the invoice price at the loading port, together with the premium of insurance and commission, as the basis of the calculation of the value of the goods; and the rule for estimating a partial loss in the like case (is the same as upon a valued policy,) by taking the proportional difference between the selling price of the sound, and that of the damaged part of the goods at the port of delivery, and applying that proportion, (be it a half, a quarter, an eighth, &c.) with reference to such estimated value at the loading port, to the damaged portion of the goods.

THIS was an action upon a policy of insurance subscribed by the defendant for 200*l.* on goods on board the *General Miranda* at and from *Jamaica to London*. In the declaration the loss was thus averred—That the ship having the goods on board, was, in the river *Thames*, and before the discharge of the goods at *London*, by the mere danger of the seas, and force and violence of the tide and winds, and the pressure of other ships, stranded and sunk, and the goods thereby totally lost. The declaration also contained the money counts. The defendant pleaded *non assumpsit*, and paid 14*l.* into court generally upon the whole declaration. And at the trial before Lord *Ellenborough*, C. J. at *Guildhall*, a verdict was found for the plaintiff for the damages laid in the declaration, subject to the opinion of the Court upon this case. (It being agreed that the amount of the damage should be settled by arbitration, if the Court should be of opinion that the plaintiff was entitled to recover any thing beyond the sum paid into Court.)

On the 4th Oct. 1807, the ship *General Miranda* arrived from *Jamaica* with the plaintiff's goods insured on board in the river *Thames*, and anchored

(1) The general proposition, that to support this action, there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff, is no longer a subject of controversy. In all the late cases, the question has been, whether the fraud, or the damage, or both, were such as the rule contemplates. In *Scott v. Lara*, Peake's Ca. 226. Lord *Kenyon* nonsuited the plaintiff, because he had not shewn, that the defendant made the misrepresentation for the purpose of imposing on the plaintiff, or that the plaintiff relying upon it was thereby deceived. In the late case of *Young & al. v. Corvell*, 8 Johns. 23, the Supreme Court of *New-York* refused to set aside a non-suit, on the ground that it did not sufficiently appear that the defendant intended to deceive, though he had given rash and indiscreet advice. Where it appeared that the agent of the plaintiff, to whom the representation was made, knew at the time that it was false, Lord *Kenyon* held, that the action could not be sustained. *Cowen & al. v. Simpson*, 1 Esp. 291. It is not necessary, in order to sustain the action, that the defendant should have had any interest in deceiving the plaintiff. *Hart v. Tallmadge*, 2 Day 381. For the general principles of this action, see, besides the cases already cited, *Burton v. Lloyd*, 3 Esp. 208. *Tapp & al. v. Lee*, 3 Bos. & Pull. 367. *Hamar v. Alexander*, 2 New Rep. 241. *Thompson v. Bond*, 1 Campb. 4. *Richardson & al. v. Smith*, 1 Campb. 277. *Wise v. Wilcox*, 1 Day 23. *Ward v. Center*, 3 Johns. 271. *Upton v. Pash*, 6 Johns. 181.

near the entrance into the *West India* docks. Shortly afterwards, and as soon as the necessary forms were complied with, the vessel left her anchorage in the river for the purpose of entering these docks in order to unload her cargo there; but on her near approach, and when about to go through the dock gates, she was wrongfully refused admittance, and ordered back by the servants of the company, under whose direction and management these docks were placed. Upon this she returned back to the river, and endeavoured to regain a place of safety there; but this was found impracticable; and the best thing that could be done was to moor her to a chain near the entrance to the docks, at which several other vessels that had returned from such entrance had previously moored. This was accordingly done, and the *General Miranda*, being the vessel nearest the shore, was at the falling of the tide forced by the violence of the current and pressure of the other ships upon a shoal or bank of the river, and was there bilged and stranded; and, in consequence, a part of the plaintiff's goods consisting of coffee was greatly damaged. In consequence of this, the plaintiff brought an action against the *West India* dock company, and recovered a verdict against them for the amount of the loss, *estimated according to the market price of coffee in London at the time when the loss took place*, but which was *less than the prime cost of the coffee at Jamaica*. The defendant obtained a Judge's order for liberty to inspect and take copies of the statement of the loss, and the following was delivered as such copy:—

“Statement of average per *General Miranda*, Orr.—*Jamaica to London*.”

Amount of goods per invoice No. 1 & 2, and bills of lading No. 3 & 4, - - - - -	£	s.	d.
Insuring £7600 to cover, as under, £6750 at 15 gs. per cent. - - 1063 2 6 850 12 - - - - 107 2 0	6326	0	1
7600 Policy - - - - -	19	0	0
Commission 1-2 per cent. for effecting	38	0	0
Commission 1-2 per cent. for settling in case of loss - - - - -	38	0	0
	1265	4	6
	7591	4	7
Deduct			
Amount of sound coffee and wood per invoice No. 5, and landing account No. 6, & 7, - - - - -	2570	3	2
Insurance on £3085 to cover, as under, £2740 at 15 gs. per cent. 413 11 0 345 - - - - 43 9 4 Policy for £3085 - - - - 7 14 3 Commission 1-2 per cent. for effecting - - - - 15 8 6 Ditto 1-2 per cent. for re- covery in case of loss - - - - 15 8 6	513	11	7
	3083	14	9
Add			
General average per Mr. Parkinson, award No. 8, - - -	4507	9	10
	189	4	6
Carried over.	4696	14	3

Brought over.	4696	14	3
Deduct			
Proceeds of damaged coffee, per A sale,			
No. 9. -	174	12	9
Recovered from <i>West India</i> dock company per statement, (a) No. 10. -	2741	15	8
From which deduct			
Extra law expenses	98	18	8
	2649	17	0
	2817	9	9
	1879	4	6

If £7600 : 1879 :: £100

Answer, £24 : 14 6 1-2 per cent. exclusive of return of premium for sailing in company with armed ship.

The only question at the trial was, by what measure the damage was to be estimated between the assured and the underwriters. The plaintiff contended, that he was entitled to such proportion of the prime cost as would correspond with the proportion of the diminution of the market price occasioned by injury which the coffee had sustained; according to the rule laid down in *Lewis v. Rucker*, 2 Burr. 1169. If this measure should be adopted, the sum paid into court was insufficient. The defendant contended, that the case of *Lewis v. Rucker* did not apply to this case; and that the plaintiff was only entitled to the difference between the actual value of the damaged and sound coffee at the market price in *London*, when the ship arrived; and according to which rule he had received a compensation from the *West India* dock company, who had been the cause of the loss. If the plaintiff were entitled to recover according to the prime cost, it was admitted that the 71. per cent. paid into court was not enough to cover the whole extent of the defendant's liability, the ulterior amount of which was agreed to be settled by arbitration. If the plaintiff were entitled to recover only according to the actual value of the coffee in *London* when the loss took place, the sum paid into court was sufficient to cover the defendant's liability. The question therefore was, whether the plaintiff were entitled to recover any thing beyond the sum paid into court? If he were, the present verdict was to stand, and the amount to be settled by arbitration; if not, a nonsuit was to be entered.

This case was argued in the last term, when the rule of calculation insisted on by the plaintiff was maintained by *Abbott*, principally upon the authority of *Lewis v. Rucker*, 2 Burr. 1169; though that was the case of a *valued*, and this is the case of an *open* policy; but the rule, (b) he contended, applied in reason equally to both. And he also referred to 2 Val. 115, and 2 Emerigon, 659, as adopting the same rule of calculation.

(a) *The West India Dock Company*
Cwt.

To amount of loss on 748 2 10 damaged coffee, per <i>General Miranda</i> , averaged per account sales of sound coffee, per said vessel, 430 3 12 of sound coffee having netted 15694. 13s. 1d.	£2727	4	0
Amount of general average	189	4	5
	2916	8	5
Deduct			
Proceeds of damaged coffee	174	12	9
	2741	15	8

(b) The rule there laid down was, that the insurer should pay to the insured for the damaged goods the like proportion of the sum at which the goods were valued in the policy, as the price of the damaged goods bore to the price of the sound goods of the same kind when landed at the port of delivery.

Carr, on the contrary, admitting the rule in *Lewis v. Rucker*, as applied to valued policies, denied its application to an open policy, such as this is; upon the ground that a policy of insurance being a mere contract of indemnity, the loss which the party sustains by the goods not arriving at the port of delivery is that which they would have neat to him if they had arrived at their port of delivery. And reckoning the sum paid by the *West India* dock company with that which has been paid into court by the defendant, the whole of the plaintiff's actual loss in consequence of the perils insured against would, he contended, be compensated. He put the case thus—Suppose the invoice price of the goods with all charges thereon to be 100*l.* at the loading port: but coming to a falling market at the port of delivery, they are only worth, if sound, 80*l.*: but being damaged, they are only worth there 40*l.* If the peril had not happened, the assured would have gotten only 80*l.*: the compensation then to be paid by the underwriter should be 40*l.*, whereas the plaintiff seeks to get considerably more. The adoption of such a rule of compensation will hold out a temptation to an assured to procure a partial loss whenever the goods are proceeding to a falling market. But, as *Ld. Mansfield* said in *Hamilton v. Mendes*, 3 Burr. 1214, an insurer ought never to pay less upon a contract of indemnity than the value of the loss, and the insured ought never to gain more. [*Le Blanc, J.* Must not the invoice price be taken as the basis of the calculation in the case of a total loss? And if so, why not in the case of a partial loss?] In the case of a total loss, that basis must be taken *ex necessitate*, because it cannot appear what the value of the goods would have been if they had arrived at the port of delivery: but a partial loss is more analogous to the case of general average; and it would be strange that the wrong-doers, by whose faults the loss was occasioned, should pay only according to the actual value at the port of delivery, and that the underwriters on a contract of indemnity should pay more. [*Lord Ellenborough, C. J.* According to the rule contended for by the underwriter in this case, he would have had to pay more than the invoice price if the goods had come, as they usually do, to a rising market. The basis of the valuation must be taken either at the port of lading, or at the port of delivery. It is in some respects an artificial rule at which ever place it is taken, and not strictly one of indemnity.] The *Consolato del mare*, the oldest modern code of maritime law, says that the amount of the loss is to be taken at the price of the goods at the port of delivery, if the voyage were half performed at the time. [*Lord Ellenborough, C. J.* That was a rule *positivi juris*: I do not mean to say an unjust one. His lordship observed, that it did not appear that *Johnson v. Shedden*, 2 East, 581, was the case of a valued policy.]

Abbott, in reply, relied on the general and more certain convenience of the rule laid down in *Lewis v. Rucker*. And he also referred to *Dick v. Allen*, at *Guildhall*, after Mich. T. 1785,^(a) where in an action upon a policy of insurance to recover an average loss upon goods, *Buller, J.* observed, that whether the goods arrived at a good or bad market was immaterial; for the true way of estimating the loss was to take them at the fair invoice price.

LORD ELLENBOROUGH, C. J. As the Court will have to promulgate a rule, which will bind in future in similar cases, it will perhaps be more willingly acquiesced in, if delivered upon more mature deliberation: we will therefore take further time before we give our opinion. The question will be, whether every case be not in effect the case of a valued policy so far as it involves this consideration, and consequently within the rule laid down in *Lewis v. Rucker*. Where the parties have put an express valuation on the subject matter of the insurance, that rule is admitted to govern; and the question is, whether general usage has not established the invoice price as the basis of the value in all

(a) Park, 139, 6th edition. Mr. Park now observed, that that was the case of an open policy. And see *Tait v. The Royal Exchange Assurance Company*, at *Guildhall*, after Trin. term, 1747, before Lord C. J. Lee, 1*b.* 138.

other cases where the policy is open. Some rule there must be, and I rather think that the one laid down in *Lewis v. Rucker* was adopted as being upon the whole the most convenient in all cases.

The case stood over for further consideration till this term, when his Lordship delivered the opinion of the Court.

It is admitted, that the assured is entitled to an indemnity, and no more; but by what standard of value the indemnity sought should be regulated is the question. In the case of a valued policy, the valuation in the policy is the agreed standard: in case of an open policy, the invoice price at the loading port, including premiums of insurance and commission, is, for all purposes of either total or average loss, the usual standard of calculation resorted to for the purpose of ascertaining this value. The selling or market price at the port of delivery cannot be alone the standard; as that does not include premiums of insurance and commission, which must be brought into the account, in order to constitute an indemnity to an owner of goods who has increased the original amount and value of his risk by the very act of insuring. The proportion of loss is necessarily calculated through another medium, namely, by comparing the selling price of the sound commodity with the damaged part of the same commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case; i. e., it gives the aliquot part of the original value, which may be considered as destroyed by the perils insured against, and for which the assured is entitled to be recompensed. When this is ascertained, it only remains to apply this liquidated proportion of loss to the standard by which the value is calculated, i. e., to the invoice price, being itself calculated as before stated: and you then get the 1-half, the 1-4th, or 1-8th of the loss to be made good in terms of money. This rule of calculation is generally favourable to the underwriter, as the invoice price is less in most cases than the price at the port of delivery; but the assured may obviate this inconvenience by making his policy a valued one; or by stipulating that, in case of loss, the loss shall be estimated according to the value of like goods at the port of delivery. In the absence of any express contract on the subject, the general usage of the assured and underwriters supplies the defect of stipulation, and adopts the invoice value, with the additions I have mentioned, as the standard of value for this purpose. In this case, after receiving the money paid by the *West India* dock company, the assured is left short of his full reimbursement (even on the defendant's own calculation) by the premiums of insurance at 15 guineas per cent. commission, and extra costs of suit, for which no allowance was made by the *West India* dock company: so that *quacunqve via data*, the 7l. per cent. paid into court is too little. The consequence is, that the verdict must stand, subject to the reference of account to an arbitrator as agreed by the case.(1)

(1) Vide *Stevens v. Columbian Insur. Co.* 3 Caines 43. *Anonymous*, 1 Johns. 312. *Snydam & al. v. Marine Insur. Co.* 2 Johns. 136. *Gahn & al. v. Broome*, 1 Johns. Ca. 120. *Le Roy v. United Insur. Co.* 7 Johns. 343. [See 2 Phill. on Ins. ch. 16. sec. 3. p. 214, &c.—W.]

Livie v. Janson.

12 East, 648. July 7, 1810.

An American ship insured from New York to London, warranted free from American condemnation, having for the purpose of eluding her national embargo, slipped away in the night, was by force of the ice, wind, and tide, driven on shore where she sustained only partial damage, but was seized the next day, and afterwards with great difficulty and expense, got off, and finally condemned by the American government for breach of the embargo: held that as there was ultimately a total loss by a peril excepted out of the policy, the assured could neither recover for a total loss, nor for any previous partial loss arising from the stranding, &c. which in the event became wholly immaterial to the assured: *aliter*, in case of actual disbursements made for repair of damage occasioned by sea perils before the total loss; which appear to be covered by the general authority given to the assured to "labour and travail, &c. for the defence, safeguard, and recovery of the property insured."

THIS was an action upon a valued(a) policy of assurance, lost or not lost, upon the ship *Liberty*, with or without papers and clearances, at and from New York to London; the adventure to begin at New York on the 23d December, 1808, for a premium of 18 guineas per cent.; and the insurance was declared to be on ship and cargo warranted free from American condemnation. The declaration contained the usual averments, and alleged the interest to be in B. Byles, and the loss by perils of the seas. At the trial before Lord Ellenborough, C. J. at the sittings after last Hilary term, a verdict was found for the plaintiff for 200*l.* subject to the opinion of the Court on the following case.

The policy was subscribed by the defendant on the 27th of February, 1809, and the insurance was effected in consequence of a letter of advice from New York, that the ship would sail notwithstanding an embargo then enforced by the government of America. Which letter was laid before the underwriters at the time of effecting the policy. The usual premium from New York to London is 8 guineas. The ship, being the property of B. Byles, was in safety in the North River, at New York, on the 23d of December, 1808, loaded with a valuable cargo on his account, destined for London, and waiting an opportunity of eluding the embargo. For this purpose she sailed, with a pilot on board, between 7 and 8 o'clock in the night of the 15th January, 1809: and in passing from New York to Governor's Island, towards the Jersey shore, being the proper course of her voyage, a large body of ice, brought down the river by the tide and wind, drove against the ship with considerable force, and carried her ashore among some rocks on Governor's Island. Every exertion was made by the master and crew to get the ship off, but without effect. It was found that a large hole was made in her side by the ice, and another in her bottom by the rocks. In consequence of this, the water rose four feet in the hold, and the ship fell down on her side as the tide left her. In this state the master and part of the crew left the ship at 11 o'clock at night in one of the boats: the mate and the remaining part of the crew continued on board till five in the morning, and then left her in the long-boat, in the condition above described. On the same morning, about 6 o'clock, the officers of the American custom-house, having discovered the ship, proceeded to seize her: and the ship and cargo were finally condemned for breach of the embargo. The cargo sustained damage exceeding 5*l.* per cent. by the accident, and the ship and tackle sustained damage exceeding 3*l.* per cent. A great number of persons were employed by the American government to take out the cargo, and to weigh up the ship: which was effected by great exertions in the course of six weeks. If the plaintiff were not entitled to recover, the verdict was to

(a) It was agreed, in the course of the argument, that this was a valued policy, but it was not stated to be so in the original case.

be set aside, and a nonsuit entered : if he were entitled to recover as for a total loss, the verdict was to stand : if for an average loss, the parties agreed to settle the amount by reference.

Scarlett, for the plaintiff, contended, that the seizure and condemnation by the *American* government were not the operative cause of the loss, but only *consequences* of that loss which had before been occasioned by the perils of the sea, and by which a right of action was vested in the plaintiff, to recover the amount from the underwriter. The only effect of the seizure was to deprive the underwriters of their benefit of salvage ; but that did not make it cease to be a total, or if not a total, at least an average loss. And he referred to *Barker v. Blakes*, 9 East, 283, where the goods of a neutral were insured on board a neutral ship bound upon a lawful adventure from his own to the enemy's country : and the ship, being off the enemy's port, was brought into a *British* port by a *British* cruiser, for the purpose of search ; and after condemnation of the enemy's goods found on board her, was liberated, together with the neutral cargo on board. There, though the detention and bringing into a *British* port for a lawful purpose by the *British* cruiser was not a peril for which the underwriter was originally and directly liable ; yet as the loss of the voyage was a consequence of that peril, it was held that the assured might recover as for a total loss, if he gave notice of abandonment in time, or for an average loss, if his notice were out of time. Admitting that the intention of eluding the embargo increased the sea risks, because she was to sail in the night, and without waiting for the best wind, and without the choice of putting back or the chance of salvage, in case of an accident in getting to sea ; yet all these additional risks were compensated to the underwriter by the increase of the premium. The ship, it appears, was a complete wreck at the time of the seizure, for with all the assistance which the *American* government could command, it was six weeks before she could be weighed up, and that at an expense which probably no individuals would have incurred. If both these parties had been upon the spot, and the assured had abandoned immediately, it cannot be disputed but that the subsequent seizure would not have altered the case : then the want of notice at the time ought not to put him in a worse condition ; at least it ought not to deprive him of the benefit of a partial loss, the value of which may be estimated before the seizure took place.

Barnewall, contra, insisted that this was the case of a total loss, not by the perils of the sea, but by the seizure of the *American* government ; which peril is excepted out of the policy, and therefore that the assured was not entitled to recover at all, either as for a total or a partial loss. He referred to *Green v. Elmslie*, (a) as in point against a total loss by the perils of the sea : for there the ship, insured against capture only, was driven by a gale of wind on the enemy's coast, and there captured ; which was contended to be a loss by the perils of the sea, and not by capture : but Lord *Kenyon*, C. J. held it was clearly a loss by capture ; for had the ship been driven on any other coast than that of an enemy, she would have been safe. Neither can the plaintiff recover as for a partial loss ; for the loss in its nature is total, though not by a peril insured against. The assured has not in fact and in the event been damaged by the perils of the sea ; for the goods in whatever degree damaged have been lost to him altogether by an event against which he was not insured : the previous damage therefore became wholly unimportant to him : the partial loss, if any, was in truth sustained by the *American* government, and not by the assured. The case of *Shaw v. Felton*, 2 East, 108, shews that the previous state of the thing insured signifies nothing, if at last there happen a total loss of it by an event insured against. [*Bayley*, J. observed, that that was the case of a valued policy : *Barnewall* answered, that this was in fact the same, though it were not so stated in the case ; and *Scarlett* admitted that it was so.] All

(a) *Sittings after Hil.* 34 Geo. 3. *Peake's N. P. Cas.* 212.

that an underwriter engages to do is to put the assured in the same state at the end of the voyage as he would have been in, if the particular peril insured against, by which the loss is immediately occasioned, had not happened. Now here, as the whole was ultimately seized and condemned by the *American* government, it is precisely the same to the assured as if the previous stranding had never happened. Though in *Godsal v. Boldero*, 9 East, 72, there was a certain loss to the assured, yet as that loss was done away (in that instance by a collateral compensation) at the time of the action brought, the plaintiff could not recover.

LORD ELLENBOROUGH, C. J. As there is some novelty in the point, we will look further into it; though it appears to me, this case falls within the general principle, that *causa proxima et non remota spectatur*. It therefore seems to be useless to be seeking about for odds and ends of previous and partial losses which might have happened to a ship in the course of her voyage, when at last there was one overwhelming cause of loss which swallowed up the whole subject-matter. At present, I own the case appears to me to be neither an average nor a total loss within the terms of the policy. But we will consider further of it.

The case stood over till the end of the term, when his Lordship delivered the judgment of the Court upon it.

This was an action on a policy on ship and goods, warranted free from *American* condemnation. The ship and goods were damaged by the perils of the sea, and were afterwards seized by the *American* government, and condemned; and the question is, whether the total loss by subsequent seizure and condemnation takes away from the assured the right to recover in respect to the previous partial loss by sea-damage? And upon consideration, we think that it does. It is to be recollected that nothing is properly imputable to the sea-damage but the deterioration of the ship and cargo; for though such sea-damage might stop the progress of the voyage, and so bring the ship and cargo within the reach and effect of some other distinct peril which they might otherwise have escaped, yet the substantive loss by that latter peril is imputable to such latter peril only, not to the previous sea-damage. If for instance a ship meet with sea-damage, which checks her rate of sailing, so that she is taken by an enemy from whom she would otherwise have escaped: though she would have arrived safe but for the sea-damage, the loss is to be ascribed to the capture, not to the sea-damage; and this upon the principle that *causa proxima non remota spectatur*. The case of *Green v. Elmslie* which was cited in the argument, proceeds upon a similar principle: there, the ship would not have been captured, had she not been driven by stress of weather upon the enemy's coast; and yet the loss was held imputable to the capture, and not to the perils of the seas, which had driven the vessel within the influence of the peril of capture. Considering the deterioration of the ship and cargo then as the extent of what is referable to the head of sea-damage, we think we may lay it down as a rule, that where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim upon the under-writers. The object of a policy is indemnity to the assured; and he can have no claim to indemnity where there is ultimately no damage to him from any peril insured against. If the property, whether damaged or undamaged, would have been equally taken away from him, and the whole loss would have fallen upon him had the property been ever so entire, how can he be said to have been injured by its having been antecedently damaged? To put another instance to the same effect: supposing ship and cargo to be damaged in the early part of a voyage by the ordinary sea perils, and afterwards wholly destroyed by fire before the voyage is finished; of what consequence to the owner is the damage which may have occurred from one or several successive causes of injury before the fire? And if the property, whether undamaged or

not, would have been equally annihilated; is not its previous deterioration rendered wholly immaterial? The object of insurance is that the thing insured shall arrive safe at the place of destination, and that if it do not arrive at all, in consequence of any of the perils insured, the assured shall recover as for a total loss: and that if it arrive damaged, a proportionable compensation shall be paid for the damage; because in that case the proprietor receives the things *pro tanto* in a worse condition than he ought to have done: but of what consequence to him in the intermediate condition of the thing, if he be never to receive it again? If, before the completion of the voyage, it be, as to him and his interests, in a state of utter annihilation, what is it to him whether it had been damaged or not in an anterior part of the voyage, before it became annihilated? It was truly said in the course of the argument, that the *American* government were the only persons in this case who were prejudiced by the deteriorated state of the ship and cargo: they obtained it in a less valuable condition on that account than it would otherwise have been to them: but that is their loss, not that of the plaintiffs. There may be cases in which, though a prior damage be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss. Actual disbursements for repairs in fact made, in consequence of injuries by perils of the seas prior to the happening of the total loss, are of this description; unless, indeed, they are more properly to be considered as covered by that authority, with which the assured is generally invested by the policy, of "suing, labouring, and travelling, &c. for, in, and about the defence, safeguard, and recovery of the property insured:" in which case the amount of such disbursements might more properly be recovered as money paid for the underwriters under the direction and allowance of this provision of the policy, than as a substantive average loss to be added cumulatively to the total loss which is afterwards incurred in consequence of the sea risks. In the present case, as the immediately operating cause of total loss was one from which and its consequences the defendant is by express provision in the policy exempted; and as the other antecedent causes of injury never produced any pecuniary loss to the plaintiff; and as there never existed a period of time, prior to the total loss, in which the assured could have practicably called on the underwriters for an indemnity against the temporary and partial injury sustained by the property insured; we are of opinion, that such prior partial injury forms in this case no claim upon the underwriters of this policy; and consequently, that the *postea* must be delivered to the defendant.(1)

Willis v. Freeman and Others.

12 East, 656. July 7, 1810.

A trader having securities in his bankers' hands to a certain amount after a secret act of bankruptcy, drew on them a bill for a larger amount on the score of his *accommodation*, payable to his own order, which, after acceptance, he indorsed to the plaintiff, (who knew of his partial insolvency, but not of the act of bankruptcy;) and a commission of bankrupt having been afterwards taken out; held that the plaintiff, who was to make title through the bankrupt's indorsement after his bankruptcy, though he were entitled to sue the acceptors upon the bill, yet could only recover on it the amount of the sum accepted for the *accommodation* of the bankrupt over and above the amount of the bankrupt's effects in the hands of the acceptors at the time of the bankruptcy; for which latter amount, and for which alone, they were liable to account in another form of action (not on the bill) to the bankrupt's assignees.

THE plaintiff declared, that on the 5th of July, 1809, one James Anderson

(1) [But see *Coit v. Smith*, 3 Johns. Cases, 16. *Lawrence v. Aberdeen*, 5 B. & A. 107.

drew a bill of exchange on the defendants, whereby he directed them on the 10th of *November*, in that year, to pay to his order 1400*l.*; that the defendants accepted the bill, and that *J. Anderson* then, on the same day, indorsed it to the plaintiff; and that the defendants have since refused to pay it. There were also the common counts. The cause was tried before Lord *Ellenborough*, C. J. at *Guildhall*, after *Hilary* term, 1810, when the plaintiff obtained a verdict for 1434*l.* 14*s.* 2*d.*, subject to the opinion of this Court on the following case.

Anderson being indebted to the plaintiff in more than 2000*l.* an action was brought to recover the same, which stood for trial at the sittings after *Trinity* term, 1809. After notice of trial was given, *Anderson* being then insolvent, represented to the plaintiff's attorney, that he was unable to pay the whole of his debts, and proposed that if the proceeding in that action were stayed, he would pay him a composition of 13*s.* 6*d.* in the pound upon the debt claimed, and the costs of the action, to fall due on the same day on which the plaintiff would be entitled to sign judgment in the action; and he named the defendants as his sureties for the same, and proposed to give their acceptance. This proposal being accepted, *Anderson* applied to the defendants by the following letter, to accept the bill in the declaration mentioned for his accommodation. (Dated *Cannon-street*, 5th *July*, 1809.) "Messrs. *Freeman* and Co. We should "be much obliged, and feel considerably accommodated, if you would accept "our bill drawn on you for about 1400*l.* payable at 4 months after this date, " (which will not be negotiated;) and what part of this bill is not covered by "bills in your hands, we shall very soon do. This is the last time we shall "have occasion to trouble you for accommodation, &c. as we shall get over in "the course of a couple of months the inconvenience we thus suffer through "Mr. *Newman*: for although our loss by his bankruptcy will be very little "or nothing, yet our advances are heavy and unexpected. We remain, &c. "James *Anderson* and Co." The defendants accepted the bill, and delivered it to *Anderson*, who endorsed it, so accepted, to the plaintiff, on the next or the second following day. At the time the defendants accepted the bill, they had funds of *Anderson* in their hands to the amount of 888*l.* 16*s.* 8*d.*, consisting of bills not then due, but since paid, and which were deposited by him with the defendants as his bankers. *Anderson* being a trader, committed an act of bankruptcy on the 7th of *March*, 1809, and a commission issued against him on the 25th of *July*, on which he was afterwards declared a bankrupt, and assignees appointed. The question was, whether the plaintiff were entitled to recover any and what sum? If he were entitled to recover the whole, the verdict was to stand: if entitled to recover no more than the difference between 888*l.* 16*s.* 8*d.* and the amount of the bill, then the verdict was to be entered for a sum so reduced; if not entitled to recover any thing, the verdict was to be set aside, and a nonsuit entered.

The case was argued a few days ago, by *Scarlett* for the plaintiff, and *Holroyd* for the defendants; but the Court in giving judgment went so fully into the grounds of the arguments, that it is unnecessary to state them here. After time taken to consider the case further,

Lord *ELLENBOROUGH*, C. J. delivered the opinion of the Court.

This was an action against the defendants as acceptors of a bill of exchange for 1400*l.*, drawn by one *Anderson*, payable to his own order, and endorsed by him to the plaintiff for value. And the defence was, that in consequence of a prior act of bankruptcy by *Anderson*, which has since been followed by a commission, *Anderson's* indorsement transferred no right to the plaintiff. As the bill was payable, not immediately to the plaintiff, but to *Anderson's* order, it was incumbent on the plaintiff, when he took the bill, to satisfy him-

Halm v. Cobbett, 2 Bing. 205. *Potter v. Prov. Wash. Ins. Co.*, 4 Mason, 300. 2 Phill. on Ins. 464. ch. 17. sec. 18. See also, *Young v. Turing*, 2 Man. & G. 593, as to what is a total loss.—W.]

self as to *Anderson's* right to endorse it; and if *Anderson* had no such right, the loss must fall upon the plaintiff. At the time this bill was accepted, the defendants had in their hands, as *Anderson's* bankers, bills of the value of 888*l.* 16*s.* 8*d.*, not then become due; but they had no other effects. To that amount, therefore, their acceptance was for value: beyond that, it was gratuitous, and merely for *Anderson's* accommodation. It may be considered as clear, that, except in cases provided for by particular statutes, a trader who has committed an act of bankruptcy, upon which a commission afterwards issues, can make no transfer of his property to the prejudice of his assignees, nor do any act to interfere with their rights; but every such attempted transfer or act is liable to be vacated by his assignees. On the other hand, when it does not affect the rights and interests of the assignees, the act of a man who has committed an act of bankruptcy has the same effect as the act of any other person. The question, therefore, for consideration here is, whether this endorsement by *Anderson*, if allowed to be effectual, could prejudice his assignees, or interfere with their rights; because, as far forth as it would do so, it is inoperative. The case of *Wilkins v. Casey*, 7 Term Rep. 711, has established, that if a man who has funds in his hands belonging to a trader, who has committed a secret act of bankruptcy, accept a bill for that trader, without knowing of such act of bankruptcy, he may apply those funds when the bill becomes due to the discharge of his own acceptance, though a commission of bankrupt may have issued in the interim, and will be protected against any claim the assignees may afterwards make upon him in respect of the funds so applied. To the extent, therefore, of the 888*l.* 16*s.* 8*d.*, it would prejudice the assignees to hold this indorsement valid; because it would destroy the claim of the assignees to that sum in the hands of the acceptors: and we have no difficulty in saying, that *this part* of the plaintiff's demand cannot be supported.

As to the surplus (511*l.* 3*s.* 4*d.*.) had the bill been for that sum alone, the case cited by the plaintiff of *Arden v. Watkins*, 3 East, 317, would be an authority in point, unless the late stat. (49 Geo. 3 c. 121. s. 8,) has altered the law in this respect. The principle decided in *Arden v. Watkins* was this, that if a man accept a bill for the accommodation of a trader who has committed a secret act of bankruptcy; and such bill be payable to the trader's order, the trader's indorsee will have a valid claim upon the bill against the acceptor, notwithstanding a commission of bankrupt shall have issued against such trader before the bill became due: because as the trader himself could have had no right upon such bill against the acceptor, his assignees, who can in this respect stand in no better situation than the bankrupt whom they represent, could have had no right upon it supposing it had remained in his possession; and therefore his indorsement works no prejudice to them. It is contended, however, in this case, first, that where the acceptance is partly for value, and in part only by way of accommodation, the assignees have an interest in the bill, and a right, *pro tanto*, to sue upon it; and that to allow the indorsement to operate upon the surplus would prejudice their right, and would be subjecting the acceptor to two actions upon the same acceptance, which is not allowable: and secondly, that since the stat. 49 Geo. 3. c. 121. s. 8, if the defendant were compelled to pay this 511*l.* 3*s.* 4*d.* to the plaintiff, he, the defendant, as a surety for a bankrupt, paying under the circumstances stated in that 8th section, would be entitled to prove his demand in respect of it under *Anderson's* commission, and the assignees and other creditors would receive a prejudice from that proof. A moment's consideration, however, will dispose of the second ground; it being clear that the quantum of proof against the estate will not be varied by the defendants' proving, (if they should be admitted to prove) and consequently their proof could not prejudice the assignees or other creditors. If the plaintiff recover this sum from the defendants, (and we will suppose the defendants are competent to prove for it,) in that way it is proved by the defendants under the bankrupt's commission: if the plaintiff do not re-

cover it from the defendants, he, the plaintiff, may certainly prove it himself, as part of the debt due from *Anderson* to himself at the time when *Anderson* became bankrupt: and in either case, therefore, will it be either by one party or the other once proveable. As to the other ground, we think the assignees had no right to the bill *in opposition to the plaintiff*, nor any right to sue upon it for the 888*l.* 16*s.* 8*d.* It was a security from the defendants for that sum and more; and though the assignees had a right to take care that the bankrupt should not use it so as to affect that sum, they had no right to controul his power over it as to the residue beyond that sum. They have a right to protect themselves, but not arbitrarily to interfere with or vary the rights of others. The possession of this bill would have placed them in no better situation than they would have been in without it: with the possession of it, they could only have recovered the 888*l.* 16*s.* 8*d.*; and without it they may still recover to that same extent. Before this bill was drawn, and independently of it, this 888*l.* 16*s.* 8*d.* was theirs: the acceptance of this bill gave them no fresh right; it merely left the old one as it was. They are entitled to say, that the 888*l.* 16*s.* 8*d.* shall not be touched; they may resist and disaffirm any operation of this bill to transfer that sum to their prejudice; but they have no further right. This is all that is necessary for their protection; and it would be working injustice, without any reasonable colour or ground for it, to give them more. The assignees, indeed, do not themselves controvert the plaintiff's right; their right is insisted upon by the defendants; they set up the *jus tertii*; and they set up that right not to protect the assignees, but to reduce the extent of their own responsibility. The assignees will have every thing to which they are entitled, independently of this bill; and that, whether the plaintiff recover upon it to the extent of the 511*l.* 3*s.* 4*d.* or not. The defendants entered into an engagement, by which, for any thing which they then knew, *Anderson* might pledge his responsibility for 511*l.* 3*s.* 4*d.* beyond what he had assets to cover. They agreed, in effect, to apply the 888*l.* 16*s.* 8*d.* towards the discharge of the bill; and if necessary to advance 511*l.* 3*s.* 4*d.* more of their own. *Anderson*, at the time of indorsing the bill to the plaintiff, had apparently the right to endorse it: he had, indeed, committed a secret act of bankruptcy, but that was unknown to the plaintiff, and no commission had issued against him. The plaintiff had therefore a right to suppose, that he was receiving a valid engagement from the defendant for 1400*l.*: the defendants, if they knew of the indorsement, must have so considered it: and is it just to allow the defendants to withdraw themselves from the *whole* engagement, because it would interfere with the rights of the assignees, unless they were relieved from a part of it? If the defendant's argument prevail, it would have prevailed equally if their debt to *Anderson* had been 6*d.* only, instead of 888*l.* 16*s.* 8*d.* If the bill is to be considered so completely indivisible as that the plaintiff can recover no part unless he recover the whole, the right to resist his claim to the extent of a single farthing would defeat it *in toto*. Could not the assignees waive their right, and affirm *Anderson's* indorsement? And if they did, could the defendants resist payment of the whole 1400*l.*? And if not, how can their conduct, in affirming or disaffirming the act, be allowed to vary the extent of the defendants' liability. This is not the case of a professed indorsement of part of the bill, which would have the effect of giving several actions on the bill; but it is an indorsement of the whole, supposed at the time to be valid for the whole, but which, from subsequent events, the defendants are at liberty to resist and vacate for a part; and upon payment of which part, they are discharged from all *further responsibility upon the bill*, though they still continue answerable for the residue of its amount to others, in another form, and upon a ground wholly independent of the bill. Upon the whole, therefore, as the defendants by their acceptance enabled *Anderson* to hold forth the bill as a pledge for 1400*l.*; as *Anderson* has no ground of his own to resist his liability to the whole of the sum, but is obliged to call in aid the right of third per-

sons, the assignees; as they have a right to the extent of 868*l.* 16*s.* 8*d.* only, and will have a complete protection if that sum be excluded from the verdict; and though the plaintiff be at the same time allowed to retain the possession of the bill, and to recover upon it *pro tanto*; it appears to us that the plaintiff is to be considered as having a right to recover such balance of 511*l.* 3*s.* 4*d.* and that the verdict ought therefore to be entered for him for such reduced sum accordingly.

Stedman v. Martinnant.

12 East, 664. July 6, 1810.

A bankrupt, sued by his surety, or person who was liable for his debt, at the time of the commission issued against him, though the surety became such after the act of bankruptcy, and paid the debt after the issuing of the commission, cannot without specially pleading it, in like manner as after the stat. 5 Geo. 2. c. 30. s. 7, avail himself of his certificate under the stat. 49 G. 3. c. 121. s. 8, which *discharges* the bankrupt having his certificate of all such demands, at the suit of every such person, in like manner to all intents and purposes, as if such person had been a creditor before the bankruptcy.

THE plaintiff declared in *assumpsit* upon the common money counts; to which *non assumpsit* was pleaded: and at the trial before Lord *Ellenborough*, C. J. in *Middlesex*, a verdict was found for the plaintiff for 260*l.*, subject to the opinion of the Court on the following case.

On the 5th of *January*, 1807, the plaintiff, at the defendant's request, and for his accommodation, accepted a bill of exchange drawn by the defendant for 234*l.* 11*s.* 0*d.*, payable at 70 days after date, and the defendant promised to provide the plaintiff with the money to pay such bill. The bill became due on the 19th of *March* 1807, and the defendant not providing for it, it was dishonoured. On the 18th of *March*, 1807, a docket was struck, and on the 21st a commission of bankrupt was issued against the defendant, which was superseded on the 15th of *April*, 1807; on which day another commission of bankrupt was issued against him; but neither of these commissions was gazetted or proceeded upon. A meeting of the defendant's creditors was then held, and time was given him to pay his debts by instalments. On the 9th of *June*, 1807, the plaintiff accepted another bill for the like accommodation of the defendant, for 237*l.* 11*s.* 10*d.*, which became due on the 12th of *September*, 1807, and was on that day paid by the plaintiff for the defendant's use, he not providing for the same. This latter bill was given for the purpose of taking up the former dishonoured bill, with the addition of interest and stamp, and was indorsed by *C. Aldrick* as an additional security to Messrs. *Herries* and Co., the holders of the former bill, who had required the same. A commission of bankrupt issued against the defendant, dated 6th of *August*, 1807, founded on an act of bankrupt committed in *March*, 1807, and the defendant was declared a bankrupt under such commission. A dividend of 6*s.* 4*d.* in the pound was declared, and made on the 6th of *August*, 1808. A second dividend of 1*s.* 6*d.* in the pound was declared and made on the 29th *July* 1809. Previous to paying the last dividend, the assignees had in hand 1547*l.* belonging to the defendant's estate; and the plaintiff, (supposing him entitled to prove the money paid on the bills as a debt,) and other creditors of the defendant who had not proved under the said commission, might at that time have received dividends equally in proportion to their respective debts, without disturbing any dividend then already made. The defendant obtained his certificate of conformity under the said commission on the 4th of *September*, 1809. The questions were, 1st, whether the plaintiff were entitled to recover the 260*l.*, (a) notwithstanding the defendant's

(a) The amount of the second bill with interest.

bankruptcy and certificate. 2dly, Whether the defendant can avail himself of his certificate under the general issue.

Puller, for the plaintiff, said, that the last question had been decided in the present term by the court of *C. B.*, in *Gaschell v. Martinnant*, where it had been held that the bankrupt could not avail himself of his certificate upon the late act of the 49 Geo. 3. c. 121. s. 8, without pleading it, in the same manner as he must have done before that act, where the debt accrued before the bankruptcy.

That section enacts, "that in all cases of commissions of bankrupt already issued, under which no dividend has yet been made, or under which the creditors who have not proved can receive a dividend equally in proportion to their respective debts, without disturbing any dividend already made, and in all cases of commissions of bankrupts hereafter to be issued, where at the time of issuing the commission any person shall be surety for or be liable for any debt of the bankrupt, it shall be lawful for such surety or person liable if he shall have paid the debt, or any part thereof in discharge of the whole debt, although he may have paid the same after the commission shall have issued, and the creditor shall have proved his debt under the commission, to stand in the place of the creditor as to the dividends upon such proof; and when the creditor shall not have proved under the commission, it shall be lawful for such surety or person liable to prove his demand in respect of such payment as a debt under the commission; not disturbing the former dividends, &c. notwithstanding such person may have become surety or liable for the debt of the bankrupt after an act of bankruptcy had been committed by such bankrupt: provided that such person had not, at the time when he became such surety, or when he so became liable for the debt of such bankrupt, notice of an act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment. Provided always, that the issuing a commission of bankrupt, although such commission shall afterwards be superseded, shall be deemed such notice. And every person against whom any commission of bankrupt has been or shall be awarded, and who has obtained or shall obtain his certificate, shall be discharged of all demands, at the suit of every such person having so paid, or being hereby enabled to prove as aforesaid, or to stand in the place of such creditor as aforesaid, with regard to his debt in respect of such suretyship or liability, in like manner, to all intents and purposes, as if such person had been a creditor before the bankruptcy of the bankrupt for the whole of the debt in respect of which he was surety, or was liable as aforesaid."

The Court, without entering into the first question, called on the defendant's counsel for an answer on the second point.

E. Lawes, who appeared now on the part of the defendant, admitted that the case cited was an authority in point against him, which had been decided since this case was reserved: but requested the indulgence of the Court to let the case stand over till to-morrow, on account of the unavoidable absence of the gentleman who was to have argued it for the defendant.

Lord ELLENBOROUGH, *C. J.* then said, that it was a rule very much of practice to require a bankrupt to plead his certificate, if he meant to avail himself of it; but it had long prevailed before the late act of parliament; and having been recently extended by the judgment of the court of *C. B.* to cases of this kind arising since the act, it would be very inconvenient if a different rule were established in this court. They should therefore consider themselves bound by that decision, unless it could be shewn to be an improvident rule, so as to induce them to confer with the judges of the other court upon it. For the present, therefore the Court would give judgment *nisi* for the plaintiff; which would stand, unless they heard any sufficient reason urged to-morrow to the contrary.

Murray, for the defendant, on the next day, suggested that the stat. 5 Geo.

2. s. 30. s. 7, which gave a summary form of plea to a certificated bankrupt sued for a debt accruing before the bankruptcy, by which he was to avail himself of his discharge by the certificate, was framed upon the ground that the remedy only was barred and not the debt. But here, he contended, that by the last statute the demand itself, which was the debt, was discharged, and the very cause of action was barred, and therefore the defence was available on the general issue.

The Court, however, were clearly satisfied, that there was no foundation for this distinction; but they offered *Marryat* leave to amend on payment of costs. And he desired time to consult his client till the next day.

Postea to the plaintiff.

Gildart v. Gladstone and Gladstone, in Error.

12 East, 668. July 9, 1810.

Judgment having been given in *C. B.* for the plaintiffs upon a special verdict in *assumpsit*, which was reversed upon writ of error in this court, the defendant is entitled here not only to judgment of acquittal, but also for the costs of his defence in *C. B.*, being the same judgment which the Court below ought to have given; the defendant in such case being entitled to his costs by the stat. 23 H. 8. c. 15.

THE judgment of the court of *C. P.* for the plaintiffs below having been reversed in this case, in *M. 50 Geo. 3. 11 East, 675*, and a rule drawn up thereupon; *Holroyd*, in the last term, obtained a rule calling upon the defendants in error to shew cause why the rule made before for reversing the judgment should not be amended, by adding thereto, that judgment of acquittal be given for the plaintiff in error, with the costs of his defence in the court of *C. P.*: and why the master of this court should not tax those costs. But he admitted that he could not have the costs of the writ of error here; as this court could only give the same judgment on a writ of error as the court of *C. P.* ought to have given, according to the judgment of the House of Lords, in *Phillips v. Bury*, 1 *Ld. Ray. 10*, and *Salk. 403*. He referred to the stat. 23 H. 8. c. 15, which gives costs to a defendant if a verdict pass against the plaintiff in certain actions, of which this was one: and here in the result it appears, by the judgment of the Court, that the verdict, which was special, should have been entered for the defendant below.

Richardson now opposed the rule; and in answer to a question put by Lord *Ellenborough*, C. J. whether the court of error ought not to perfect their judgment by giving that relief to the defendant below which the Court below ought to have given to him; he referred to *Parker v. Harris*, 1 *Salk. 262*, where a distinction is taken, "that where judgment is given below for the plaintiff, and the defendant brings error, there shall only be judgment to reverse the former judgment; for the suit is only to be eased and discharged of that judgment: but where the plaintiff below brings error, the judgment shall not only be a reversal, but the Court shall also give such judgment as the court below should have given; for his writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit." The same rule was recognized and acted upon in *Baker v. Lade*, *Carth. 254*. It is true, that those cases were upon demurrer, and before the statute 8 and 9 W. 3. c. 11. s. 2, giving costs to a defendant obtaining judgment on demurrer: but *Phillips v. Bury*, in which the same rule was recognized, was upon a special verdict. If it be said, that, one of the reasons there given for the distinction is, that the defendant who obtains, upon error brought, the reversal of a judgment given against him below, is in *statu quo*, and therefore has no need to enter a new judgment; and that since the statute giving him costs, that reason no longer applies: the answer is that the same distinction has been recognized in cases

and books of practice long since the statute of William; of which he instanced several.(a) [*Bayley, J.* Is not that contrary to the rule, as laid down in Salk. 401, and 7 Mod. 3. Anon. E. 1 Ann. B. R.](b)

Holroyd, and J. Clarke, in support of the rule, observed, that in general where a defendant brings a writ of error, it is for some fault in the declaration after verdict and judgment against him, for which he ought to have moved in arrest of judgment in the court below; and therefore he is not entitled to costs; but upon a special verdict the finding of the jury is in the alternative: and if the defendant be found to be in the right, the justice of the case is not answered merely by setting aside the erroneous judgment for the plaintiff, but the defendant is entitled to an absolute judgment upon the verdict found in his favour. And if the rule be general, as it now seems to be settled, that the court of error ought to pronounce the same judgment which the court below ought to have given; it will apply to this case, and the defendant will be entitled to his costs within the stat. 23 H. 8. c. 15, which gives costs to a defendant where the verdict is against the plaintiff in a case of this description: and this has been holden, *Alsop v. Cleydon*, Cro. Eliz. 465, to extend to the case of a special as well as of a general verdict. So where judgment given by this Court for a defendant, upon a special verdict in ejectment, was reversed in the Exchequer-chamber; that court, on motion, gave the plaintiff leave to enter up judgment of reversal, and that he should recover his term, damages, and costs.(c) They were then stopped by the Court.

Lord ELLENBOROUGH, C. J. The court are bound *ex officio* to give a perfect judgment upon the record before them. In this case, the judgment below was given for the plaintiffs upon a special verdict, where of course there was an alternative finding by the jury according as the Court should be of opinion, that the verdict and judgment ought to have been for the plaintiffs, or for the defendant: if for the plaintiffs, the verdict was to be entered one way: if for the defendant another way. This Court then having been of opinion, that the judgment of the court of C. P. was erroneous, and ought to have been for the defendant below, which would have entitled him there to his costs on the verdict as found for him: we should not do him all the justice which he is entitled to receive upon the record now before us, if we did not, upon reversing the judgment below, give the same judgment which the court below ought to have given; which is a judgment for the costs of his defence in that court, as well as a judgment of acquittal.

The other judges concurred; and *Bayley, J.* added, that there were other cases where injustice would be done if the court of error were not to give the same judgment for a defendant upon a reversal of the judgment of the court below against him, which the court below ought to have given; as in *replevin* and *quare impedit*; where the defendant, in the one case, would be entitled to a judgment *de returno habendo*, and in the other to a writ to the bishop.(d)

(a) 2 Tidd, 1165, (2d edit.) cites 1 Salk. 261. 401. 4 Mod. 76. 4 Burr. 2156. 2 Bac. Abr. Error, M. 2, which latter, (5th edit.) also refers to *Pugh v. Goodtitle Lessee of Bailey*, House of Lords, 15th of May, 1787, which was upon a writ of error from B. R. in Ireland; and *Cumming v. Sibley*, 4 Burr. 2490.

(b) The rule as laid down in the report in *Salkeld* is this—If a judgment be below for the plaintiff, which is reversed on error; yet if the record will warrant it, the Court ought to give a new judgment for the plaintiff: but if the judgment be erroneous, and against the plaintiff on the merits; that ought to be reversed, and no new judgment given for the plaintiff. [Here the report in *Modern* says, “and a new judgment given for the defendant.”] If an erroneous judgment be given for the defendant, and it is reversed, and the merits appear for the plaintiff, he shall have judgment; if the merits be against the plaintiff, the defendant, shall have a new judgment. So it is in the exchequer-chamber; for they are to reform, as well as to affirm or reverse it.

(c) *Denn d. Moller v. Moore*, in Error, 1 Bos. & Pull. 30.

(d) Vide per *Hobart, C. J.* Hob. Rep. 163, in the great Commendam case of *Colt and Glover v. The Bishop of Litchfield and Coventry*.

The King v. Beard.

12 East, 673. July 9, 1810.

The pawnbrokers' act, 39, & 40 Geo. 3. c. 99, having enacted, that they shall and may take, by way of profit, a certain rate of interest on pledges, *and no more*; the taking of more, is an offence within the act, cognizable by a justice of peace on summary information within the 26th sect. which, after providing specific penalties for specific offences) says, that "*for every other offence against this act, where no forfeiture or penalty is provided or imposed on any particular or specific offence against any part of this act,*" the pawnbroker offending against this act shall forfeit not less than 40s. nor more than 10l. in the discretion of the justice.

THIS was an application for a mandamus to be issued to the defendant, a magistrate of *Lancashire*, commanding him to proceed to hear and determine an information exhibited before him by *J. S.* against *Robert Rawlinson*, a pawnbroker, for certain trespasses and contempts against the late pawnbrokers' act of the 39 and 40 Geo. 3. c. 99. The information laid before the magistrate on the 4th of *June* 1810, charged, that *Rawlinson*, a pawnbroker at *Manchester*, unlawfully demanded, received, and took from one *J. S.* in the name of *J. D.*, on redeeming the pledge after-mentioned, 6d. by way of profit for the loan of 3s.: the same being an intermediate sum, exceeding 2s. 6d. and not exceeding 40s., which on the 15th of *December*, 1809, was lent by *Rawlinson* to *J. S.* on a pledge of two spoons, the said pledge not having remained in pawn any time exceeding 6 calendar months: being more than at the rate of 4d. for the loan of 20s. by the calendar month; contrary to the statute; and then claimed a penalty of not less than 40s. nor more than 10l. The question was, whether this were a case for a summary conviction in a penalty within the statute: the magistrate thought it was not, and refused to proceed upon the information.

The 2d section allows pawnbrokers to take a certain rate of interest on pledges, *inter alia*, "for every pledge upon which there shall have been lent any sum not exceeding 2s. 6d. the sum of one halfpenny for any time during which the said pledge shall remain in pawn, not exceeding one calendar month; and the same for every calendar month afterwards, including the current month in which such pledge shall be redeemed; although such month shall not be expired. For every pledge on which there shall have been lent the sum of 5s., one penny," &c. and so in proportion for any fractional sum: which said several sums shall be taken in lieu of, and as a full satisfaction for, all interest due, and charges for warehouse room." By the 3d section, "In all cases where any intermediate sum lent upon pawn shall exceed 2s. 6d., and not exceed 40s., the lender shall and may take by way of profit, as aforesaid, at the rate of 4d., *and no more*, for the loan of 20s. by the calendar month, including the current month as aforesaid." No penalty is given by these clauses, but penalties are given by several clauses of the act for specific offences; and the act also contains many regulating clauses. And by s. 26, "In case any pawnbroker shall in any wise offend against this act, he shall for every such offence neglecting to make, &c. any such entries in his books as is required to be made by him by this act, forfeit such sum, as to the justice before whom any information thereon shall be heard and determined in his discretion shall seem reasonable and fit, not exceeding 10l.: and for every other offence against this act, where no forfeiture or penalty is provided or imposed on any particular or specific offence against any part of this act, not less than 40s., nor more than 10l."

Topping and *Yates* now shewed cause against the rule, and stated the doubt entertained below to be, whether the taking by the pawnbroker of more than the stipulated rate of interest, &c. permitted by the act in the 2d and 3d clauses, for which no penalty is given, were an offence against the act, so as to bring the case within the summary jurisdiction of the magistrate under the

general words of the 26th section: particularly as this, being a penal act, was to be construed strictly: and as provision was made by the 14th section, which seemed to point out the proper remedy in this case; that if any pledge not exceeding in value 10*l.* shall be refused to be delivered up by the pawnbroker, upon tender by the owner of the loan and profit thereon, according to the table of rates established by the act, without shewing reasonable cause to the satisfaction of the justice, he may direct the restoration of the pledge, and commit the pawnbroker till such restoration made or compensation given to the owner. But the Court having intimated their opinion against the validity of the objection to the magistrate's proceeding: *Topping* and *Yates* said they could not deny that the taking more than the stipulated rate of profit was an offence, where the act says that so much *and no more* may be taken. And by

Lord ELLENBOROUGH, C. J. It is prohibited by the act to take more than the stipulated rate of profit: and therefore the taking more is an offence against the act: and as no particular penalty is provided for that transgression, it falls within the general words of the 26th clause.

Per Curiam,

Scarlett and *J. Clarke* were to have supported the rule.

Rule absolute.

AN

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ACTION—after Indictment for Felony.
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- 4 In case against a judgment creditor for maliciously suing out an alias fi. fa. after a sufficient execution levied upon the plaintiff's goods under the first fi. fa. held that the sheriff's returns indorsed upon the two writs, (which writs had been produced in evidence by the plaintiff as part of his case,) wherein the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, were prima facie evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons. *Gyfford v. Woodgate*, T. 49 G. 3. 148
- 5 An action on the case lies upon the stat. 6 Geo. 1. c. 16. s. 1, by the party grieved, to recover damages against the inhabitants of the adjoining township for trees, coppice, and underwood, unlawfully and feloniously burnt by persons unknown; though the clause directs the party grieved to recover his damages "in the same manner and form as given by the stat. 13 Ed. 1. st. 1. c. 46, for dikes and hedges overthrown by persons in the night;" upon which the usual course of proceeding has been by the writ of noctantur. *Thornhill v. The Township of Huddersfield*, T. 49 G. 3. 172

- 6 Due notices having been given to the parson of the setting out the tithes of fruit and vegetables in a garden; which were accordingly set out on the days specified; and the tithes not having been removed at the distance of a month afterwards, when they had become rotten; a notice then given by the owner, to remove the tithed fruits and vegetables within two days, otherwise an action would be commenced against the parson, is sufficient notice of their having been set out, whereon to found an action, if they be not removed. And due notices having been given of setting out tithes of

- garden vegetables and field barley, on certain days between the 11th and 16th of *September*, a general notice on the 17th to the parson, to take away *all the tithes of his* (the plaintiff's) lands within two days, is sufficient whereon to found the like action. *Kemp v. Filewood*, T. 49 G. 3. 176
- 7 Where lights had been put out and enjoyed without interruption for above 20 years, during the occupation of the opposite premises by a tenant; that will not conclude the landlord of such opposite premises; without evidence of his knowledge of the fact, which is the foundation of presuming a grant against him; and consequently will not conclude a succeeding tenant, who was in possession under such landlord, from building up against such encroaching lights. *Daniel v. North*, T. 49 G. 3. 182
- 8 Firing at wildfowl to kill and make profit of them by one who was at the time in a boat on a public river or open creek, where the tide ebbs and flows, so near to an ancient decoy on the shore, (about 200 yards) as to make the birds there take flight; the defendant having before fired at a greater distance from the decoy, which brought out some of the birds from thence; though he did not fire into the decoy pond; is evidence of a wilful disturbance of and damage to the decoy, for which an action on the case is maintainable by the owner. *Carlington v. Taylor*, M. 50 G. 3. 273
- 9 An action on the case lies for discharging guns near the decoy pond of another with design to damnify the owner by frightening away the wildfowl resorting thereto, by which the wildfowl were frightened away and the owner damnified. *Keeble v. Hickeringill*, T. 5 Ann. 275
- 10 A count in an action on the case, stating that the defendants, being owners of a ship at *Liverpool*, bound on a voyage from thence to *Waterford*, the plaintiff shipped goods on board to be carried upon the said voyage by the defendants and to be delivered at *W.* to the plaintiff's assigns: and thereupon the plaintiff insured the goods at and from *L. to W.*; and then averring that it was the duty of the defendants as such owners to cause the ship to proceed on the voyage from *L. to W.* without deviation; and alleging a breach of such duty, by their causing the ship to deviate from the course of that voyage; after which she was lost, with the goods; and the plaintiff, by reason of such deviation, lost his goods and the benefit of his policy, &c.: cannot be sustained, for want of alleging that the goods were delivered to or received by the defendants for the purpose of carriage, or that they had notice of the shipment; from whence a promise or duty, founded upon an agreement to carry the goods, might be inferred; and also for want of an allegation that the defendants undertook to carry the goods directly to *W.* from *L.*; for though the ship's ultimate destination might be *W.*, yet she might have been first destined to other places on a coasting voyage. *Max v. Roberts*, H. 50 G. 3. 367
- 11 Upon a declaration in case, alleging a deceit to have been effected upon the plaintiff by means of a warranty made by two defendants, upon a joint sale to him by both, of sheep, their joint property, the plaintiff cannot recover upon proof of a contract of sale and warranty by one only, as of his separate property; the action, though laid in tort, being founded on the joint contract alleged. *Weal v. W. and H. King*, T. 50 G. 3. 534
- 12 The plaintiff being desirous to dispose of his interest in certain buildings, trade, and stock, in which trade he was engaged with the defendant, pending a treaty between them for the purchase by the defendant, the latter false and deceitfully represented to the plaintiff, that he was about to enter into partnership in the same trade with other persons whose names he would not disclose, and that those persons should not consent to the giving the plaintiff more for his interest than a certain sum; whereas in truth neither *A.* and *B.*, with whom he was then about to enter into partnership, nor any other intended partners of his, had refused to give more than that sum, but had then agreed with the defendant that he should make the best terms he could with the plaintiff, and would have given him a larger sum, and in fact the defendant charged them with a larger price in account for the purchase in the plaintiff's interest. Held, that an action on the case did not lie for this false and deceitful representation by the bidder concerning the seller's probability of getting a better price for his property: for it was either a false representation of another's intention, or at most a mere gratis dictum of the bidder, upon a master which he was not under any legal obligation to the seller to disclose with accuracy, and on which it was the folly of the seller to rely. But that at any rate the count was bad, in not shewing that the plaintiff had been damaged by such false representation; inasmuch as it was not alleged that the other intended partners of the defendant would have bid at all without him, or that he would have joined in giving the additional price. *Vernon v. Keys*, T. 50 G. 3. 616

ADDITION.

See AFFIDAVIT, 2.

ADMINISTRATOR AND EXECUTOR.

See COMPENSATION, 2. COSTS, 6. EVIDENCE, 17, or PLENE ADMINISTRATIVIT, 1. WITNESS, 3.

1 On plea of plene administravit, proof of

- an admission by the executor, that the debt was just and should be paid as soon as he could, is not evidence to charge him with assets. *Hindsley v. Russel*, E. 50 G. 3. 432
- 2 The executor having pleaded non-assumpsit as well as *plene administravit* and *plene administravit prater, &c.*, and thereby forced the plaintiff to go to trial; the plaintiff obtaining a verdict on the non assumpsit, and being entitled to judgment of assets *quando acciderint*, is entitled to the general costs of the trial, though the issue of *plene administravit*, was found for the defendant. *ib.*
- 3 The wife of an acting executor taking no beneficial interest under the will is a competent attesting witness to prove the execution of it, within the description of a credible witness in the statute of frauds, 29 Car. 2. c. 3. s. 5. *Battison v. Bromley*, Bart. E. 50 G. 3. 441

ADMIRALTY,

See ASSUMPSIT, 11.

AFFIDAVIT.

- 1 Affidavit intitled "In the King's Bench," upon which the Attorney General had filed an information ex officio against the defendant, permitted to be read in aggravation, after judgment by default. *The King v. Morgan*, M. 45 G. 3. 221
- 2 Where a deponent had been a few days before discharged out of prison, but by permission had still continued to lodge there at night, having no other place of residence; his describing himself bona fide in an affidavit in Court as *late* of such prison, is sufficient to satisfy the rule of Court of M. 15 Car. 2, ordering the true place of abode of every person making affidavit in B. R., to be inserted. But a deponent who had left one place of residence; and resided in another, would not satisfy the rule by describing himself as *late* of the former. *Sedley v. White*, M. 50 G. 3. 253
- 3 The affidavits made in answer to a rule nisi for an attachment must be entitled on the civil side of the court in the cause out of which the motion arises: but after the rule for the attachment is granted, the affidavits in any matter concerning such attachment are entitled on the crown side. *Whitehead v. Firth*, H. 50 G. 3. 401

AFFIDAVIT, to hold to Bail.

- 1 Affidavit of debt, stating that the defendant was indebted to the plaintiff in so much for goods sold and delivered (not saying by the plaintiff) to the defendant, is insufficient. *Taylor v. Forbes*, T. 49 G. 3. 157
- 2 A defendant cannot be held to special bail on an affidavit stating him to be indebted to the plaintiff in so much for goods bargained and sold, without also

saying delivered. *Hopkins v. Thorne*, E. 50 G. 3. 508

AGENT,

See VENDOR AND VENDEE, 2.

AGENT AND PRINCIPAL,

See ASSUMPSIT, 11. RECEIVER. WITNESS, 3.

AGREEMENT,

See ASSUMPSIT. COVENANT. INSURANCE, 20, or CHARTER-PARTY, 3. INTEREST. LANDLORD AND TENANT, 3. PAYMENT, 1. VENDOR AND VENDEE.

- 1 If it appear to have been the understanding of the parties to a contract at the time, that it was not to be completed within a year, though it might be and was in fact in part performed within that time, it is within the 4th clause of the statute of frauds 29 Car. 2. c. 3; and if not in writing, signed by the party to be charged, &c. it cannot be enforced against him. And his signature in a book intitled, "*Shakespeares subscribers*, their signatures," not referring to a printed prospectus which contained the terms of the contract, and which was delivered at the time to the subscribers to the *Boydell Shakespeares*, cannot be connected together, so as to take the case out of the statute, as such connexion could only be established by parol evidence. *Boydell v. Drummond*, E. 49 G. 3. 80
- 2 A contract by the owner of a close cropped with potatoes, made on the 21st of November, to sell to the defendant the potatoes at so much a sack; the defendant to get them out of the ground immediately; is not a contract for any interest in land within the 4th section of the statute of frauds, but the same as if the potatoes, which had done growing and were to be taken up immediately, had been sold in a warehouse from whence they were to be removed by the defendant. *Parker v. Stanilund*, T. 49 G. 3. 178
- 3 Where a debtor entered into an agreement with his creditors, whereby they agreed to receive 20l. per cent. in satisfaction of their several demands, and released the remainder, in consideration that half of the composition should be secured by the acceptances of a certain person (also a creditor,) which security was accordingly given and paid when due; held that such agreement was binding on the plaintiff, one of the creditors; though the agreement were not under seal; and though he were the last who signed it, and it did not appear that he had actively induced any of the other creditors or the surety to sign it. And that the plaintiff's suing the debtor, after having received the composition, was a fraud upon the surety and the other creditors. *Steinman v. Magnus*, T. 44 G. 3. 191

- 4 The defendant being indebted to the plaintiffs, his bankers, in nearly 30,000*l.*, about 21,000*l.* of which was secured by bonds (a considerable part of which was advanced by them when stocks were below 50*l.*) agreed with them that they should place 25,000*l.* to his credit in account; for which he was to purchase 50,000*l.* stock, (then at 51 1-4) in their names, and account to them for the dividends upon such stock as from the last dividend-day; after which agreement, the plaintiffs, acting upon the basis of it, (though the defendant never purchased the stock so agreed upon) entered in their books the sum of 25,000*l.* to the credit of the defendant, and continued to honor his drafts from time to time; crediting him also with other sums actually paid by him; and wrote off the amount of his bonds to his credit, and delivered them up to him.
- Held that this agreement to repay the new credit of 25,000*l.* by the purchase of stock as at 50*l.*, when in fact it was more at the time of the agreement made, though it had been less when a considerable part of the money was actually advanced upon his general credit, was usurious and void: but that nevertheless the sum of 25,000*l.*, credited under that agreement by the plaintiffs to the defendant in his banking account, was to be reckoned against them upon balancing the account of debtor and creditor between them. *Bolders and Another v. Jackson*, M. 50 G. 3. 291
- 5 Printed conditions of sale of timber growing in a certain close, not stating any thing of the quantity; parol evidence, that the auctioneer at the time of sale warranted a certain quantity, is not admissible, as varying the written contract. *Pinel v. Edmunds*, H. 50 G. 3. 330
- 6 An instrument containing words of present demise will operate as a lease, if such appear to be the intention of the parties, though it contain a clause for a future lease or leases; as where the one thereby agrees to let, and the other agrees to take land for 61 years at a certain rent for building, and the tenant agreed to lay out 2000*l.* within four years in building 5 or more houses, and when 5 houses were covered in, the landlord agreed to grant a lease or leases (which might be for the more convenient underletting or assignment of the leases,) but this agreement was to be considered binding till one fully prepared could be produced. *Poole v. Bentley*, H. 50 Geo. 3. 402
- 7 The rules which govern the construction of conditions to create real estates do not apply to personal contracts, which must be performed according to the words and apparent meaning of the parties, and are not satisfied by a performance cypress. *Want and Another, Executors, &c. v. Blunt*, H. 50 G. 3. 410
(See further LIFE INSURANCE.)
- 8 Upon a declaration in case, alleging a

deceit to have been effected upon the plaintiff by means of a warranty made by two defendants, upon a joint sale to him by both, of sheep, their joint property, the plaintiff cannot recover upon proof of a contract of sale and warranty by one only as of his separate property; the action, though laid in tort, being founded on the joint contract alleged. *Weat v. W. & H. King*, T. 50 G. 3. 534

- 9 Where by agreement between the plaintiffs, bankers at *Carlisle*, and the defendants, bankers at *Newcastle*, the plaintiffs were weekly to send to the defendants all their own notes and the notes of certain other banking houses; and the defendants were in exchange to return to the plaintiffs their own notes and the notes of certain other bankers, and the deficiency, if any, was to be made up by a bill drawn by the defendants in favour of the plaintiffs at a certain date: held, that the notes so sent by the plaintiffs to the defendants constituted a debt against them, which the defendants might pay by a return of notes according to the agreement; but if they made no such return, or a short return, and gave no bill for the balance, such balance remained as a debt against them, which was provable by the plaintiffs under a commission of bankrupt issued against the defendants, on an act of bankruptcy committed after the time when the bill for the balance, if drawn, would have been due and payable; and that the plaintiffs could not maintain an action to recover damages as for a breach of contract against the defendants who had obtained their certificates. *Forsler v. Surtees*, T. 50 G. 3. 603

ALIEN ENEMY,

- See ASSUMPSIT, 11. INSURANCE, 13, 14, 15, 16.

To trespass and false imprisonment, a plea of alien enemy is not allowed to be pleaded, together with a special justification inconsistent therewith, and the general issue. *Truckenbort v. Payne*, H. 50 G. 3. 419

ANNUITY.

- 1 Where a party gave a bond to secure an annuity, whereby he bound himself, his heirs, executors, &c.; a memorial describing such security, generally, as a bond from A. to B. in such a sum, &c. is defective and void under the annuity act 17 G. 3. c. 26. But the Court only set aside the judgment entered up by warrant of attorney on such bond, and directed the warrant of attorney which was in court to be deposited with the proper officer of the court. *Denne v. Dupuis*, E. 49 G. 3. 76
- 2 An annuity granted by one who was mortgagor in fee in possession of lands, on which it was secured, of greater annual value than the interest of the mort-

gage and the annuity, is within the exception of the 8th section of the annuity act 17 G. 3. c. 26, as a grant of an annuity by one who was *seised in fee simple*; and therefore no memorial of it need be enrolled: the *seisin in fee* there excepted extending in parity of reason to *equitable* as well as *legal* estates. And though a replication, alleging that the grantor was, at the time of the annuity granted, *seised in fee simple* in possession of the premises on which the annuity was charged, would, abstracted from the subject matter, by the mere force of the words *seised in fee simple*, be considered as alleging a *legal seisin*; yet, with reference to the subject-matter, and to the plea, to which it was an answer; which alleged that the grant was made after the annuity act, and that no memorial of it was enrolled according to that act; it shall be taken to mean such an estate as is deemed to be a *seisin in fee*, within the construction of those words in the annuity act. *Amhurst v. Skynner*, E. 50 G. 3. 447

APPEAL.

- 1 Upon an appeal to the sessions against an order of filiation, the respondents are to begin, by supporting their order, as in all other cases. *The King v. Knill*, Hil. 50 G. 3. 349
- 2 Upon an appeal against a rate made under a private act of parliament, the respondent appearing to answer the appeal, and admitting, when called upon by the sessions, that he had made the rate by virtue of a certain act of parliament; a printed copy of which, in the common form, was produced in court by the appellants; and the sessions having thereupon entered into the merits of the appeal, and decided upon them, notwithstanding an objection made by the respondent that the appellants had not given legal evidence of the jurisdiction of the sessions to receive the appeal, for want of proof of the printed copy having been examined with the rolls of parliament; this court refused to quash their order, which was removed by *certiorari*. *The King v. Shaw*, T. 50 G. 3. 547
- 3 No appeal lies to the sessions against a conviction and commitment in execution for three months of a collier under the stat. 6 G. 3. c. 25, for absenting himself from his master's service; the clause of appeal in that statute excepting an *order of commitment*; and the order of commitment in question containing a conviction of the collier for an offence within the act. *The King v. the Justices of Staffordshire*, T. 50 G. 3. 589

APPRENTICE,

See SETTLEMENT BY APPRENTICESHIP.

- 1 The stat. 20 G. 2. c. 19. s. 4, enabling two
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magistrates, "upon application or complaint made upon oath by any master against such apprentice" as is described in the act touching any misdemeanor in such service, to hear and determine the same, and to commit or discharge the apprentice, extends to a complaint in writing preferred by the master, and verified by the oath of another person. *Finley v. Jowle*, E. 50 G. 3. 440

- 2 An indenture binding out a poor apprentice, executed by *W. S.* churchwarden, and *J. G.* overseer of the poor of a hamlet maintaining its own poor separately from the parish at large, not being impeached by evidence negating its execution by a majority of the churchwardens and overseers of the hamlet, shall be deemed good, by intending that there were two overseers for the hamlet as required by stat. 13 & 14 Car. 2. c. 12. s. 21, and only one churchwarden, by custom, in the same place; and therefore the apprentice serving 40 days under it gains a settlement. *The King v. the Inhabitants of Hinckley*, E. 50 G. 3. 492

ARREST,

See ASSUMPSIT, 2.

- A plaintiff who was attending from day to day at the Sittings, in expectation of his cause being tried, was privileged from arrest whilst waiting for that purpose at a coffee-house in the vicinity of the court before the actual day of trial. *Childerton v. Barrett*, T. 49 G. 3. 212

ASSETS,

See EVIDENCE, 17.

ASSUMPSIT,

See PAYMENT, 1.

- 1 An undertenant, whose goods were distrained and sold by the original landlord for rent due from his immediate tenant, cannot maintain an action for *money paid* to the use of the latter; for immediately on the sale under the distress, the money paid by the purchaser vested in the landlord in satisfaction of the rent, and never was the *money of the undertenant*. *Moore v. Pyrke*, E. 49 G. 3. 40
- 2 Evidence of an account stated, whereby the defendant admitted a certain balance due to the plaintiff is not done away, but confirmed in support of an assumpsit, by evidence of a foreign judgment recovered by the plaintiff for the same sum, with a stay of execution for six months, to enable the defendant to prove a counter demand, if he had any; and the plaintiff not having declared till after that period, it was held no objection that the writ was sued out and the defendant arrested before. *Hall v. Odber*, E. 49 G. 3. 69
- 3 A factor selling a parcel of prize manufactured tobacco, consigned to him from

- his correspondent at *Guernsey*, of which a regular entry was made on importation, but without having entered himself with the excise officer as a *dealer* in tobacco, nor having any licence as such, may yet maintain an action against the vendee for the value of the goods sold and delivered: and this, though the tobacco were sent to the defendant without a permit, at his desire; there being no fraud upon the revenue, but at most a breach of revenue regulations protected by penalties: even if such factor could, upon this single and accidental instance, be considered as a *dealer* in tobacco within the meaning of the stat. 29 Geo. 3. c. 68. s. 70, which requires every person, who shall *deal* in tobacco, first to take out a licence under a penalty. *Johnson v. Hudson*, E. 49 G. 3. 96
- 4 An attorney not having delivered any bill to his client before action brought, but having delivered a bill of particulars of his demand under a judge's order after action brought, is entitled to recover items of charge for money paid for his client's use, having no reference to his business of an attorney; although other items in the bill of particulars might be taxable, and within the provision of stat. 2 Geo. 2. c. 23. s. 23, requiring a bill to be delivered a month before the action brought. *Mowbray, One, &c. v. Fleming*, T. 49 G. 3. 143
- 5 The stat. 17 G. 3. c. 42, which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller; if bricks be sold and delivered under the statutable size, unknown to the buyer, the seller cannot recover the value of them. *Law v. Hodson*, T. 49 G. 3. 150
- 6 A contract by the owner of a close cropped with potatoes, made on the 21st of *November*, to sell to the defendant the potatoes at so much a sack; the defendant to get them out of the ground immediately; is not a contract for any interest in land within the 4th section of the statute of frauds, but the same as if the potatoes, which had done growing and were to be taken up immediately, had been sold in a warehouse, from whence they were to be removed by the defendant. *Parker v. Staniland*, T. 49 G. 3. 178
- 7 The sole registered owner of a ship gave orders for materials to be furnished and work to be done for the repairs of it; but before all the articles were delivered on board, he conveyed the vessel, with all its furniture, to another by a bill of sale, which was duly registered. Held that the vendee was not liable for any of the goods furnished before the legal title was conveyed to him, and registered in the manner prescribed by the registry acts; whatever equitable agreement might have existed before between him and the vendor for the conveyance of the whole or a share of the ship, which was unknown to the tradesman: nor was the vendee even liable for any of the goods delivered on board after the sale to him, by virtue of the previous orders of the vendor, to whom the credit was personally given: but the vendee was held liable for articles which were ordered by the captain for the use of the vessel after the legal title was transferred to him. *Trenchella v. Rowe*, T. 49 G. 3. 211
- 8 Where an agreement between an outgoing and an incoming tenant was, that the latter should buy the hay, &c. of the former upon the farm, and that the former should allow to the latter the expense of repairing the gates and fences of the farm; and that the value of the hay, &c., and of the repairs, should be settled by third persons; held that the balance settled to be due to the outgoing tenant for his hay, &c., after deducting the value of the repairs, might be recovered by him, in a count upon a general *indebitatus assumpsit* for goods sold and delivered; having failed upon his count on the special agreement, for want of including in it that part of the agreement which related to the valuation of the repairs. *Leeds v. Burrows*, H. 50 G. 3. 327
- 9 The drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but apprehending that he was still liable upon the bill in default of the acceptor, 3 months after it was due, said that *he knew that he was liable, and if the acceptor did not pay it, he would*; held that he was bound by such promise. *Stevens v. Lynch*, H. 50 G. 3. 344
- 10 Upon a guarantee by the defendant to the plaintiff "for any goods he hath or may supply *W. P.* with to the amount of 100*l.*," the plaintiff may declare as upon a continuing or standing guarantee to that extent, for goods which may at any time have been supplied to *W. P.*, until the credit was recalled; although goods to more than 100*l.* had been before supplied and paid for. *Mason v. Pritchard*, E. 50 G. 3. 429
- 11 The plaintiffs, a *Frenchman* and a *Swiss*, carrying on trade at *Lisbon*, under the name of the defendant a *Portuguese*, shipped a cargo from thence for a port of *France*; which cargo being captured by a *British* cruiser, and libelled for condemnation in the court of Admiralty as *French* and enemy's property, was ordered to be restored to the defendant on his putting in and establishing, with the plaintiffs' privity and consent, a claim to it as his own property; held that the plaintiffs were by thus colluding with the defendant to withdraw from the Admiralty the decision of the true question, by establishing a false fact, estopped from maintaining an action for money had and received against the defendant for the proceeds, by shewing the true fact, that

the property was their own, and that the defendant was their agent. *De Metton and Another v. De Mello*, E. 50 G. 3.

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- 12 The broker effecting a policy, being the common agent of the assured and of the underwriter, while the premium remains in his hands for the one party, and the policy for the other; and having received notice of events which entitled the assured to a return of premium before action brought by the underwriter to recover the full premium; is authorized to deduct such return, and only to pay over the difference to the underwriter. *Skees v. Clarkson*, T. 50 G. 3. 560

- 13 A tenant having agreed with his landlady, that if she would accept another for her tenant in his place, (he being restrained from assigning the lease without her consent,) he would pay her 40*l.* out of 100*l.* which he was to receive for the good-will if her consent were obtained; and having received the 100*l.* from the new tenant, who was cognizant of this agreement, is liable to the landlady in an action for money had and received for her use; the consideration being executed, and therefore the case being taken out of the statute of frauds, as a contract for an interest in land. *Griffith v. Young*, T. 50 G. 3. 563

- 14 The plaintiffs having contracted, by charter-party sealed, to let a ship, then in the *Thames*, to freight to the defendants for eight months, to commence from the day of her sailing from Gravesend on the voyage there stated, and having covenanted that she should sail from the *Thames* to any British port in the English Channel, there to load such goods as the freighters should tender, and sail to the *West Indies*, and bring back a return-cargo to London; afterwards agreed by parol with the defendants, that the ship, instead of loading at some port in the Channel, should load in the *Thames*, and that the freight should commence from her entry outwards at the customhouse: held that this subsequent parol contract was distinct from and not inconsistent with the contract by deed, being anterior to it in point of time and execution, and might therefore, be enforced by action of assumpsit. *White v. Parkin*, T. 50 G. 3. 591

ATTORNEY,

See PLEADING, 14.

- 1 An attorney, not having delivered any bill to his client before action brought, but having delivered a bill of particulars of his demand under a judge's order after action brought, is entitled to recover items of charge for money paid for his client's use, having no reference to his business of an attorney; although other items in the bill of particulars might be taxable,

and within the provision of the stat. 2 G. 2. c. 23. s. 23, requiring a bill to be delivered a month before the action brought. *Mowbray, One, &c. v. Fleming*, T. 49 G. 3. 143

- 2 A party in a cause having changed his attorney in the progress of it, a judge's order was afterwards obtained by the second attorney for the delivery of a bill signed by the first attorney under the stat. 2 G. 2. c. 23. s. 23, which delivery was accordingly made to the second attorney in the cause: held that this was a sufficient delivery to the party to be charged therewith, within the words and meaning of that statute, so as to enable the first attorney to bring his action against the client for the amount of such bill. *Vincent v. Slaymaker*, E. 50 G. 3. 496

ATTORNEY, POWER OF,

See CONUSANCE, 2.

AUCTION,

See AGREEMENT, 6. STAMP, 2.

AUGMENTED CURACY.

Proof of a curacy augmented is made by shewing an order for the augmentation of it, entered in a book, and signed by the governors of Queen Anne's bounty, according to stat. 1 G. 1. st. 2. c. 10. s. 20; without going on to prove that the money was afterwards laid out in land, and allotted by deed under the corporation seal of the governors to be annexed to the curacy, and that such deed was enrolled within six months after its execution, according to that statute, s. 21, and 9 G. 2. c. 36. *Doe, lessee of Graham, v. Scott*, M. 50 G. 3. 230

AWARD.

- 1 Debt on bond, which was conditioned to perform an award; plea, no award; replication, setting out an award; rejoinder, stating the whole award, (in which were recited the bonds of submission, whereby it appeared that the award was not warranted by the submission;) and then demurring. Held that the rejoinder was not inconsistent with, nor a departure from, the plea. *Fisher v. Pimbley*, E. 49 G. 3. 100
- 2 Under a submission of all matters in difference between *A.* and *B.*, an award on matters in difference between *A.* and *B. C.* and *D.* jointly; directing *A.* to pay *B.* a certain sum, as a compensation for coals gotten by *A.* belonging to *B.* or to *B.* and others; and directing *B.* to give *A.* a bond to indemnify him against the claims of *C.* and *D.*, is bad. *ib.*
- 3 After the time was out for moving to set aside an award, made a rule of court, the Court granted an attachment for non-performance of it, and would not drive the

plaintiff to his action on the submission bond, on an affidavit disclosing that the arbitrators, after having appointed one umpire who refused to act, appointed another who accepted the authority; but that the defendant afterwards, and before the umpire had proceeded, having objected to his appointment, because of partiality, the arbitrators acceded to the objection, and each proposed another, but could not agree on the person to be substituted, and did not in fact substitute any other, though the respective attorneys agreed on a third person; in consequence of which the umpire objected to was called on by the plaintiff's attorney to proceed, and made his award within time. *Oliver v. Collings*, T. 49 G. 3.

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- 4 Upon a submission by bond of all matters in difference between the parties in a cause, without making any mention of costs, the arbitrator has no authority to award costs as between attorney and client. But the plaintiff waiving his costs, and having only demanded the principal sum awarded, took his attachment for that sum. *Whitehead v. Firth*, H. 50 G. 3.

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BAIL,

See SCIRE FACIAS.

- 1 Where a writ of error is allowed before the expiration of the time permitted to the bail to render their principal, the bail are entitled to stay the proceedings against them pending the writ of error, on the terms of undertaking to pay the damages recovered, or to surrender the defendant within four days of the determination of the writ, if determined in favour of the original plaintiff. *Sprang v. Monprivatt*, T. 49 G. 3.
- 2 If bail to the sheriff be put in above, and exception taken before an assignment of the bail bond, they are bound to justify notwithstanding such assignment. *Hill v. Jones*, T. 49 Geo. 3.
- 3 Upon a writ of error, prosecuted by the party in person, to reverse an outlawry in a civil action, for a common law error, the recognizance of bail is to be taken in the common alternative form, to pay the condemnation money, or render the principal, and not absolutely to pay the condemnation money, as in a case of reversals of outlawry upon the stat. 31 Eliz. c. 3, for want of proclamations, or upon the stat. 4 & 5 W. & M. c. 18. s. 3, on appearance by attorney and by motion. *Hazelock v. Geddes*, T. 50 G. 3.
- 4 On reversal of an outlawry on writ of error, because the party was beyond sea at the time of the exigent promulgated, in a case where special bail was required in the original action, the court will direct the recognizance of bail in answer to the new

action to be taken in the alternative, to pay the condemnation money, or render the principal, and not absolutely to pay the condemnation money. *Serecoid v. Hampson*, H. 16 G. 2, cited *ib.*

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BANKRUPT.

- 1 The assignees of a bankrupt are entitled to recover back money paid by the bankrupt to the defendant after a secret act of bankruptcy committed by the bankrupt, (though before the date of the commission,) which money the defendant had before recovered by judgment against the bankrupt in an action on a promissory note, reserving interest half-yearly, given for the balance of an account consisting, amongst other articles, of money lent by the defendant to the bankrupt; such note not being given in the usual and ordinary course of trade and dealing, so as to be protected by the stat. 19 G. 2. c. 32, even supposing a promissory note to be within that statute, which only mentions bills of exchange. *Harwood, &c. assignees of Odell a Bankrupt, v. Lomas*, E. 49 G. 3.
- 2 Where the act of delivering goods by a trader, to secure the defendant, who was under acceptances for him payable at a future day, was clearly not voluntary on the trader's part, but made in consequence of the urgency of the defendant, (evidenced by the proposal for giving such security originating with him,) it is immaterial to consider whether the trader had his bankruptcy in contemplation at the time. Nor will the transaction, being bona fide and not colourable, be impeached by the secrecy with which the delivery was made by the trader, in order to save his own credit in the view of the world. *Crosby, &c. assignees of Boucher, a Bankrupt, v. Crouch*, E. 49 G. 3.
- 3 A farmer and grazier, exercising also the business of a drover by buying and selling cattle from time to time beyond the occasions of his farms, is exempted from the operation of the bankrupt laws by stat. 5 G. 2. c. 30. s. 40. And the purchase of hay for the support of his cattle, and the sale of part of it again, because it was more than was required for their consumption, will not make him a trader. *Bolton v. Sowerby*, T. 49 G. 3.
- 4 Where by agreement between the plaintiffs, bankers at Carlisle, and the defendants, bankers at Newcastle, the plaintiffs were weekly to send to the defendants all their own notes, and the notes of certain other banking houses; and the defendants were in exchange to return to the plaintiffs their own notes and the notes of certain other bankers, and the deficiency, if any, was to be made up by a bill drawn by the defendants in favour of the plaintiffs at a certain date; held that the notes so sent by the plaintiffs to the defend-

ants constituted a debt against them, which the defendants might pay by a return of notes according to the agreement; but if they made no such return, or a short return, and gave no bill for the balance, such balance remained as a debt against them, which was proveable by the plaintiffs under a commission of bankrupt issued against the defendants, on an act of bankruptcy committed after the time when the bill for the balance, if drawn, would have been due and payable; and that the plaintiffs could not maintain an action to recover damages as for a breach of contract against the defendants who had obtained their certificates. *Forster and Another v. Surtees and Others*, T. 50 G. 3. 603

5 *A.* having 40 tons of oil secured in the same cistern, sold 10 tons to *B.* and received the price; and *B.* sold the same to *C.*, and took his acceptance for the price at four months, and gave him a written order for delivery on *A.*, who wrote and signed his acceptance upon the said order; but no actual delivery was made of the said 10 tons, which continued mixed with the rest in *A.*'s cistern: yet held that this was a complete sale and delivery in law of the ten tons by *B.* to *C.*; nothing remaining to be done on the part of the seller; though as between him and *A.* it remained to be measured off; and therefore that *B.* the seller, could not, upon the bankruptcy of *C.* the buyer, before his acceptance became due, countermand the measuring off and delivery in fact of the 10 tons to the buyer; nor were the goods in *transitu*, so as to enable the seller to stop them. *Whitehouse and Others, Assignees of Townshend, a Bankrupt, v. Frost and Others*, T. 50 G. 3. 607

6 A trader having securities in his bankers' hands to a certain amount, after a secret act of bankruptcy, drew on them a bill for a larger amount on the score of his accommodation, payable to his own order, which he indorsed to the plaintiff, (who knew of his partial insolvency, but not of the act of bankruptcy;) and a commission of bankrupt having been afterwards taken out; held that the plaintiff, who was to make title through the bankrupt's indorsement after his bankruptcy, though he were entitled to sue the acceptors upon the bill, yet could only recover on it the amount of the sum accepted for the accommodation of the bankrupt, over and above the amount of the bankrupt's effects in the hands of the acceptors at the time of the bankruptcy; for which latter amount, and for which alone, they were liable to account in another form of action (not on the bill) to the bankrupt's assignees. *Willis v. Freeman and others*, T. 50 G. 3. 627

7 A bankrupt sued by his surety, or person who was liable for his debt, at the time of the commission issued against him,

(though the surety, &c. became such after the act of bankruptcy, and paid the debt after the issuing of the commission,) cannot, without specially pleading it, in like manner as after the stat. 5 G. 2. c. 30. s. 17, avail himself of his certificate, under the stat. 49 G. 3. c. 121. s. 8, which discharges the bankrupt having his certificate of all such demands, at the suit of every such person, in like manner to all intents and purposes as if such person had been a creditor before the bankruptcy. *Stedman v. Martinnant*, T. 50 G. 3. 631

BASTARDS,

See MARRIAGE, 1.

The husband being found to have gone beyond seas above two years before the birth of a child borne by his wife, she remaining at home; the conclusion is irresistible, that such child is a bastard. *Rex v. The Inhabitants of Maidstone*, T. 50 G. 3. 579

BASTARDY, ORDER OF,

See APPEAL, 1.

BILLS OF EXCHANGE, &c.

1 A broker agrees with the defendant to get their bills discounted, and that he shall retain out of the money so raised the exorbitant brokerage of 10s. per cent., but the broker was not to advance the money himself, nor was his name on the bills: Held that a bill accepted by the defendants, and negotiated by the broker, upon these terms, could not be avoided in the hands of an innocent indorsee, as for an usurious consideration within the stat. 12 Ann. c. 16. *Dagnall v. Wigley*, E. 49 G. 3. 35

2 A promissory note for the amount of the fair expences of the prosecution, agreed to be given at the recommendation of the Court of Quarter Sessions by a defendant who stood convicted before them of a misdemeanor in ill treating his parish apprentice; for which the parish officers had been bound over by recognizance to prosecute him under the stat. 32 G. 3. c. 57; and the giving of which security was considered by the Court in abatement of the period of imprisonment to which he would otherwise have been sentenced; is legal, and may be enforced by action. *Beeley v. Wingfield*, E. 49 G. 3. 37

3 Though the indorsers of a bill of exchange had full knowledge of the bankruptcy of the drawer, and of the insolvency of the acceptor, before and at the time when the bill became due; and, within a day after notice might (but for a mistake of the holders) in due course have reached them from the holders, communicating such their knowledge to the bankers in *Liverpool*, with whom they had before discounted the bill, and who had transmitted it to the holders in *London*; yet that did not

- dispense with such holders giving notice of the dishonour in due time to the indorsers. *Esdaile v. Sowerby*, E. 49 G. 3. 67
- 4 The assignees of a bankrupt are entitled to recover back money paid by the bankrupt to the defendant after a secret act of bankruptcy committed by the bankrupt, (though before the date of the commission) which money the defendant had before recovered by judgment against the bankrupt in an action on a promissory note, reserving interest half-yearly, given for the balance of an account consisting, amongst other articles, of money lent by the defendant to the bankrupt: such note not being given in the usual and ordinary course of trade and dealing, so as to be protected by the stat. 19 G. 2. c. 32, even supposing a promissory note to be within that statute, which only mentions bills of exchange. *Harmood, &c. Assignees of Odell, a Bankrupt, v. Lomas*, E. 49 G. 3. 73
- 5 A verdict having passed for the defendants in an action to recover the amount of the re-exchange upon the dishonour of a bill drawn from *London on Lisbon*, upon evidence that the enemy were in possession of *Portugal*, when the bill became due, and *Lisbon* was then blockaded by a *British* squadron, and there was in fact no direct exchange between *Lisbon* and *London*, though bills had in some few instances been negotiated between them through *Hamburg* and *America* about that period; the Court refused to grant a new trial, on the presumption that the jury had found their verdict upon the fact, that no re-exchange was proved to their satisfaction to have existed between *Lisbon* and *London* at the time; the question having been properly left to them to allow damages in the name of re-exchange, if the plaintiff, who had indorsed the dishonoured bill to the holder, had either paid or were liable to pay re-exchange; and saving the question of law, whether any exchange or re-exchange could be allowed between this and an enemy's country. *De Tastet v. Baring*, E. 49 G. 3. 134
- 6 The drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but apprehending that he was still liable upon the bill in default of the acceptor, three months after it was due, said, that he knew he was liable, and if the acceptor did not pay it, he would. Held that he was bound by such promise. *Stevens v. Lynch*, H. 50 G. 3. 344
- 7 A protest for non-acceptance of a foreign bill of exchange is not necessary to be proved in an action by the indorsee against the drawer, if it appear that the drawer had no effects, nor probability of any effects, in the hands of the drawee at the time, and it do not appear that there was any fluctuating balance of assets between them unascertained at the time, which might then have afforded probable ground of belief to the drawer that his bill would be honoured. *Legge v. Thorpe*, H. 50 G. 3. 404
- 8 A. being partner with B. in one mercantile house, and with C. in another; the house of A. and B. indorse a bill of exchange to the house of A. and C.; after which B., acting for the house of A. and B., receives securities to a large amount from the drawer of the bill, upon an agreement by B., that the bill should be taken up and liquidated by B.'s house, and if not paid by the acceptors when due, should be returned to the drawer: Held that the securities being paid and the money received by B. in satisfaction of the bill, A. was bound by this act of his partner B., whether in fact known to him or not at the time, not only in respect of his partnership interest in the house of A. and B., but also individually in other respects; and therefore that he could not, in conjunction with C., his partner in the other house, maintain an action as indorsee and holders of the bill against the acceptors, after such satisfaction received through the medium of and by agreement with B. in discharge of the same. *Jacard and Another v. French and Others*, E. 50 G. 3. 471
- 9 Upon a motion to refer it to the Master to compute principal, interest, and costs, upon a bill of exchange, drawn in *Scotland* upon and accepted by the defendant in *England*, the Court will not direct the Master to allow re-exchange. *Napier v. Schneider*, E. 50 G. 3. 518
- 10 The want of due notice of the dishonour of a bill is answered by showing the holder's ignorance of the place of residence of the prior indorser, whom he sues: and whether he used due diligence to find out the place of residence is a question of fact to be left to the jury. *Bateman v. Joseph*, T. 50 G. 3. 525
- 11 The holder of a bill before it was due, having tendered it for acceptance, which was refused, kept it till due, when it was tendered for payment and refused; and then immediately returned it on the second indorser; who, not knowing of the laches, took up the bill: held that his ignorance, when he paid the bill, of the laches of the former holder did not entitle him to recover against the first indorser, who set up such defence. *Roscoe v. Hardy*, T. 50 G. 3. 526
- 12 A trader having securities in his banker's hands to a certain amount, after a secret act of bankruptcy, drew on them a bill for a larger amount on the score of his accommodation, payable to his own order, which he indorsed to the plaintiff, (who knew of his partial insolvency, but not of the act of bankruptcy;) and a commission of bankrupt having been afterwards taken out; held that the plaintiff, who was to make title through the bankrupt's indorsement after his bankruptcy, though he were entitled to sue the acceptors upon the bill, yet he could only recover on

it the amount of the sum accepted for the accommodation of the bankrupt, over and above the amount of the bankrupt's effects in the hands of the acceptors at the time of the bankruptcy; for which latter amount, and for which alone, they (the acceptors) were liable to account in another form of action (not on the bill) to the bankrupt's assignees. *Willis v. Freeman and Others*, T. 50 G. 3. 627

BILLS OF LADING.

- 1 A freighter of a ship to *Spain and Portugal* or either, as the master should be directed by the freighter or his agents, having first ordered the master to proceed to *Lisbon*, in consequence of which the master had taken in goods and signed bills of lading to that port, cannot afterwards countermand that order, and order him to proceed to *Gibraltar*, without first recalling the bills of lading, or at least tendering sufficient indemnity to the master against the consequence of his liability thereon. *Davidson v. Gayne*, E. 50 G. 3. 500

And *vid.* CHARTER-PARTY, 2.

- 2 The master is entitled to recover freight upon a charter-party, as upon a right and true delivery of the cargo agreeably to the bills of lading, upon proof of having delivered the entire number of chests, &c. for which bills of lading had been signed; though it appeared that the contents of the chests of fruit were damaged by the negligence of the master and crew on board, in not ventilating them sufficiently: the party injured having his counter-remedy by action for such negligence. *id.*

BOND.

- 1 A bond given to trustees to secure the faithful services of a clerk to the *Globe* insurance company, who were no corporation, may be put in suit by the trustees for a breach of faithful service by the clerk, committed at any time during his continuance in the service of the actually existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer; the intention of the parties to the instrument being apparent, to contract for such service to be performed to the company as a fluctuating body; and the intervention of the trustees removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body. *Metcalf, Bart. and Others, v. Brin*, E. 50 G. 3. 509
- 2 A bond conditioned to pay costs on 29th of November in *Cumberland*, when taxed by the master of K. B., is forfeited by non-payment; though in fact the costs were only taxed on the 25th Nov., of which the defendant had no notice on or before the 29th; for the defendant might have had them taxed before, and thus have

known their amount in time. *Bigland v. Skelton*, T. 50 G. 3. 527

BONDING WINES, See MONOPOLY.

BRICKS.

The stat. 17 G. 3. c. 42, which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller; if bricks be sold and delivered under the statutable size, unknown to the buyer, the seller cannot recover the value of them. *Law v. Hodson*, T. 49 G. 3. 150.

BRIDGES.

The inhabitants of a county are bound to repair every public bridge within it, unless, when indicted for the non-repair of it, they can show by their plea that some other person, or body politic or corporate, is liable; and every bridge in a highway is, by the statute of bridges, 22 H. 8. c. 5, taken to be a public bridge for this purpose. Therefore, where Queen Anne, in 1708, for her greater convenience in passing to and from *Windsor* castle, built a bridge over the *Thames* at *Datchet*, in the common highway leading from *London* to *Windsor*, in lieu of an ancient ferry, with a toll, which belonged to the crown; and she and her successors maintained and repaired the bridge till 1796, when being in part broken down, the whole was removed, and the materials converted to the use of the king, by whom the ferry was reestablished as before; held that the inhabitants of the county of *Bucks*, who in an answer to an indictment for the non-repair of that part of the bridge 13 years afterwards pleaded these matters, and traversed that the bridge was a common public bridge, were bound to rebuild and repair it. *The King v. The Inhabitants of the County of Bucks*, H. 50 G. 3. 413

BRISTOL DOCKS, See COMPENSATION, 1.

BROKER.

- 1 Goods sold by a broker for a principal not named, upon the terms, as specified in the usual bought and sold notes, delivered over to the respective parties by the broker; of "payment in one month, money," may be paid for by the buyer to the broker within the month, and that by a bill of exchange accepted by the buyer and discounted by him within the month, though having to run a longer time before it was due. But where the buyer was also indebted to the same broker for another parcel of goods, the property of a different person, and he made a payment to the broker, generally, which was larger than the amount of either demand,

- but less than the two together; and afterwards the broker stopped payment; such payment to the broker ought to be equitably apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer. *Favenc v. Bennett*, E. 49 G. 3. 32
- 2 A broker agrees with the defendants to get their bills discounted, and that he shall retain out of the money so raised the exorbitant brokerage of 10s. per cent.; but the broker was not to advance the money himself, nor was his name on the bills: Held that a bill accepted by the defendants, and negotiated by the broker, upon these terms, could not be avoided in the hands of an innocent indorsee, as for an usurious consideration within the stat. 12 Ann. c. 16. *Dagnall v. Wigley*, E. 49 G. 3. 35
- 3 The broker effecting a policy, being the common agent of the assured and of the underwriter, while the premium remains in his hands for the one party, and the policy for the other; and having received notice of events which entitled the assured to a return of premium before action brought by the underwriter to recover the full premium; is authorized to deduct such returns, and only to pay over the difference to the underwriter. *Shee v. Clarkson*, T. 50 G. 3. 560

BURNING WOODS.

An action on the case lies upon the stat. 6 G. 1. c. 16. s. 1, by the party grieved, to recover damages against the inhabitants of the adjoining township for trees, coppice, and underwood, unlawfully and feloniously burnt by persons unknown; though the clause directs the party grieved to recover the damages in the same manner and form as given by the stat. 13 Ed. 1. st. 1. c. 46, "for dikes and hedges overthrown by persons in the night;" upon which the usual course of proceeding has been by the writ of *noc-tanter*. *Thornhill v. The Township of Huddersfield*, T. 49 G. 3. 172

BY-LAW,

See CORPORATION, 5. OFFICE, 2.

CAMBRIDGE UNIVERSITY,

See CONUSANCE.

CANAL.

By the act for making and maintaining the *Glamorganshire* canal, power is given to the canal company to make all such works as they shall think necessary and proper for "effecting, completing, maintaining, improving, and using the canal, and "other works;" and the company were required to lay before the sessions an account of the sums expended in making and completing the canal, up to the

time of its completion; and after that, an annual account of the rates collected, and of the charges and expences of supporting, maintaining, and using the navigation and its works; and the sessions are authorized, in case it appears to them that the clear profits exceed the per centage limited by the act on the sums mentioned in the first account to have been expended by the company (i. e. in making and completing the canal and its works,) to reduce the canal rates; held that the sessions, even after the period fixed for the completion of the canal, and after the first account delivered of the capital expended in the undertaking, and on which the dividends were to be calculated, were not authorized to reject charges and expences, stated in the annual account of disbursements, for new works, such as a reservoir and steam engine, which the company deemed necessary, and proved by evidence to have been erected for the support and improvement of the original line of canal and for the better supplying it with water in dry seasons. Though it seems that if the new works had been shewn to be merely colourable, and erected for purposes collateral to the navigation authorized by the act of parliament, such charges would have been rightly rejected by the sessions. *The King v. The Glamorganshire Canal Company*, H. 50 G. 3. 397

CANAL COMPANY.

Where by statute a canal company were empowered to take such rates as should be fixed at a general assembly of the proprietors, not exceeding 1d. &c. per ton per mile, upon coal; and they were also empowered to reduce the rates at a general assembly held on certain notice; but no reduction was to be made without the consent of the major part in value of the proprietors; a contract made by individuals with the company, but not at such general meeting, whereby, in consideration that those individuals, would make a navigable cut to convey water from their collieries, through land not within the statuteable line of the canal, into the canal, and convey the same to the company, the latter should permit them to carry their coals through the cut and along the canal for 1s. per ton, the company paying back 6d. per ton, is illegal and void; 1st, As a speculation by which the company might gain more or less than the legislature intended they should take under similar circumstances from the public in general. 2dly, As extending in effect the power of the company to purchase lands beyond the limits assigned by the act. 3dly, As enabling them to raise more capital than they were entitled by the act to do, by means of paying for land or works by a total or partial sale of their tolls; which tolls are made a security for the money

subscribed or taken upon mortgage. 4thly, Because the tolls could in no instance be reduced but at a general assembly, &c. and this in fact operates as a reduction of the tolls pro tanto. Also Quære, 5thly, Whether such a contract be not void, as diminishing the inducement (by favouring individuals) to a general reduction of the tolls, when proper, for the benefit of the public. *Lees and Others v. The Company of Proprietors of the Canal Navigation from Manchester to Ashton-under-Line and Oldham*, M. 50 G. 3. 306

CERTIFICATE of the Speaker of the House of Commons; as to Costs of Election Committees.

See COSTS.

CHARTER,

See CORPORATION. OFFICE, 2.

CHARTER-PARTY.

1 Where a ship was let to freight by charter-party from the plaintiff to the defendant, a clause in the deed—"and it is hereby covenanted and agreed by and between the said parties that 40 days shall be allowed for unloading and loading again, &c." was held to raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading, &c. beyond the 40 days: and if he detain her for any longer time, the owner's remedy is upon that covenant, and not in assumpsit, as upon an implied new contract. *Randall v. Lynch*, H. 50 G. 3. 408

2 Where the master of a vessel covenanted with the freighter, (inter alia) that the vessel should proceed with the first convoy from England for Spain and Portugal, or either, as he should be directed by the freighter or his agents: and there make a right and true delivery of the cargo, agreeably to the bills of lading signed for the same; and so take in a home cargo, and return and make a right and true delivery thereof at London, &c. In consideration whereof, and of every thing above mentioned, the freighter covenanted (inter alia) to load the vessel out and home, and pay certain freight per ton per month, part before and the remainder on the right and true delivery of the homeward cargo at London: held,

1st, That the freighter having first ordered the master to proceed to Lisbon, in consequence of which the master had taken in goods and signed bills of lading for that port, could not afterwards countermand that order, and order him to proceed to Gibraltar, without first recalling the bills of lading, or at least tendering sufficient indemnity to the master against the consequence of his liability thereon.

2d, But supposing the freighter had such a power, yet his supercargo and agent

who was on board the vessel, had the like authority in the absence of his principal, even before the vessel sailed from this country, to alter again the destination to Lisbon.

3d, That the master having proceeded with the outward cargo to Lisbon under the first order, and brought home a return cargo, and delivered the same to the freighter at London, was entitled to his freight for that voyage; though he had not sailed with the first convoy: the sailing with the first convoy not being a condition precedent to his recovering freight for the voyage actually performed under the first order but a distinct covenant, for the breach of which he was liable in damages.

4th, And he was entitled to recover such freight as upon a right and true delivery of the cargo agreeably to the bills of lading, upon proof of having delivered the entire number of chests, &c. for which bills of lading had been signed; though it appeared that the contents of the chests of fruit were damaged by the negligence of the master and crew on board, in not ventilating them sufficiently; the party injured having his counter remedy by action for such negligence. *Davidson v. Gwynne*, E. 50 G. 500

3 Where a ship was chartered to take a cargo of lead from London to St. Petersburg, and there immediately receive a return cargo from the freighter's agent, and bring it to London; with a proviso, that if political circumstances should prevent a return cargo from being loaded, the master, after waiting at St. P. 40 running days, without the outward cargo being unloaded, and consequently without the return cargo being loaded, should be at liberty to return to London or any port in England: and the ship not having been permitted to unload at St. P. by the Russian government, the master, after waiting there 40 running days, loaded a return cargo for his own benefit upon the outward cargo, both of which he brought home, and earned new freight on the homeward cargo; which freight was adjudged to him by the judgment of the court of C. B. in the action between him and the freighters, over and above the dead freight stipulated to be paid by the charter-party; held that the freighters were entitled to recover the whole of such dead freight from the underwriters upon a policy of insurance, whereby they agreed to pay a loss in case the master should not be allowed by the Russian government to unload the outward cargo at St. P.; the vessel having sailed chartered by the freighters on a voyage from London to St. P. and back: and that the underwriters were not entitled to deduct such returned freight earned by the master on his own account, and adjudged to him by C. B.; they having agreed with the

assured pending this action, and pending the action in C. B. that in case the plaintiffs (to whom they had paid a per centage loss) should not be able to obtain so large an allowance as the full return freight paid to the master, *by reason of any demurrages or expenses being allowed against the said freight*, the difference should be paid by the underwriters by further per centage, whether the same were settled between the plaintiffs and the master of the ship by arbitration, or by legal decision. *Puller and Another v. Halliday*, T. 50 G. 3. 554

- 4 Where a ship was chartered to take a cargo of lead from *London* to *St. Petersburg*, and there immediately receive a return cargo from the freighters' agent and bring it to *London*, with a proviso that if political circumstances should prevent a return cargo from being loaded, the master, after waiting at *St. Petersburg* 40 running days, without the outward cargo being unloaded, and consequently without the return cargo being loaded, should be at liberty to return to *London* or at any port in *England*: held, that such political circumstances having occurred as hindered the unloading of the outward cargo at *St. P.* and the ship having waited the 40 running days there, the master was entitled to receive the freight of a *homeward* cargo, which he loaded on his own account upon the outward cargo, and brought home; in addition to the dead freight payable by the freighters according to the stipulations of the charter-party. *Bell v. Puller and Another*, H. 50 G. 3. 555

CHESTER,

See PRACTICE, 14.

CHURCHWARDENS.

An indenture binding out a poor apprentice, executed by *W. S.* churchwarden, and *J. G.* overseer of the poor of a hamlet maintaining its own poor separately from the parish at large, not being impeached by evidence negating its execution by a majority of the churchwardens and overseers of the hamlet, shall be deemed good, by intending that there were two overseers for the hamlet as required by stat. 13 & 14 Car. 2. c. 12. s. 21, and only one churchwarden, by custom, in the same place; and therefore the apprentice serving 40 days under it gains a settlement. *The King v. The Inhabitants of Hinckley*, E. 50 G. 3. 492

CINQUE PORTS,

See SMUGGLING.

COMMITMENT,

See CONVICTION.

COMPANY TRADING BUT NOT INCORPORATED,

See BOND.

COMPENSATION.

- 1 Under the *Bristol dock act*, 43 G. 3. c. 140. s. 107, which gives compensation where, "by means of the dockworks, or in the progress or execution thereof, damages may be done to any hereditaments, houses, lands and tenements, or the same may be rendered less valuable thereby," no compensation is due to the owners of a brewery for a loss arising to them in their business from the deterioration of the water of the public river *Avon*, from which the brewery had been before supplied by means of pipes laid under low water-mark; the use of the water having been common to all the king's subjects, and not claimed as an easement to the particular tenement. The only remedy for such an injury is by indictment, which was taken away in this case by the act of parliament. *The King v. The Directors of the Bristol Dock Company*, T. 50 G. 3. 523

- 2 The compensation clause in the *London dock act*, 39 & 40 G. 3. c. 47, reciting that divers tenements, &c. may become less valuable by the trade being diverted therefrom, provides that in case they do so, or the owners or occupiers suffer loss by the dockworks, the commissioners shall make them compensation; and no claim is to be made for compensation till three years after the opening of the docks; and then it is to be made within a given time; held, that where the owner of the inheritance of a tenement, which was in lease died after three years from the opening of the docks, without having made any claim; her devisee, and not her executor, was entitled to claim within the time allowed, compensation for an injury done by the dockworks to the inheritance in the time of his testatrix. *The King v. The Commissioners of Compensation under the London Dock Acts*, T. 50 G. 3. 546

COMPOUNDING DEBTS,

See DEBTOR AND CREDITOR.

CONDITION.

Under a devise of a mansion and family estate to several successively for life and in tail; with a proviso that whatsoever person should, by virtue of the will, become possessed of or entitled to the estate should, from the time he became so possessed, take upon himself the surname of *Thelwall*, and make the mansion his usual and common place of abode and residence: held that a tenant in tail in remainder succeeding to the possession, who had also become heir at law, to the testator, since his death, not being found to have had notice of the will of her ancestor containing such condition, her title could not be

impeached by the remainder-man over, who brought ejectment after her death against her husband, by whom she had issue which died before her: she having also in fact suffered a recovery about four months after she came of age, within which period it was contended that she ought to have complied with the condition of residence to enable her to make a good tenant to the præcipe. *Doe, d. Kenrick and Others, v. Lord William Beaucherk, M.* 50 G. 3. 311

CONDITION IMPLIED OR PRECEDENT.

See CHARTER-PARTY, 2. MONOPOLY.

The owner of a homeward-bound ship entering the *West India* docks in so leaky a condition as to require immediate unloading and assistance, without waiting her turn to be quayed and unloaded in rotation in the import dock in the manner required by the 39 G. 3. c. 69, is bound to bear the extra expences of labourers for pumping the ship after the crew were discharged, and for delivering the cargo into lighters in the outward dock or basin; also for cooping previous to such delivery into lighters, and for the hire of such lighters; the company having afterwards unladen the cargo out of such lighters upon the quays in the import dock, and performed the requisite cooperage, &c. upon such unloading, in the same manner as they would have done if the cargo had been delivered out of the ship itself in proper time and place. For the labour and expence required to be performed and incurred by the company upon a ship entering the docks to discharge her cargo must be understood of the ordinary labour and expences of navigating, mooring, unmooring, removing, and managing a ship which is in a reasonably navigable, moorable, unmoorable, removeable, and manageable condition; and not of a ship incapable of performing with safety those ordinary functions. *Blackett and Another v. Smith, Treasurer of the West India Dock Company, T.* 50 G. 3. 565

CONDITION PRECEDENT,

See FREIGHT, 4.

CONSPIRACY,

See NEW TRIAL, 1.

CONSTABLE,

See CORPORATION, 3.

CONTRACT,

See AGREEMENT.

CONUZANCE.

1 Claim of conuzance made by the vice chancellor of the university of *Oxford*, in the vacancy of the office of chancellor, by death, on behalf of the university,

allowed in a plea of trespass. *Williams v. Brickenden, M.* 50 G. 3. 259

2 Conuzance of a plea of trespass sued against a resident member of the university of *Cambridge* for a cause of action, verified by affidavit to have arisen within the town and suburbs of *Cambridge*, over which the university court has jurisdiction, was allowed upon the claim of the vice-chancellor, on behalf of the chancellor, masters, and scholars of the university, entered on the roll in due form, setting out their jurisdiction under charters confirmed by acts of parliament, and averring the cause of action to have arisen within such jurisdiction. Though it was objected,

1st, That the claim of conuzance was stated on the roll to be made by the attorney of the V. C., when the power which constituted the person attorney, was executed by the V. C., as V. C. and deputy of the chancellor, masters, and scholars of the university; and therefore that the claim ought to have been made by the attorney in their names. But it sufficiently appeared that he was attorney for the V. C. claiming ex officio.

2dly, That the claim was preferred too early, upon the mere issuing of the writ of latitat against the privileged member to answer in a plea of trespass, before declaration; by which it could not appear where the cause of action arose, and consequently that it arose within the town and suburbs of *Cambridge*, to which the jurisdiction of the university court in personal actions is confined; and that it was not sufficient to supply that fact by affidavit. But held that it was the usual course to support claims of conuzance by affidavits verifying the necessary facts, which it was competent to the plaintiff to deny in the same mode; and that the difficulty was not greater before than after declaration; and the sooner the claim, if well founded, was preferred, the better for the plaintiff.

3dly, That if the claim might be preferred upon the latitat, before declaration, then it ought to be preferred in the first instance after the return of the latitat; namely, upon the day of appearance given by the rule of court, i. e. in eight days. But held that the first instance after the return-day of the writ, which is the first step of the plaintiff entered on the record, continued till the declaration filed, which is the next step taken by the plaintiff on the record; within which time the claim was made.

4thly, That it appeared by the roll on which the power of attorney to claim the conuzance, and the claim itself, were entered, that the claim was made on the return day of the writ, i. e. the 15th of November, before the power of attorney to claim it was executed, which bore date on the 27th. But the court took notice that the claim was in fact made on the 28th, in

the letter missive and signifiatory of the V. C. to them; although in making up the roll it was entered by their officer as on the return-day of the writ by relation; no subsequent day in court being then given on the record.

- 5thly, That taking the letter missive and signifiatory of the V. C. to be the original and proper claim of consuance, it was defective in not alleging that the cause of action arose within the jurisdiction; and that this could not be supplied by the formal entry of the claim on the roll made by the officer of the court, in which that averment is made from the affidavit. But held that such averment made in the formal entry of the claim on the roll, verified by affidavit, of which the court would take notice was sufficient. *Brown v. Renouard*, H. 50 G. 3. 332

CONVEYANCE,

See EXECUTORS, 2.

CONVICTION,

See APPRENTICE.

- 1 The stat. 43 G. 3. c. 141, does in no instance extend to protect justices of peace in the execution of their office against actions for acts of trespass or imprisonment, unless done on account of some conviction made by them of the plaintiffs in such actions by virtue of any statute, &c. *Massey v. Johnson*, H. 50 G. 3. 357
- 2 But whether certain proceedings alleged by the plaintiff to have been set on foot against him by the defendant, a justice of the peace, ex mero motu, without any information laid on oath before him, (though falsely alleged to be on the information on oath of J. S.,) on which the plaintiff was taken and imprisoned, were a conviction within the meaning of the act; so that the plaintiff was thereby confined to seek redress by an action on the case framed as the act directs; the court would not inquire of an affidavit, but sent the case to a new trial to have the fact of such conviction ascertained. And it appearing on a second trial, that an information on the oath of T. O. on a charge of vagrancy against the plaintiff, was laid before the magistrate on a certain day, when the plaintiff was examined and heard upon that charge, and that the magistrate then made out a warrant of commitment until the next sessions; in which warrant it was wrongly stated that the plaintiff had been charged on the oath of T. S., (who negatived having made any such oath;) but which allegation it was held might be rejected as surplusage; and afterwards drew up a conviction dated on the same day, but not exhibited till a month afterwards at the sessions: held that this was sufficient evidence of a conviction connected with the imprisonment, however informally such conviction, or warrant of

commitment operating as a conviction, were drawn up; and therefore, that at all events the magistrate was protected against this action of trespass. *ib.*

- 3 The magistrate is liable to answer in an action for such part of an imprisonment suffered under his warrant as was within six calendar months before the action commenced against him. *ib.*
- 4 No appeal lies to the sessions against a conviction and commitment in execution for three months, of a collier under the stat. 6 G. 3. c. 25, for absenting himself from his master's service; the clause of appeal in that statute excepting an order of commitment; and the order of commitment in question containing a conviction of the collier for an offence within the act. *The King v. The Justices of Staffordshire*, T. 50 G. 3. 589
- 5 The pawnbroker's act, 39 & 40 G. 3. c. 90, having enacted that they shall and may take, by way of profit, a certain rate of interest on pledges, and no more, the taking of more is an offence within the act, cognizable by a justice of the peace on summary information within the 26th section; which (after providing specific penalties for specific offences,) says, that "for every other offence against this act, where no forfeiture or penalty is provided or imposed on any particular or specific offence against any part of this act," the pawnbroker offending against this act shall forfeit not less than 40s., nor more than 10l. in the discretion of the justice. *The King v. Beard*, T. 50 G. 3. 635

COPYHOLD.

- 1 Where copyholder for life cut trees, though none were applied to the repair of the premises till several months after, and after ejectment brought as for a forfeiture, and most of them still remained unapplied, but parts of the premises were still out of repair; it is a question for the jury whether they were cut bona fide for the purpose of repair, and were in a course of application for that purpose: and there being no evidence that they were to be applied to any other purpose, the Court refused to set aside a verdict for the defendant. *Doe, lessee of Foley v. Wilson*, E. 49 G. 3. 41
- 2 An inclosure made from the waste 12 or 13 years before, and seen by the steward of the same lord from time to time, without objection made, may be presumed by the jury to have been made by licence of the lord; and ejectment cannot be brought against the tenant as a trespasser, without previous notice to throw it up. *ib.*
- 3 A copyholder surrenders "his copyhold cottage, with a croft adjoining," and a common right, &c. belonging to the same; "all which premises (as the surrender describes it) were then in his own possession;" and on the same day he devises

"all his copyhold cottage and premises then in his own possession." In fact the croft, between which and the cottage and garden there was only a gooseberry hedge, was in the actual occupation of a tenant at the time. Yet held, that the whole passed under the description of "all his copyhold cottage and premises;" the words, "then in his own possession," being merely a mistaken description, following the mistake of the surrender, which mentions the croft with the rest as then being in his possession. *Goodright, Lessee of Lamb, v. Pears*, E. 49 G. 3. 42

4 Devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; nor will such a surrender operate by estoppel against the parties or their heirs. *Doe, Lessee of Blacksell and Others, v. Tomkins*, E. 49 G. 3. 98

5 A surrender out of court to the use of his will, made by the surrenderee of a copyhold before his admittance, is absolutely void and of no effect, and cannot be made good by his subsequent admittance. *Doe, Lessee of Taffield v. Taffield*, E. 49 G. 3. 126

6 The enfranchisement of a copyhold may, upon proper evidence, be presumed even against the crown. And where a surrender had been made to churchwardens and their successors in 1636, without naming any rent; but in 1649 the parliamentary survey charged the churchwardens with 6d. rent; under the head of "freehold rents;" and there was no evidence of any different rent having been paid since that time, and receipts had been given for it, as for a freehold rent, by the steward of the manor: held that this was evidence to be submitted to a jury, on which they might presume a grant of enfranchisement, although the manor had continued out in lease from before 1636 to 1804; and though a tablet of parochial benefactions, at least as old as 1656, which was suspended in the parish church, noticed the gift of the copyhold by surrender, but did not notice any enfranchisement of it. *Roe, Lessee of Johnson, v. Ireland*, T. 49 G. 3. 141

Copyhold descending by custom to all the children equally of the tenant last seised, one of the parsoners may maintain ejectment on his single demise for his own share. *Roe d. Raper v. Lonsdale*, H. 50 G. 3. 345

COPYRIGHT.

An action is maintainable on the stat. 8 An. c. 91, for pirating a single sheet of music. *Clementi v. Goulding*, E. 49 G. 3. 125

CORONER.

A mandamus to the justices in sessions, to allow an item of charge in the coroner's account, refused; because the justices were of opinion, under the circumstances, that there was no ground to suppose that

the deceased had died any other than a natural, though a sudden death; and therefore that the inquisition had not been duly taken; and this Court seeing no reason for interfering with that judgment. *The King v. The Justices of Kent*, E. 49 G. 3. 118

CORPORATION,

See OFFICE, 2.

1 Assuming that under the stat. 11 G. 1. c. 4, an election began at a corporate meeting, whereat the mayor presided, may be completed, in case of his absenting himself pending the proceedings, under the presidency of the next in place and order to him; yet where a question arose upon the right of a voter, on which the mayor as presiding officer decided by rejecting the vote: and thereupon, the remaining votes being equal, he declared the same, and that no election could be made: and thereupon ordered the meeting to be dissolved; and no objection was made at the time, nor any notice given to the electors present that any of them intended to proceed in the election notwithstanding the decision (which turned out to be erroneous); but after suffering the mayor and many of the freemen to depart, without notice, the rest who remained together proceeded to complete the election; held that such election was void even under the statute, as a surprize and fraud on the other electors. *The King v. Gaborian*, E. 49 G. 3. 51

2 The mayor having summoned the corporation to meet and elect a new mayor on the usual day, a majority, when met, cannot, against the consent of the mayor, (nor, as it seems, without the unanimous consent of the whole body) proceed to any other business, such as that of filling up vacancies in the common council; there being no certain day fixed for this purpose; though the general custom had been to fill up all vacant offices on the day of electing the new mayor. *Machell v. Nevinsom*, E. 10 G. 1. MS. cited. 54

3 A high constable may be appointed, and a rate in the nature of a county rate levied, for a town corporate having an exclusive commission of the peace, though not a county in itself, by virtue of the stat. 13 G. 2. c. 18; though no such officer had been appointed or such rate levied before; the corporation having defrayed the expences out of their own funds. And in an action of trespass for distraining goods in satisfaction of such rate the Court would not inquire into the necessity of making such a rate, nor as to the application of the corporate funds for the same purpose. *Weatherhead v. Drevory*, E. 49 G. 3. 91

4 Where a prescriptive ecclesiastical corporation of vicars choral of the cathedral of *Chichester* had, besides other estates

in common, four vicarial houses with their appurtenances, which had always been appropriated to the several use and residence of the four vicars; and by ancient custom upon every vacancy the vicars, according to seniority, made their option of taking in severally any one of such vicarial houses, with the appurtenances; of which option an entry was made in the corporation act-book and signed by the vicars: held that a new vicar having made an option, which was entered in the act book and signed by all, to take one of the vicarial houses, *with certain appurtenances*, then in the possession of *J. S.*; which were *not all the appurtenances*, formerly annexed to and enjoyed with the same house by his predecessors therein; could not maintain an ejectment for the other appurtenances, such as part of the ancient garden which had been leased off by the corporation before his appointment. For supposing him entitled to make an option of the entire premises, and to have it entered in the act-book, as against the corporation; yet no such option having been made and entered in the book, according to the custom, he had no separate legal title to the premises in question, on which he could maintain an ejectment. *Goodtitle, Lessee of Miller, Clerk, v. Wilson*, T. 49 G. 3. 166

- 5 A charter giving the right of electing an alderman to the mayor and burgesses of Nottingham at large from themselves, a by-law, stated to be made in 1577 by the then mayor and burgesses, but *not now extant in writing*, whereby the right of electing was restrained to "the mayor and certain of the burgesses of the town viz. the recorder, aldermen, coroners, commoncouncilmen, and such of the burgesses of the said town as had served or did serve the office of chamberlain or sheriff of the said town, and called the *livery or clothing burgesses* for the time being, or so many of them as should be duly assembled together for that purpose, whereof the mayor to be one, or the major part of them," was held to be a reasonable and valid by-law. But every by-law may be repealed by the same body which made it. And the office of *chamberlain of the town*, as stated in such by-law, has taken to be a corporate office as well as the other offices, the serving of which was made the qualification of the electing burgesses. *The King v. Ashwell*, H. 50 G. 3. 337

COSTS.

- 1 The plaintiff, in trespass for breaking his close, who recovers less than 40s. is not entitled to costs of increase merely because a view was granted before trial, though upon the application of the defendant. *Finn, v. Hill*, E. 49 G. 3. 98
- 2 Where an election committee had, under

the st. 28 G. 3. c. 58, reported to the House of Commons, that *two several petitions* against the return of members to serve in parliament for *East-Grinstead* were frivolous and vexatious: whereupon the then Speaker, on application of the parties grieved, had referred the costs to be taxed on both petitions *jointly*, and had first granted a certificate of the amount of such *joint* taxation, and afterwards another amended certificate, referring to the former, and apportioning how much of the costs were incurred in opposing each petition *separately*, and how much *jointly*: held that both these certificates being invalid, by reason that the act only authorizes the costs to be taxed *separately* on each distinct petition, a new and valid certificate, ascertaining the separate costs incurred on each petition, might be granted by the Speaker of a new parliament; the act mentioning the *Speaker* generally. *Strachey, Bart. v. Turley*, E. 49 G. 3. 102

- 3 Trespass for breaking and entering the plaintiff's free fishery in *A.*, and also in *B.*, and also in *A. and B.*; plea, 1. Not guilty. 2. That the said free fisheries were parcel of a navigable harbour, &c. common to all the king's subjects. Replication, prescribing for a free fishery in the said place in right of the plaintiff's manor. Rejoinder, taking issue on such prescription. Held that on verdict for the plaintiff on the general issue, and for the defendant on the prescription; the latter going to the whole declaration, the plaintiff is not entitled to costs. *Vivian v. Blake*, E. 49 G. 3. 133

- 4 After judgment by default in debt on bond to secure an annuity payable quarterly; and scire facias thereof, suggesting a breach in non-payment of a quarter, and damages assessed to that amount on the stat. 8 & 9 W. 3. c. 11; held that the plaintiff was entitled to his costs on the 8th section, which directs a stay of proceedings *on payment of future damages, costs, and charges, totius quoties*; though the 3d section only gives costs in scire facias after *plea or demurrer*. *Brooke v. Booth*, T. 49 G. 3. 189

- 5 Upon a submission by bond of all matters in difference between the parties in a cause, without making any mention of costs, the arbitrator has no authority to award costs as between attorney and client. But the plaintiff waiving his costs, and having only demanded the principal sum awarded, took his attachment for that sum. *Whitehead v. Firth*, H. 50 G. 3. 401

- 6 An executor having pleaded non-assumpsit as well as plene administravit and plene administravit præter, &c., and thereby forced the plaintiff to go to trial; the plaintiff obtaining a verdict on the non-assumpsit, and being entitled to judgment of assets *quando acciderint*, is entitled to the general costs of the trial, though the issue of plene administravit was found

- for the defendant. *Hindley v. Russell, Executor, &c.* E. 50 G. 3. 432
- 7 A bond conditioned to pay costs on 29th of Nov. in Cumberland, when taxed by the master of K. B., is forfeited by non-payment; though in fact the costs were only taxed on the 25th Nov. of which the defendant had no notice on or before the 29th: for the defendant might have had them taxed before, and thus have known their amount in time. *Bigland v. Skelton*, T. 50 G. 3. 527
- 8 Judgment having been given in C. B. for the plaintiffs upon a special verdict in assumption, which was reversed upon writ of error in this court, the defendant is entitled here not only to judgment of acquittal, but also for the costs of his defence in C. B., being the same judgment which the court below ought to have given; the defendant in such case being entitled to his costs by the stat. 23 H. 8. c. 15. *Gildart v. Gladstone, and Gladstone in Error*, T. 50 G. 3. 633

COUNTY RATE,

See RATE for Town corporate.

Where before the stat. 12 G. 2. c. 29, the county rates had been assessed upon the district or place of *Hartshhead with Clifton*, but the two townships of H. and C. separately maintained their own poor, and were used to contribute towards the county rates in certain fixed proportions between themselves; yet as that statute only establishes the accustomed proportions of contribution to the county rates, as between the entire districts which were before assessed to such rates within the limits of the respective counties, &c. and does not meddle with the proportions which had been used to be observed as between the subdivisions of those districts; this case was held to fall within the third section; which provides that where there is no poor's rate in the parish, township, or place assessed to the county rates, (by which must be understood no entire poor's rate co-extensive with the place or district assessed to the county rates, the county rates shall be raised by the petty constables in such manner as by law the poor's rate is to be assessed and levied; that is, by an equal rate on all the inhabitants, &c. *The King v. The Justices of the W. R. of Yorkshire*, H. 50 G. 3. 379

COVENANT.

- 1 A distinct covenant in a lease, whereby the tenant bound himself to pay the property tax, and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by the stat. 46 G. 3. c. 65. s. 115, will not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, &c. generally; for such general words will be understood of such taxes as

the tenant might lawfully engage to defray. *Gaskell v. King*, E. 49 G. 3. 89

2 Releasors covenanted that for and notwithstanding any act, &c. by them, or any or either of them done to the contrary, they had good title to convey certain lands in fee; and also that they or some or one of them, for and notwithstanding any such matter or thing as aforesaid, had good right and full power to grant, &c.; and likewise that the releasee should peaceably and quietly enter, hold and enjoy the premises granted, without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whatsoever; and that the releasee should be kept harmless and indemnified by the releasors and their heirs against all other titles, charges, &c. save and except the chief rent issuing and payable out of the premises to the lord of the fee. Held that the generality of the covenant for quiet enjoyment against the releasors and their heirs, and any other person or persons whatsoever, was not restrained by the qualified covenants for good title and right to convey for and notwithstanding any act done by the releasors to the contrary.

But if the covenant for quiet enjoyment were to be restrained to the acts of the releasors by any qualifying context, then the declaration in covenant, stating it by itself in its own absolute terms, without such qualifying context belonging to it, seems to be an untrue statement of the deed in substance and effect, which the defendant may take advantage of on the general issue of non est factum, as a variance and ground of nonsuit or of a verdict for him. *Howell v. Richards*, M. 50 G. 3. 300

3 Where a ship was let to freight by charter-party from the plaintiff to the defendant, a clause in the deed, "and it is hereby covenanted and agreed by and between the said parties, that 40 days shall be allowed for unloading and loading again, &c." was held to raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading, &c. beyond the 40 days: and if he detain her for any longer time, the owner's remedy is upon that covenant, and not in assumption, as upon an implied new contract. *Randall v. Lynch*, H. 50 G. 3. 408

4 The plaintiffs having contracted, by charter party sealed, to let a ship, then in the Thames, to freight for the defendants for eight months, to commence from the day of her sailing from Gravesend on the voyage then stated, and having covenanted that she should sail from the Thames to any British port in the English Channel, there to load such goods as the freighters should tender, and sail to the West-Indies, and bring back a return-cargo to London; afterwards agreed by parol with the defendants, that the ship, instead of loading at some port in the Channel, should load in the Thames, and that the freight should

commence from her entry outwards at the custom house: held, that this subsequent parol contract was distinct from and not inconsistent with the contract by deed, being anterior to it in point of time and execution, and might therefore be enforced by action of assumpsit. *White v. Parkin*, T. 50 G. 3. 591

- 5 Aliter where the charter-party allowed waiting for convoy at *Portsmouth* and *Ferrol*, and a parol agreement was attempted to be substituted for that, to wait for convoy at *Corunna*. *Leslie v. Dela Torre*, *sittings after Trinity 1795*, cor. *Ld. Kenyon*, C. J. cited, *ib.* 594

COVERTURE,

See HUSBAND AND WIFE, 2.

CURACY,

See AUGMENTED CURACY.

CUSTOM.

- 1 Where a prescriptive ecclesiastical corporation of vicars choral of the cathedral of *Chichester* had, besides other estates in common, four vicarial houses with their appurtenances, which had always been appropriated to the several use and residence of the four vicars; and, by ancient custom, upon every vacancy the vicars according to seniority made their option of taking in severally any one of such vicarial houses with the appurtenances: of which option and entry was made in the corporation act book, and signed by the vicars; held that a new vicar having made an option, which was entered in the act book and signed by all, to take one of the vicarial houses, with certain appurtenances, then in the possession of J. S.; which were not all the appurtenances formerly annexed to and enjoyed with the same house by his predecessor therein; could not maintain an ejectment for the other appurtenances, such as part of an ancient garden, which had been leased off by the corporation before his appointment. For supposing him entitled to make an option of the *entire premises*, and to have it entered in the act book, as against the corporation; yet no such option having been made and entered in the book, according to the custom, he had no separate legal title to the premises in question on which he could maintain an ejectment. *Goodtitle lessee of Miller, Clerk, v. Wilson*, 49 G. 3. 166
- 2 Evidence of reputation of the custom of a manor, that in default of sons, the *eldest daughter*, and in default also of daughters, the *eldest sister*, and in case of the death of all, the *descendants* of the eldest daughter or sister respectively, of the person last seised should take, is proper to be left to the jury of the existence of such a custom, as applied to a *great nephew* (the grandson of an elder sister,) of the person last seised; although the instances in

which it was proved to have been put in use extended no further than eldest daughter and eldest sister, and the son of an *eldest sister*. *Doe d. Foster and Another v. Sisson*, H. 50 G. 3. 355

- 3 The existence of such extended custom in adjacent manors seem to be no evidence of the custom in the particular manor. *ib.*

CUSTOM-HOUSE CAPTURE,

See PRIZE, 1.

CUSTOM-HOUSE OFFICERS,

See OFFICE, 1. SMUGGLING.

DEALING IN TOBACCO,

See ASSUMPSIT, 3.

DEBT,

See PLEADING, 2.

See BANKRUPT, 4. SMUGGLING, 1.

DEED,

See LANDLORD AND TENANT, 3.

STAMP, 4.

DEPUTY,

See OFFICE, 2.

DEBTOR AND CREDITOR.

Where a debtor entered into an agreement with his creditors, whereby they agreed to receive 20l. per cent. in satisfaction of their several demands, and released the remainder, in consideration that half of the composition should be secured by the acceptances of a certain person (also a creditor), which security was accordingly given and paid when due; held that such agreement was binding on the plaintiff, one of the creditors; though the agreement were not under seal; and though he were the last who signed, and it did not appear that he had actively induced any of the other creditors or the surety to sign it. And that the plaintiff's suing the debtor, after having received the compensation, was a fraud upon the surety and the other creditors. *Steinman v. Magnus*, T. 49 G. 3. 191

DEVISE.

- 1 One having power to appoint lands by will amongst his children; and having other lands; by his will (not referring to the power) gives legacies to his several children; and then devises all the rest, residue, and remainder of his lands, &c. and personal estate, after payment of his debts, legacies, and funeral expences, to his eldest son: held that the power was not thereby executed. *Doe, Lessee of Hellings and Wife, v. Bird*, E. 49 G. 3. 38
- 2 A copyholder surrenders "his copyhold cottage, with a croft adjoining," and a

- common right, &c. belonging to the same; "all which premises (as the surrender describes it) were then in his own possession:" and on the same day he devises "all his copyhold cottage and premises then in his own possession." In fact the craft between which and the cottage and garden there was only a gooseberry hedge, was in the actual occupation of a tenant at the time. Yet held that the whole passed under the description of "all his copyhold cottage and premises;" the words "then in his own possession" being merely a mistaken description following the mistake of the surrender, which mentions the craft, with the rest, as then being in his possession. *Goodright, Lessee of Lamb, v. Pears*, E. 49 G. 3. 42
- 3 Two being seized of undivided moieties, as tenants in common, in fee, quære whether a devise by the one of his half part to the other will carry the fee? But at any rate the fee did not pass by a residuary clause, whereby the testator, after several pecuniary bequests, ordered the lease of his house, with his furniture, to be sold, and all the rest and residue to be divided amongst other persons; and appointed executors; for such division of the rest and residue must be intended to be made by the executors as such, and therefore confined to personal property. *Bebb v. Penoyre*, E. 49 G. 3. 87
- 4 After introductory words, "as touching" the testator's "worldly estate," &c. he devised a cottage house, &c. to A. and his heirs, and also gave to B., whom he made his executrix, "all and singular his lands, messuages and tenements by her freely to be possessed and enjoyed:" held that, the latter words, being ambiguous, did not pass the fee against the heir; but might mean free of incumbrances, or disposable of waste; and that the word estate, in the introductory clause, could not be brought down into the latter distinct clause. *Goodright, Lessee of Drewry, v. Barron*, E. 49 G. 3. 114
- 5 Real Property may pass under the description of "personal estates" in a will; it being manifest from the whole of the instrument, as by terms of direct reference to that description in ulterior disposition of the same real property, that such was the devisor's intention. *Doe, Lessee of Toffield v. Toffield*, E. 49 G. 3. 126
- 6 Where one devises land to five trustees to sell and apply the money to certain uses, and afterwards makes the same persons his executors; they do not take the land as executors, but as devisees in trust and joint tenants. *Dennis, Lessee of Bowyer, v. Judge*, T. 49 G. 3. 144
- See further EXECUTORS, 2.
- 7 A devise of all the residue of the testator's "money, stock, property and effects, of what nature or kind soever," to A. VOL. VI. 83
- and B., "to be divided equally between "them, share and share alike," will pass real as well as personal estate, where from other parts of the will it appeared that the testator had applied the words property and effects to real estate. As where he began his will by stating "as to my money and effects, I dispose thereof as follows," &c.; and then proceeded to dispose of parts of his real estate. And again, having lands interlying with another's lands, he directed the purchase of the latter, if offered for sale, to be added to his other adjoining property. *Doe, Lessee of Andrew, v. Lainchbury*, T. 49 G. 3. 145
- 8 A remote reversion of a settled estate will pass by the general words of a residuary clause in a will, by which the testator, having before devised certain other real estates in strict settlement, and given annuities for life, to A. B. and C., which annuities he charged upon "all and singular his manors, lands, tenements, and hereditaments, &c. not before disposed of:" devised "all and singular, his said manors, lands, &c. and other his real estate so charged with and subject to the said three several annuities as aforesaid: although one of the annuitants had a prior life estate in the property, the reversion of which was in the testator. For general words in a residuary clause will carry every estate or interest which is not expressly or necessary by implication excluded from its operation; and no intention of the testator to exclude the reversion is necessarily to be implied from the circumstance, that the charge of one of the annuities could not attach upon this reversion, as the other two might; and the clause will be construed reddendo singula singulis. *Doe, Lessee of Earl and Countess Cholmondeley, v. Weatherby*, T. 49 G. 3. 161
- 9 Under a devise of land to a trustee and his heirs, out of the rents and profits to pay an annuity to the testator's wife, and the overplus to his nephews; and after his wife's death, to the use of his nephews, and the survivor for their lives; remainder to the use of the trustee to preserve contingent uses and estates, &c. during their lives; and after their deceases in trust for the heirs male of the body and bodies of the nephews; and in default of such issue, then to the use of another in fee: Held that the limitation in trust for the heirs male of the body and bodies of the nephews was executed by the statute, and therefore united with the prior use executed in them for life; and that a recovery suffered of the whole estate by the survivor of the nephews after the death of the other nephew without issue, and after the death of his own issue, bound the entail, and defeated the subsequent limitation in fee. *Doe, Lessee of Terry, v. Collier*, T. 49 G. 3. 185
- 10 Upon a devise to the testator's wife of all his wines, &c. for housekeeping, in

addition to the settlement he had made her upon his *copyhold* estate; and to his niece *M.* the rents and profits of his new inclosed *freehold* cow pasture close in *North Collingham*, during the life of his wife; and to two nephews all his *personal* estate, to be divided between certain nephews and nieces, and their sons and daughters; and *after the decease of his wife*, he devised to the same two nephews all his furniture, plate, &c. and "*all his copyhold estates in North and South Collingham*," and all other his *personal* estate, to sell and divide amongst his nephews and nieces, &c. including *T. B.* who, he declared, should be an equal sharer in this division of his *real* and *personal* estate: held that extrinsic evidence could not be given, that the settlement on his wife included a certain *freehold* close, mistakenly there enumerated as one of several *copyhold* closes settled, and which was in fact intermingled with the *copyholds*, (as were also some other *freehold* closes, the bounds of which were no longer distinguishable from the *copyhold*, and all of which *freeholds* were included in the settlement;) for the purpose of shewing that by the devise of "*all his copyhold estates in North and South Collingham*," "*after his wife's decease*, in trust to be divided, &c. the *freehold* close in question passed: as meant to include all his *real* estate in *settlement* upon his wife, and *which settlement was referred to* in the first devise to the wife.— And as the settlement which was thus referred to in the former part of the will was not evidence for that purpose, so neither were other instruments and papers, not referred to, admissible for the same purpose; such as, 1. A bond of the same date with the settlement, and in aid of it, speaking only of *copyhold* to be settled; 2. The rough draught of the settlement altered by the testator; 3. A book indorsed "*Collingham estate survey*," kept with the muniments of his property, and including the *freehold* in question, without distinguishing it from the *copyhold* closes; and 5. A rental kept in the same place, on which was indorsed by the testator, that "*all the rents of the copyhold lands in North and South Collingham, &c. were settled on his wife for life*."— For there is no ambiguity on the face of the will; the testator having *copyhold* estates in *North and South Collingham* to answer the description in it: nor is there any reference from the devise in question to the settlement, but by connecting it with the antecedent devise to the wife; and there is no such necessary connexion. Nor does it follow that the testator meant to devise the *same premises* under the name of *copyhold* to the trustees as were settled on his wife; or that he was under the same mistake, that the close in question was *copyhold*, when he made his will, as when he made the settlement or

indorsed his rental: and therefore there is nothing appearing on the will to warrant a construction of the word *copyhold* so contrary to its ordinary acception as to include the *freehold* in question. *Doe, Lessee of Brown, v. Brown*, T. 49 G. 3.

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11 One, after devising certain lands to trustees and their heirs, to pay debts in aid of the *personal* estate, devised the surplus, and all his other lands, &c. to his 1st, 2d, 3d, and other sons, successively, for life; with successive remainders to trustees and their heirs, to preserve subsequent estates during the lives of the several tenants for life; with several remainders successively to the first and other sons of the bodies of the testator's several sons in tail male; with like remainders to his daughter *S.* for life, to trustees, &c. and to her first and other sons, successively, in tail male: with a proviso, that each of the testator's sons, as he came into possession, might from time to time grant or appoint all or any part of the lands whereof he should be so seized and possessed to trustees, on trust, by the rents and profits to pay a jointure to any wife, &c. for the term of each such wife's natural life only. There were also powers by deed to charge the lands with portions for daughters and younger children, and to lease for 21 years.

The eldest son, having married, by deed, reciting the will and power, conveyed certain of the lands to trustees and their heirs, on trust by the rents and profits to raise and pay a jointure to his wife during her natural life only; and charged the lands with portions for younger children, if any: which deed also contained a covenant for quiet enjoyment during the wife's life: held that by such deed the trustees took a fee. *Wykham v. Wykham*, M. 50 G. 3.

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12 A devise to the testator's wife, of "*all his property both personal and real forever*," passes the fee in the real estate: and the deviser's intent to use the words in a more restricted sense is not shewn by a subsequent clause of the will, whereby, after her decease, he gave an additional annuity to a person to whom he had before given a smaller annuity preceding the devise to the wife. *Doe, Lessee of the Baroness Lady Decca, v. Roper*, M. 50 G. 3.

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13 Under a devise to *A.* for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of *A.* successively in tail male; with like remainders to *B.* and his sons; with remainder to the right heirs male of *A.* for ever; these last words are words of limitation, and not of purchase, notwithstanding the prior estates given to the sons of *A.* and their issue male, which are not of themselves sufficient to indicate an intention in the testator to use those words differently from their legal signification;

particularly as such words might, in certain events, operate to advance the general intent of the testator, and let into the succession some male descendants of A., who might be excluded from taking under the prior limitations to his first and other sons in tail male. And such ultimate limitation to the heirs male of A., to whom a precedent estate for life was given, operating to give him an estate in tail male in remainder, such devise lapses by his death before the testator. *Doe, Lessee of Abbermarle, Earl of Lindsey, v. Cotyear*, M. 50 G. 3. 261

- 14 A devise of all the rest and residue of the testator's estate in the manor and lands at *Bantry*, &c. not already settled on his eldest son *Simon*'s marriage (except those parts of it before devised to his (second) son *Hamilton*), together with all remainders and reversions of the said lands settled on the said marriage, to his eldest son *Simon* and the heirs of his body; and for default of issue of *Simon*, then he devised his said entire estate of *Bantry* to his son *Hamilton* in tail, with remainders over; lapses by the death of *Simon* in the lifetime of the testator, and the residue passes to *Hamilton* immediately on the death of the testator, though *Simon* left issue. *Hamilton White v. Warner, Lessee of Richard White*, M. 22 G. 3. 264

- 15 A testator devised one of three estates to trustees and their heirs, until his nephew *Thomas*, son of his brother *William* should attain 21 or die; and on his attaining 21, to the said *Thomas* for life sans waste; and after the determination of that estate, to the trustees during *Thomas*'s life to preserve contingent remainders, &c.; and after the decease of *Thomas*, to all and every the son and sons of the body of *Thomas*, severally and successively one after another in priority of birth, &c.; and for default of such issue, to the trustees until his nephew *John*, son of his brother *Samuel*, should attain 21 or die; and in case *John* attained 21, then to him for life, sans waste; and after the determination of that estate, to the trustees, during *John*'s life, to preserve contingent remainders; and after his decease, to all and every the son and sons of the body of *John*, severally and successively one after another, in priority of birth, &c.; and after the determination of that estate (or, as it stood here in the limitation of one of the other estates "and for default of such issue," to the trustees, until his nephew *S. W.* should attain 21 or die, &c.: and so repeating all the former limitations as to *S. W.* and his sons; and the like with respect to a fourth nephew *F. W.* and his sons; concluding—and for default of such issue, to the testator's brother *Joseph* for life, sans waste; and after his death, to his son *Joseph* and his heirs. The testator repeated the same set of limitations twice more, with respect

to two other estates, only varying the priority of his four first named nephews in the disposition of them; but concluding after each set of limitations to those four nephews, with the same devises to his brother *Joseph* for life, and to *Joseph*'s son in fee.

The nephews *Thomas* (the heir at law) and *S. W.* had issue male after the testator's death, but none of the nephews had any son born during the testator's lifetime. Held that the four first mentioned nephews and their sons only took estates for life respectively, for want of words of limitation or other tantamount words; the words, "for default of such issue" meaning for default of son or sons, &c. *Foster and Others v. Lord Romney*, M. 50 G. 3. 283

- 16 A devise to *S. N.*, the son of *T. N.*, for life; remainder to trustees, &c.; remainder to the first and other sons of the body of *S. N.*, and the heirs male of their respective bodies; and for default of such issue, to the use of all and every the daughters of the body of *S. N.* begotten or to be begotten; and for default of such issue, to the right heirs of *T. N.* for ever. *T. N.* died leaving issue *S. N.* and two daughters. Held that the daughters took only estates for their lives. *Denne, Lessee of Briddon and Mary his Wife, v. Page*, M. 24 G. 3. 287

- 17 Under a devise of a mansion and family estate to several successively for life and in tail: with a proviso that whatever person, should, by virtue of the will, become possessed of or entitled to the estate, should, from the time he became so possessed, take upon himself the surname of *Thelwell*, and make the mansion his usual and common place of abode and residence: held that a tenant in tail in remainder succeeding to the possession, who had also become heir at law to the testator, since his death, not being found to have had notice of the will of her ancestor containing such condition, her title could not be impeached by the remainderman over, who brought ejectment after her death against her husband, by whom she had issue which died before her: she having also in fact suffered a recovery about four months after she came of age, within which period it was contended that she ought to have complied with the condition of residence to enable her to make a good tenant to the præcipe. *Doe, d. Kenrick and Others, v. Lord Wm. Beauchamp*, M. 50 G. 3. 311

- 18 A testator devised one estate to his wife for life, and after her decease to his daughter *Mary* and the heirs of her body begotten or to be begotten, as tenant in common, and not as joint tenants; but if such issue should die before he, she, or they, attained 21, then to his son *Joseph* in fee: and then devised another estate to his wife for life, remainder to his son *Joseph* and to the heirs of his body begotten

- or to be begotten; but if he died without issue, or such issue all died before he or they attained 21, then to his daughter *Mary* and the heirs of her body begotten or to be begotten; such issue, if more than one, to take as tenants in common: Held that the daughter *Mary* only took an estate for life in the first estate, with remainder to all her children equally as purchasers. *Doe d. Strong and Others, v. Goff*, M. 50 G. 3. 316
- 19 After a devise to one and her heirs of certain lands in A., and other devises to the same person and her executors, administrators, and assigns, of leasehold interests in B., C., and D., a devise of all the residue of the testator's estate and effects, real and personal, whatsoever and wheresoever; not before disposed of, after payment of debts, legacies, and funeral expences to the same devisee, her executors, administrators, and assigns, for her own use absolutely, will carry a distant reversion in fee in the lands in B.; the words of the residuary clause being large enough to carry the fee, as comprehending all the residue of the devisor's real estate, and giving it to the devisee absolutely; and the intent to devise the whole interest in all his remaining property not being rebutted by limiting the estate to her and her executors, &c., omitting heirs; or by the limitation of other lands to her and her heirs; or by the prior devise of a leasehold interest to the same person in the same lands of which the devisor had such distant reversion. *William d. Hughes and Wife, v. Thomas*, H. 50 G. 3. 390
- 20 Under a devise of lands to the testator's son and his heirs for ever; as to part of the lands, upon condition that he should pay to the testator's daughter 12l. a year till she came of age, and then pay her 300l.: and in default of payment, that she should enter upon and enjoy the said part to her and her heirs for ever; and in case his son and daughter both died without leaving a child or issue, he devised the reversion and inheritance of all the lands to another: held that the devise over was not an executory devise, but a remainder limited after successive estates tail in the son, and also in the daughter by implication: the intent being apparent, that the devise over should not take effect till after failure of the issue of the son and daughter, and that it should then take effect: and this being the only construction which would give effect to such intent, consistently with the whole of the will taken together. *Tenny d. Agar v. Agar*, E. 50 G. 3. 442
- 21 Under a devise to A. (a natural son) then under age, and the heirs of his body; and "if he died before 21, and without issue," then over to other relations, and ultimately to the testator's own right heirs: held that A., having attained 21, the limitations over did not take effect; as by the natural sense of the word "and," they were made to depend upon the hap-
- pening of both events, i. e. the son's dying before 21, and without issue. And this construction was not varied by a codicil made after the son attained 21; by which the testator confirmed every part of his will so far as his affairs were consistent. *Doe, Lessee of Usher v. Jessop*, E. 50 G. 3. 458
- 22 Under a devise to trustees, their heirs, &c. of freehold and leasehold estate on trust to permit and suffer the testator's wife to receive and take the rents and profits until his son should attain 21, and then to the use of his son in fee: and a devise of other lands to the trustees, upon trust to receive the rents and profits till his son attained 21; and in the mean time to apply the profits in discharging the interest of a bond of 3000l.; and on the son's attaining 21, upon trust by sale, lease, or mortgage of the last mentioned premises, to raise the 3000l., and discharge the bond; and subject thereto, to the use of his son in fee on his attaining 21. And a third devise of other lands, and the residue of his real and personal estate, to the use of the same trustees, in trust by sale, lease, or mortgage of the same, to raise 3000l. and pay it to his daughter *Elizabeth*: and after payment thereof, absolutely to sell and dispose of so much of the residue of his said lands, &c. as they should think proper, to raise money to pay his debts, legacies, and funeral expences, and then upon trust to pay the interest and produce of his real and personal estate to his then wife, for the maintenance of herself and two children till the latter should attain 21, if she continued his widow; but if not, then for the benefit of the two children till 21; and then to transfer to those children such residue; with further trusts if either or both of them died under 21. With a *Proviso*, "that it should be lawful for the trustees, and the survivor, at any time or times till all the said lands, &c. devised to them should actually become vested in any other person or persons by virtue of the will or until the same or any part thereof should be absolutely sold as aforesaid, to lease the same or any part thereof, for any term of years not exceeding 14, at the best rent." Held that the devise in the first clause to the trustees, upon trust to permit and suffer the testator's wife to receive and take the rents and profits of the land there described until his son attained 21, vested the legal estate of those lands in her, and was not affected by the subsequent leasing proviso given to the trustees; which was confined to premises originally vested in them as trustees; or over which, when afterwards becoming vested in others, the trustees retained a power of sale, &c. *Right d. Harriet Phillips and Others v. Smith*, T. 50 G. 3. 535
- 23 Under a devise to one and her heirs (she having two children before, and a third

born after making the will,) *during their lives*: held that these latter words were repugnant to the others, and that she took an estate of inheritance. *Doe d. Cotton v. Stenlake*, T. 50 G. 3. 564

- 24 Where a testator devised all his real estate (except at S.) to the head of his family for life: and then to several of the junior branches in succession, to each for life; with remainder to his first and other sons in tail male; with the ultimate remainder to *his own right heirs*; and then devised his estate at S. to some by name of the junior branches, but not to all of those to whom he had devised the first estate, and varying the order of succession, to each for life, with remainder to his first and other sons in tail male; and then devised that "for default of such issue," the estate at S. should go "to such person and persons, and for such estate and estates, as should at that time," (i. e. on the death of the last tenant for life named, without issue male,) "and from time to time afterwards, be entitled to the rest of his real estate by virtue of and under his will;" held that the ultimate remainder in fee of the estate at S. vested by descent in the person who was the testator's heir at the time of his death, and did not remain in contingency under the will till the death of the last tenant for life without issue male who was named in the devise of that estate. *Doe d. the Earl and Countess of Cholmondeley v. Mazey*, T. 50 G. 3. 596

DEVISEE,

See COMPENSATION, 2. DISSEISIN.

NOTICE TO QUIT.

DISSEISIN.

Tenant for life having levied a fine, and afterwards devised the premises, and died seised, the entry and continuing possession of the devisee (the defendant in ejectment,) is no disseisin of the reversioner; disseisin importing an ouster of the rightful tenant from the possession, and an usurpation of the freehold tenure. And therefore, no question could arise whether, considering the devisee of the reversion as a disseisee, a fine sur cognizance de droit come coe, levied by her before entry to a stranger, without any declaration of uses, would bar her right of entry by estoppel and fortify the estate of the disseisor; or whether it would simply enure to her own use, or be altogether inoperative. *William d. Hughes and Wife v. Thomas*, H. 50 G. 3. 390

DISTRESS,

See LANDLORD AND TENANT.

Where one, who entered under a warrant of distress for rent in arrear, continued in possession of the goods upon the premises for 15 days, during the four last of which he was removing the goods, which

were afterwards sold under the distress; held that at any rate he was liable in trespass quare clausum fregit for continuing on the premises and disturbing the plaintiff in the possession of his house, after the time allowed by law. *Winterbourne v. Morgan*, T. 49 G. 3. 193

EASEMENT.

Under the *Bristol dock act*, 43 G. 3. c. 140. s. 107, which gives compensation where, "by means of the dockworks or in the progress or execution thereof, damage may be done to any hereditaments, houses, lands, and tenements, or the same may be rendered less valuable thereby," no compensation is due to the owners of a brewery for a loss arising to them in their business from the deterioration of the water of the public river *Avon*, from which the brewery had been before supplied by means of pipes laid under low water-mark; the use of the water having been common to all the king's subjects and not claimed as an easement to the particular tenement. The only remedy for such an injury is by indictment, which was taken away in this case by the act of parliament. *The King v. The Directors of the Bristol Dock Company*, T. 50 G. 3. 523

ECCLESIASTICAL CORPORATION,

See CORPORATION, 4.

EFFECTS,

See DEVISE, 7.

EJECTMENT,

See NOTICE TO QUIT.

- 1 An inclosure made from the lord's waste by a copyholder 12 or 13 years before, and seen by the steward of the same lord from time to time, without objection made, may be presumed by the jury to have been made by licence of the lord: and ejectment, if so presumed, lies not against the tenant as a trespasser, without previous notice to throw it up. *Doe, lessee of Foley, v. Wilson*, E. 49 G. 3. 41
- 2 A lease of lands by deed, since the new stile, to hold from the feast of *St. Michael*, must be taken to mean from *New Michaelmas*, and cannot be shewn by extrinsic evidence to refer to a holding from *Old Michaelmas*: and a notice to quit at *Old Michaelmas*, though given half a year before *New Michaelmas*, is bad. *Doe, Lessee of Spicer, v. Lea*, T. 49 G. 3. 156
- 3 Where a prescriptive ecclesiastical corporation of vicars choral of the cathedral of *Chichester* had, besides other estates in common, four vicarial houses with their appurtenances, which had always been appropriated to the several use and residence of the four vicars: and by ancient custom, upon every vacancy the vicars, according to seniority,

- made their option of taking in *severalty* any one of such vicarial houses with the appurtenances; of which option an entry was made in the corporation act book and signed by the vicars: held that a new vicar, having made an option, which was entered in the book and signed by all to take one of the vicarial houses, *with certain appurtenances*, then in the possession of J. S., which were *not all the appurtenances* formerly annexed to and enjoyed with the same house by his predecessors therein, could not maintain an ejectment for the other appurtenances, such as part of the ancient garden which had been leased off by the corporation before his appointment. For supposing him entitled to make an option of the *entire premises*, and to have it entered in the act book, as against the corporation; yet no such option having been made and entered in the act book, according to the custom, he had no separate legal title to the premises in question, on which he could maintain an ejectment. *Goodtitle, Lessee of Miller, Clerk v. Wilson*, T. 49 G. 3. 166
- 4 Where an old mortgage term of 1000 years created in 1727, was recognized in a marriage settlement by the owner of the inheritance in 1751, by which a sum was appropriated to its discharge; and no further notice was taken of it till 1802, when a deed, to which the then owner of the inheritance and the representatives of the termors were parties, reciting that the term was still subsisting, conveyed it to others to secure a mortgage; held that it could not be presumed to have been surrendered against the owner of the inheritance, who was interested in upholding it. *Doe, Lessee of Graham, v. Scott*, M. 50 G. 3. 230
- 5 A possession of crown land commencing at least 55 years ago by encroachment on the crown in the time of the lessor of the plaintiff's father, maintained by the father till his death, 19 years ago, and afterwards continued for two years by his widow, when the defendant obtained the possession, would be sufficient evidence for the jury to presume a grant from the crown to the lessor's father, if the crown were capable of making such a grant; in order to support a demise in ejectment from the eldest son and heir of such first possessor, against the defendant who had no apparent title, and whose possession was not defended by the crown, nor found to be by licence from it.
- But it appearing, upon a second trial, that by the stat. 20 Car. 2. c. 3, all future grants of land by the crown in the forest of *Dean*, within which the land in question lay, were avoided, and consequently no presumption could be made of a valid grant; the lessor of the plaintiff, who can only recover in ejectment by the strength of his own title, was held not entitled to recover even against a stranger, whose possession, adverse to him, was not defended by the crown. And this, notwithstanding a part of the premises was first held by the lessor's father 60 years ago; and by the stat. 9 G. 3. c. 16, the suit of the crown is barred after a continuing adverse possession for 60 years under the original trespasser? For from the death of the father 19 years ago, the possession was adverse to his heir, the lessor of the plaintiff; or at least the defendant's possession for the last 17 years was adverse; and the act of Geo. 3. does not give a title to the first wrongful possessor and those claiming under him, but only bars the remedy of the crown against them after 60 years continuing adverse possession by them; and as it does not repeal the stat. 20 Car. 2. c. 3, no presumption of a grant to legalize the possession of the lessor's father for the first 41 years, on which alone the lessor's claim could be founded, can be made against that statute. And the jury it seems may presume that the possession of the lessor's father for the first 41 years, and that of the defendant (adverse to the heir) for the last 17, were both legally holden by the licence of the crown. *Goodtitle, Lessee of Parker v. Baldwin*, M. 50 G. 3. 234
- 6 Where house and land are let together to be entered upon at different times: and it do not appear from the terms of the demise from what time the whole is to be taken as let together; it is a question of fact for the jury, which is the principal, and which the accessorial subject of demise, in order for the judge to decide whether the notice to quit the whole were given in time. *Doe, on the demise of Heapy v. Howard*, M. 50 G. 3. 239
- 7 Copyhold descending by custom to all the children equally of the tenant last seized, one of the parceners may maintain ejectment on his single demise for his own share. *Roe d. Raper v. Lensdale*, H. 50 G. 3. 345
- 8 The plaintiff in ejectment, under the several demises of two, may, after notice to quit, recover the possession of premises held by the defendant as tenant from year to year, upon evidence that the common agent of the two had received rent from the tenant, which was stated in the receipts to be due to the two lessors; even assuming such receipts to be evidence of a joint tenancy; for a several demise severs a joint tenancy: and supposing the contract with the tenant to have been entire, no objection lies on that account to the plaintiff's recovery in this case, as he had the whole title in him. *Doe d. Marsack and Others v. Read*, H. 50 G. 3. 353
- 9 It seems that a receiver appointed by the court of Chancery, with a general authority to let the lands to tenants from year to year, has also authority to determine

such tenancies by a regular notice to quit, *ib.* 353

- 10 In ejectment brought upon the joint demise of several trustees of a charity, it is not enough for the defendant, who had paid one entire rent to the common clerk of the trustees, to shew that the trustees were appointed at different times, as evidence that they were tenants in common; for as against their tenant, his payment of the entire rent to the common agent of all is, at all events, sufficient to support the joint demise, without making it necessary for them to shew their title more precisely. *Doe d. Clarke and Others v. Grant*, E. 50 G. 3. 426

- 11 In ejectment the landlord having proved payment of rent by the defendant and half a year's notice to quit given to him, cannot be turned round by his witness proving, on cross examination, that an agreement relative to the land in question was produced at a former trial between the same parties, and was on the morning of the then trial seen in the hands of the plaintiff's attorney: *the contents of which the witness did not know*; no notice having been given by the defendant to produce that paper: for though it might not affect the matter in judgment, nor even have been made between these parties. *Doe d. Sir Mark Wood v. Morris*, E. 50 G. 3. 434

12 See FORFEITURE OF FINE.

ELECTION COMMITTEE,

See COSTS, 2.

EMANCIPATION,

See SETTLEMENT FROM PARENTS, 2.

ENEMY,

See ALIEN ENEMY, ASSUMPSIT, 18. INSURANCE, 16. TRADING WITH ENEMIES.

ESCAPE.

- 1 Action lies upon the stat. 44 Geo. 3. c. 23. s. 4, by a common informer suing for himself and the king, to recover a penalty against the sheriff for the misconduct to his bailiff in wilfully suffering a seaman to go at large who had been taken out of the king's service by arrest on civil process, on which he afterwards was bailed, instead of delivering him over to the charge of a proper naval officer; the statute which speaks of sheriffs, gaolers, or other officers arresting, apprehending, or taking in execution such seaman, or in whose custody they may be; and who are made liable for their escape, meaning by "other officers" such as may be charged with the execution of criminal warrants against such seamen, or to whom any process may properly be directed for their arrest, detention or discharge; and not the inferior officers of the sheriff. And

the sheriff may be charged in such action for wrongfully and wilfully permitting the escape. *Sturmy v. t. v. Smith*, E. 49 G. 3. 28

- 2 A plea to an action against the marshal for the escape of a prisoner in custody for a debt, after stating the return of the prisoner into custody after such escape, before action brought, &c. ought to shew a detention of him by the officer down to the commencement of the action, or a legal discharge from that detention; and therefore though the plea only stated that, after the return of the prisoner into custody, the defendant did thereupon *then and afterwards keep and detain* the said prisoner in his custody in execution, under and by virtue of the said commitment, &c.: and the replication traversed, that after the prisoner's return, the defendant did *keep and detain* him in custody in execution, &c. *in manner and form* as stated in the plea; *a detention down to the commencement of the action*, or until a legal discharge from such detention, is virtually implied in the plea, and included in the traverse; and therefore the plea is negatived by shewing in evidence, that after the prisoner's return he again escaped and died out of custody. *Chambers v. Jones*, T. 49 G. 3. 197

ESCHEAT, INQUEST OF.

- 1 The statutes 8 H. 6. c. 16, and 18 H. 6. c. 6, prohibiting the granting to farm of lands seised into the king's hands, upon inquest before the escheators, until such inquest be returned in the Chancery or Exchequer, and for a month afterwards, *if the king's title in the same be not found of record*, unless to the party grieved who shall have tendered his traverse to such inquest; and avoiding all grants made contrary thereto; extend to the case of an escheat upon the death of the tenant last seised, without heirs, where no immediate tenure of the crown was found by the inquest. And as the crown could not grant to a stranger in such a case without office, neither can the plaintiff in ejectment recover upon the demise of the crown. *Doe d. Hayne and his Majesty v. Redfern*, H. 50 G. 3. 370
- 2 And the 8th section of stat. 2 & 3 Ed. 6. c. 8, (which is in general terms, and not confined to the particular inquisitions mentioned in the other clauses of the act,) extends to avoid any such inquisition or office before escheators, not finding of whom the lands are holden; in the same manner as if the jury had expressly found their ignorance of the tenure: and a *melius inquirendum* shall be awarded. *ib.*
- 3 Quære, Whether at common law, upon the death of the tenant last seised of the land without heirs, the right and possession must be presumed to be immediately in the crown, without office, as though the person last seised were the king's im-

mediate tenant; the king's title not appearing by any matter of record, and the possession not having been vacant from the death of the tenant last seised. *ib.*

ESTOPPEL,

See EVIDENCE, 18.

Devises of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; nor will such a surrender operate by estoppel against the parties or their heirs. *Doe, Lessee, of Blacksell and Others, v. Tomkins*, E. 49 G. 3. 98

EVIDENCE,

See CONVICTION, 2.

See AUGMENTED CURACY, 1. TRESPASS, 7. VENUE, 1. WITNESS.

- 1 Notice of the delivering out to subscribers the numbers of the *Boydell Shakespeare*, through the medium of a newspaper, was held not to be brought home to a subscriber, without shewing that he was in the habit of taking in such newspaper. By Lord Ellenborough, C. J. *Boydell v. Drummond*, E. 49 G. 3. 80
- 2 In trespass for distraining goods in satisfaction of a rate in nature of a county rate, made by corporate justices with an exclusive commission of the peace, by virtue of stat. 13 G. 2. c. 18, the court will not inquire into the necessity of making such a rate, nor as to the application of corporate funds sufficient for that purpose. *Weatherhead v. Drewry*, E. 49 G. 3. 91
- 3 The enfranchisement of a copyhold may, upon proper evidence, be presumed even against the crown. And where a surrender had been made to churchwardens and their successors in 1636, without naming any rent; but in 1649 the *parliamentary survey* charged the churchwardens with 6d. rent, under the head of "*freehold rent*"; and there was no evidence of any different rent having been paid since that time, and receipts had been given for it, as for a *freehold* rent, by the steward of the manor: held that this was evidence to be submitted to a jury, on which they might presume a grant of enfranchisement; although the manor had continued out in lease from before 1636 to 1804; and though a tablet of parochial benefactions, at least as old as 1656, which was suspended in the parish church, noticed the gift of the copyhold by surrender, but did not notice any enfranchisement of it. *Roe, Lessee of Johnson, v. Ireland*, T. 49 G. 3. 141
- 4 In case against a judgment creditor for maliciously suing out an alias *fi. fa.* after a sufficient execution levied upon the plaintiff's goods under the first *fi. fa.* held that the sheriff's returns indorsed upon the two writs, (which writs had been produced in evidence by the plaintiff as part of his case,) wherein the sheriff stated

that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, were *prima facie* evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons. *Gyfford v. Woodgate*, T. 49 G. 3. 148

5 Where a witness admitted herself to have been connected with different men, and the judge thought it immaterial to hear witnesses tendered by the defendant to shew her connexion with other persons; as leading merely to the same conclusion as to her character; the court being satisfied that this could have had no influence on the verdict, refused a new trial on that account. *The King v. Teal*, T. 49 G. 3. 153

6 A lease of lands by deed, since the *New-Style*, to hold from the feast of *St. Michael*, must be taken to mean from *New-Michaelmas*, and cannot be shewn by extrinsic evidence to refer to a holding from *Old Michaelmas*: and a notice to quit at *Old Michaelmas*, though given half a year before *New Michaelmas*, is bad. *Doe, Lessee of Spicer, v. Lea*, T. 49 G. 3. 156

7 An order of removal, executed and unappealed against, is conclusive as to the settlement of the pauper at the time of such order, even as between third parties no parties to the former order. *The King v. The inhabitants of Corsham*, T. 49 G. 3. 190

8 Upon a devise to the testator's wife, of all his wines, &c. for housekeeping, in addition to the settlement he had made her upon his copyhold estate; and to his niece *M.* the rents and profits of his new inclosed freehold cow pasture in *North Collingham*, during the life of his wife; and then to two nephews all his personal estate, to be divided between certain nephews and nieces, and their sons and daughters: and after the decease of his wife, he devised to the same two nephews all his furniture, plate, &c. and "all his copyhold estates, in *North and South Collingham*," and all other his personal estate, to sell and divide amongst his nephews and nieces, &c. including *T. B.* who, he declared should be an equal sharer in this division of his real and personal estate; held that extrinsic evidence could not be given, that the settlement on his wife included a certain freehold close, mistakenly there enumerated as one of several copyhold closes settled, and which was in fact intermingled with the copyholds, (as were also some other freehold closes, the bounds of which were no longer distinguishable from the copyhold, and all of which freeholds were included in the settlement;) for the purpose of shewing that by the devise of "all his copyhold estates in *North and South Collingham*," after his wife's decease, in trust to be divided, &c. the freehold close in question passed; as meant to include all his real

estate in *settlement* upon his wife, and which *settlement* was referred to in the first devise to the wife.

And as the settlement which was thus referred to in the former part of the will was not evidence for that purpose, so neither were other instruments and papers, not referred to, admissible for the same purpose; such as, 1. A bond of the same date with the settlement, and in aid of it, speaking only of *copyhold* to be settled; 2. The rough draught of the settlement altered by the testator; 3. A book indorsed "*Collingham* estate survey," kept with the muniments of his property, and including the freehold in question, without distinguishing it from the *copyhold* closes; and 5. A rental kept in the same place, and on which was endorsed by the testator, that "all the rents of the *copyhold* lands in *North and South Collingham*, &c. were settled on his wife for life."

For there is no ambiguity on the face of the will; the testator having *copyhold* estates in *North and South Collingham* to answer the description in it. Nor is there any reference from the devise in question to the settlement, but by connecting it with the antecedent devise to the wife: and there is no such necessary connexion. Nor does it follow that the testator meant to devise the same premises under the name of *copyhold* to the trustees, as were settled on his wife; or that he was under the same mistake that the close in question was *copyhold* when he made his will, as when he made the settlement or indorsed his rental: and therefore there is nothing appearing on the will to warrant a construction of the word *copyhold* so contrary to its ordinary acceptation as to include the *freehold* in question. *Doe, Lessee of Brown v. Brown*, T. 49 G. 3.

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9 Under what circumstances a grant or licence from the crown to hold or occupy crown land may be presumed. See EJECTMENT, 5.

10 Evidence of *Seisin*, see FINE, 1.

11 A certain paper being found along with other papers, relating to the private concerns of the person last seised, after his death, in a drawer in his house; which paper purported to be the will of a person answering the description of his grandfather, made in 1738, but which was found cancelled, and no evidence was given of its ever having been acted upon, or probate of it taken out; is yet evidence of its recognition by the party last seised, as the declaration of his ancestor concerning the state of his family, so as to let in the contents of it for the purpose of shewing that that ancestor acknowledged a brother of the name of *Thomas* to be older than another brother of the name of *William*; assuming the Jury to be satisfied of the fact, that the paper so found was kept there by the person last seised with a

knowledge of its contents, and that no imposition was practised. *Doe, Lessee of Johnson v. The Earl of Pembroke*, M. 60 G. 3.

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12 In an action for a malicious prosecution, the copy of the original roll or record of acquittal given in evidence, stated the finding of the bill of indictment against the now plaintiff in *B. R.*, the process to bring in the party, her appearance, and plea of not guilty in *Mich.* term, and the joining of issue in the same court; and then it stated the venire facias juratores returnable in *Hilary* term, and the distringas juratores, by which the sheriff is commanded to have the jury before our said lord the king at Westminster, on Wednesday next after 15 days from Easter, on before the lord Chief Justice if he should come before that time, i. e. on Tuesday next after the end of the term (*Hilary*), at Westminster, &c. in the great hall of pleas there; and then after giving a day in bank to the prosecutor and defendant, it proceeded—on which day, viz. on Wednesday next after 15 days, &c. before our said lord the king, at W., came the parties; and the Chief Justice before whom the said Jurors came to try, &c. sent here his record (which is the nisi prius record) in these words; (which are the words of the postea indorsed on the nisi prius record;) viz. afterwards, on the day and at the place last within mentioned, before the Chief Justice, &c. and so it proceeded to set out the trial, and the verdict of not guilty; (which is the conclusion of the postea on the nisi prius record sent into the court in bank by the Chief Justice;) and then the original roll proceeded—Whereupon, all the premises being seen by the court of our said lord the king now here, it is considered and adjudged by the said court now here, that M. W. (the now plaintiff) do depart here without day, &c. The form and component parts of the original roll, or record of acquittal, being thus understood, it follows that the words of the postea, "afterwards, on the day and at the place last within mentioned," stated in the indorsement on the nisi prius record, as sent by the Ld. Chief Justice into the court in bank, refer to the day and place last mentioned in the distringas juratores set forth in that record; namely, to "Tuesday next after the end of the term, (*Hilary*) at Westminster, &c. in the "great hall of pleas there;" which was the day and place at nisi prius given; and not to the "Wednesday next after 15 days, &c. before our said lord the king at W.;" which was the return day in bank in the subsequent term, and consequently after the trial was had; though the statement of this return day intervenes on the roll between the statement of the day and place given to the jury in the distringas, and the statement of the postea indorsed on the nisi prius record as sent in by the Lord Chief Justice.—

- And as by the roll it appeared that the trial was at nisi prius, and the judgment of acquittal in bank; it was therefore held not to prove an allegation in the declaration, that the "defendant (the now plaintiff) on Wednesday next after 15 days, &c. in the court of our said lord the king, before the king himself, at W. before the Lord Chief Justice assigned to hold pleas before the king himself, &c. W. J. being associated with him, &c. was in due manner and according to the due course of law by a jury of the said county of M. acquitted, &c.;" which allegation supposed the trial to have been in bank on the return-day there given. *Woodford and Mary his Wife v. Ashley*, M. 50 G. 3. 243
- 13 A rated parishioner not being bound, upon an appeal touching the settlement of a pauper, to give evidence against his own parish, the opposite parish may give evidence of his declarations as to the facts in issue; the weight due to which must depend upon his means of knowledge as to the facts so declared, and the genuineness of the declarations, to be collected from circumstances. *The King v. the Inhabitants of Hardwick*, M. 50 G. 3. 277
- 14 Where the plaintiff declares on a covenant in a deed stating such covenant by itself in its own absolute terms, it seems that the defendant may give in evidence on non est factum, that other parts of the deed in their legal effect qualified the generality of the covenant declared on. *Howell v. Richards*, M. 50 G. 3. 300
- 15 Printed conditions of sale of timber growing in a certain close, not stating any thing of the quantity; parol evidence, that the auctioneer at the time of sale warranted a certain quantity, is not admissible as varying the written contract. *Powell v. Edmunds*, H. 50 G. 3. 330
- 16 Evidence of reputation of the custom of a manor, that in default of sons, the eldest daughter, and in default also of daughters, the eldest sister, and in case of the death of all, the descendants of the eldest daughter or sister respectively, of the person last seised should take, is proper to be left to the jury of the existence of such a custom, as applied to a great nephew (the grandson of an elder sister,) of the person last seised; although the instances in which it was proved to have been put in use extended no further than eldest daughter and eldest sister, and the son of an eldest sister. The existence of such extended custom in adjacent manors seems to be no evidence of the custom in the particular manor. *Doe d. Foster and Jamieson v. Sisson*, H. 50 G. 3. 355
- 17 On plea of plene administravit, proof of an admission by the executor, that the debt was just and should be paid as soon as he could, is not evidence to charge him with assets. *Hindsley v. Russell*, E. 50 G. 3. 432
- 18 The plaintiffs, a Frenchman and a Swiss, carrying on trade at Lisbon, under the name of the defendant, a Portuguese, shipped a cargo from thence for a port of France; which cargo being captured by a British cruiser, and libelled for condemnation in the court of Admiralty as French and enemy's property, was ordered to be restored to the defendant on his putting in and establishing, with the plaintiffs' privity and consent, a claim to it as his own property: held that the plaintiffs were, by thus colluding with the defendant to withdraw from the Admiralty the decision of the true question, by establishing a false fact, estopped from maintaining an action for money had and received against the defendant for the proceeds, by shewing the true fact, that the property was their own, and that the defendant was their agent. *De Metton and Another v. De Mello*, E. 50 G. 3. 433
- 19 In ejectment, the landlord having proved payment of rent by the defendant, and half a year's notice to quit given to him, cannot be turned round by his witness proving on cross examination, that an agreement relative to the land in question was produced at a former trial between the same parties, and was on the morning of the then trial seen in the hands of the plaintiff's attorney, the contents of which the witness did not know; no notice having been given by the defendant to produce that paper: for though it might be an agreement relative to the land, it might not affect the matter in judgment, nor even have been made between these parties. *Doe d. Sir Mark Wood v. Morris*, E. 50 G. 3. 434
- 20 Where an assured, a British merchant, in an action on a policy of insurance on goods bound to an enemy's port in Holland, seeks to protect the adventure under the king's licence to trade with the enemy, it is not sufficient to give in evidence at the trial, and to prove his possession in fact before the voyage commenced of a general licence dated three months before, licensing six neutral vessels to pass unmolested to or from any port of Holland from or to any part of this Kingdom, with certain goods, (including the goods insured,) which licence was directed to R. S. and other British merchants; with a condition annexed, that they should cause the licence to be delivered up to them or their agents when the ship should enter any port of this kingdom; without also giving probable evidence to account for his possession of the licence, and to shew that his user of it was lawful; as by shewing from whom and when he received it; and thereby connecting his own particular adventure with such general licence. *Barlow v. M'Intosh*, E. 50 G. 3. 468

21 Upon an appeal against a rate made under a private act of parliament, the respondent appearing to answer the appeal, and admitting, when called upon by the sessions, that he had made the rate by virtue of a certain act of parliament; a printed copy of which, in the common form, was produced in court by the appellants; and the sessions having thereupon entered into the merits of the appeal, and decided upon them, notwithstanding an objection made by the respondent that the appellants had not given legal evidence of the jurisdiction of the sessions to receive the appeal, for want of proof of the printed copy having been examined with the rolls of parliament; this court refused to quash their order, which was removed by certiorari. *The King v. Shaw*, T. 50 G. 3. 547

EXECUTOR,

See ADMINISTRATOR and EXECUTOR.

EXECUTORS.

- 1 A fee does not pass by a residuary clause in a will, whereby the testator, after several pecuniary bequests, ordered the lease of his house, with his furniture, to be sold and all the rest and residue to be divided amongst certain persons; and appointed executors; for such division of the rest and residue must be intended to be made by the executors, as such, and therefore confined to personal property. *Bebb v. Penoyre*, E. 49 G. 3. 87
- 2 Where one devises land to five trustees to sell and apply the money to certain uses, and afterwards makes the same persons his executors; they do not take the land as executors but as devisees in trust and joint tenants. And at any rate the case is not helped by the statute 21 H. 6. c. 4, so as to pass the whole estate upon production of a conveyance purporting to be executed by the five, but the execution of which by three only could be proved. But taking it to be a conveyance by the three only, it would sever the joint-tenancy and convey 3-5ths of the estate to be held in common with the two remaining parts. *Denne, Lessee of Bowyer v. Judge*, T. 49 G. 3. 144

FALSE IMPRISONMENT,

See JUSTICES OF PEACE.

FALSE REPRESENTATION,

See ACTION ON THE CASE, 12.

FELONY.

After an acquittal of the defendant upon an indictment for a felonious assault upon the plaintiff by stabbing him, the plaintiff may maintain trespass to recover damages for the civil injury, if he be not shewn to have colluded in procuring such acquittal. *Crosby v. Leng*, E. 50 G. 3. 513

FERRY,

See BRIDGE.

- 1 The lessee and occupier of an ancient and exclusive ferry, not being an inhabitant resident within the township in which one of the termini of the ferry is situated, is not liable to be rated there for any share of the tolls of such ferry: for supposing a ferry to be real property, it is not such real property as is mentioned in the statute of 43 Eliz. c. 2, the occupancy of which subjects the party to the relief of the poor of the place. *The King v. Nicholson*, E. 50 G. 3. 478
- 2 The owner of a ferry residing in a different parish, but taking the profits of the ferry on the spot by his servants and agents, is not rateable for such tolls in the parish where they were so collected, and where one of the termini of the ferry was situated, and on which shore the ferry boats were secured by means of a post in the ground; the soil itself at the landing places being the king's common highway; and the owner of the ferry having no property in, or exclusive possession of it. *Williams, Executrix, &c. v. Jones*, E. 50 G. 3. 485

FILIATION, ORDER OF,

See APPEAL, 1.

FINE.

Where a fine was levied of *Michaelmas* term, relating to the 6th of November, though in fact levied on the 8th; it is sufficient evidence of the seisin in fact of the cognizor at the time of the fine levied, that a writ of possession after a recovery in ejectment was executed on his behalf on the evening of the 6th, by the officer's entry on the land and claiming it for the cognizor, but without any actual change of the tenant in possession, who afterwards paid rent to the cognizor. And so it seems the receipt by a lawful possessor of rent due after a fine levied, for a period antecedent to such fine, is prima facie evidence, if no covin appear, of his possession during the period for which the rent is received. *Doe, Lessee of Osborn, v. Spencer*, M. 50 G. 3. 238

- 1 Tenant for life having levied a fine, and afterwards devised the premises, and died seised, the entry and continuing possession of the devisee (the defendant in ejectment,) is no disseisin of the reversioner; disseisin importing an ouster of the rightful tenant from the possession, and an usurpation of the freehold tenure. And therefore, no question could arise whether, considering the devisee of the reversion as a disseisee, a fine sur cognizance de droit come coe, levied by her before entry to a stranger, without any declaration of uses, would bar her right of entry by estoppel and fortify the estate of the disseisor; or whether it would simply enure to her own use, or be al-

- together inoperative. *William, d. Hughes and Wife v. Thomas*, H. 50 G. 3. 390
- 2 A forfeiture by tenant for years in levying a fine, not having been taken advantage of by the entry of the then reversioner to avoid the lease, cannot be taken advantage of after the reversion has been conveyed away to recover the estate in ejectment from the tenant, upon the several demises of the grantor and grantee of such reversion. *Fenn, on the several demises of Matthews and Others, v. Smart*, T. 50 G. 3. 530

FOREIGN JUDGMENT.

Evidence of an account stated, whereby the defendant admitted a certain balance due to the plaintiff, is not done away, but confirmed in support of an assumption, by evidence of a foreign Judgment recovered by the plaintiff for the same sum, with a stay of execution for six months to enable the defendant to prove a counter demand, if he had any: and the plaintiff not having declared till after that period, it was held no objection that the writ was sued out and the defendant arrested before. *Hall v. Odber*, E. 49 G. 3. 69

FORFEITURE.

A forfeiture by tenant for years in levying a fine, not having been taken advantage of by the entry of the then reversioner to avoid the lease, cannot be taken advantage of, after the reversion has been conveyed away, to recover the estate in ejectment from the tenant, upon the several demises of the grantor and grantee of such reversion. *Fenn on the several demises of Matthews and Others v. Smart*, T. 50 G. 3. 530

FRAUDS, STATUTE OF,

See GOODWILL.

FRAUDS, statute of, 29 Car. 2. c. 3.

- 1 If it appear to have been the understanding of the parties to a contract, that it was not to be completed within a year, though it might be and was in fact in part performed within that time, it is within the 4th clause of the statute of frauds; and if not in writing signed by the party to be charged, &c. it cannot be enforced against him. And his signature in a book intitled "*Shakespeare subscribers*, their signatures," not referring to a printed prospectus which contained the terms of the contract, and which was delivered at the time to the subscribers to the *Boydell Shakespeare*, cannot be connected together, so as to take the case out of the statute, as such connexion could only be established by parol evidence. *Boydell v. Drummmond*, E. 49 G. 3. 80
- 2 A contract by the owner of a close cropped with potatoes, made on the 21st of November, to sell to the defendant the potatoes at so much a sack; the defendant,

to get them out of the ground immediately; is not a contract for any interest in land within the 4th section of the statute of frauds; but the same as if the potatoes, which had done growing and were to be taken up immediately, had been sold in a warehouse, from whence they were to be removed by the defendant. *Parker v. Staniland*, T. 49 G. 3. 178

FREIGHT,

See CHARTER-PARTY.

- 1 Freighters chartered a foreign ship to take a cargo from *London* to *St. Petersburg*, and to load a cargo there and immediately return to *London*, paying so much freight per ton: and it was covenanted that if political or other circumstances should prevent the shipping a return cargo, or discharging the outward cargo, the freighters might detain the ship at *St. P.* for 40 running days; and if that time elapsed without the outward cargo being delivered, and consequently without the return cargo being put on board, the master should be at liberty to return to *London*, and the freighters should pay him 2500*l.* immediately upon the arrival of the ship at *London*. The freighters then procured a policy of insurance, whereby the underwriters agreed to pay a total loss, in case the ship was not allowed by the Russian Government to load a cargo at *St. P.* on the chartered voyage. In fact the Russian Government, when the ship arrived at *St. P.*, presuming that the outward cargo was British, refused permission to unload her, and consequently she could not take in a Russian cargo: on which the master, judging for the best, proceeded immediately to *Stockholm*, where, after disposing of the outward cargo to disadvantage, he brought home a Swedish cargo to *London*, and earned freight thereon. Held,
- 1st, That the insurance was legal in the terms of it.
- 2dly, That the refusal of the Russian Government to permit the ship to unload her outward cargo, was in effect, and within the meaning of the contracting parties, a refusal to allow her to load a cargo at *St. P.*; and consequently that a total loss within the policy was incurred.
- 3dly, That the proceeding directly from *St. P.* to *London* was not a condition precedent to the master's right to recover from the freighters the dead freight of 2500*l.*; but that he was entitled to the same, notwithstanding the intermediate voyage to *Stockholm*, under the circumstances; and consequently that the freighters were entitled to recover the same from the underwriters. But,
- 4thly, That as the freighters would be entitled to deduct from the sum payable to the master for dead freight the amount of the freight received by him on the cargo from *Stockholm* to *London*; though such intermediate voyage were not originally contemplated by the contracting

parties, but was undertaken upon the emergency; therefore the undertakers were entitled to make the same deduction from the total loss stipulated for by the policy in the event which had happened; every contract of insurance being in its nature a contract of indemnity. *Puller v. Staniforth*, E. 49 G. 3. 119

FRIENDLY SOCIETIES.

It seems that no society is within the intent and meaning of the friendly society act, 33 G. 3. c. 54, so as to require the justices in sessions to allow and confirm their rules, &c. in the manner therein provided for, if it appear that the general objects of such society are not confined to the charitable relief and maintenance of its old, sick, and infirm members, their widows, and children. *The King v. The Justices of Staffordshire*, E. 50 G. 3. 454

GAME,

See WILDFOWL.

A plea to an action of trespass, for killing the plaintiff's dog, cannot justify the act, by stating that the lord of the manor was possessed of a close, and that the defendant as his gamekeeper killed the dog when running after hares in that close, for the preservation of the hares; such plea not even stating that it was necessary to kill the dog for the preservation of the hares; nor stating that it was the dog of an unqualified person. *Vere v. Lord Camdor*, M. 50 G. 3. 272

GLAMORGAN CANAL COM-

PANY,

See CANAL, 1.

GOODWILL.

A tenant having agreed with his landlady, that if she would accept another for her tenant in his place, (he being restrained from assigning the lease without her consent,) he would pay her 40*l.* out of 100*l.* which he was to receive for the good will if her consent were obtained; and having received the 100*l.* from the new tenant, who was cognizant of this agreement, is liable to the landlady in an action for money had and received for her use; the consideration being executed, and therefore the case being taken out of the statute of frauds, as a contract for an interest in land. *Griffiths v. Young*, T. 50 G. 3. 569

GUARANTEE.

A guaranty by the defendant to the plaintiff "for any goods he hath or may supply W. P. with to the amount of 100*l.*," the plaintiff may declare as upon a continuing or standing guaranty to that extent, for goods which may at any time have been supplied to W. P., until the credit was recalled; although goods to more

than 100*l.* had been before supplied and paid for. *Mason v. Pritchard*, E. 50 G. 3. 429

HIGHWAY.

- 1 One who is injured by an obstruction in a highway, against which he fell, cannot maintain an action on the case for the injury, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction. *Butterfield v. Forrester*, E. 49 G. 3. 43
- 2 To an indictment against the inhabitants of a parish for non-repair of a highway within it, a plea stating that the parish was immemorially divided into seven townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that part of the highway indicted, was within the township of G. B. &c., and that the residue, &c. was within the township of L. B. &c. and that the respective parts ought to be repaired by the inhabitants of the respective townships, &c. is bad; without specifying what part of the highway lay within one township, and what part within the other. *The King v. The Inhabitants of Bridekirk*, T. 49 G. 3. 152
- 3 The owners of land suffering the public to have the free passage of a street in London, though not a thoroughfare, for eight years, without any impediment, such as a bar shut at times to denote the limited dereliction of the soil for the purpose, is sufficient for presuming a general dereliction of it to the public: and six years has been held sufficient. *The Trustees of the Rugby Charity v. Merryweather*, *Middlesex. Sittings, 26th of May 1790*, cor. Lord Kenyon, C. J. 184
- 4 But if the land had been out in lease all the time, or even for much longer, the acquiescence of the tenant would not, it seems, have bound the landlord, without evidence of his knowledge sufficient to presume a grant from him. 184

HIGHWAY-RATE.

An application under the highway act, 13 G. 3. c. 78. s. 47, for a rate to reimburse two inhabitants of a parish on whom a fine for the non-repair of a highway had been levied, after a conviction upon an indictment against the parish for non-repair, ought to be made within a reasonable time after such levy, before any material change of inhabitants: and this Court refused a mandamus to the justices to make such rate after an interval of eight years, though applications had been from time to time made to the magistrates below in the interval, who had declined to make the rate, on the ground that the parish at large had been improperly indicted and convicted; the onus of repair being thrown by immemorial custom on

an interior district; and though so lately as the year before this application the magistrates had ordered an account to be taken of the quantum expended upon the repairs out of the money levied. *The King v. The Justices of Lancashire*, E. 50 G. 3. 494

HUSBAND AND WIFE.

- 1 A woman cannot give evidence of the non-access of her husband to bastardise her issue, though he be dead at the time of her examination as a witness: and therefore an order of sessions, stated by that Court to be founded in part upon credence given to her testimony of that fact, was quashed. *The King v. The Inhabitants of Kea*, E. 49 G. 3. 75
- 2 A wife cannot, as a feme sole, maintain trespass for breaking and entering her house and seizing goods in her possession, by replying, in answer to a plea of coverture, that her husband had four years before deserted her and gone beyond seas, without leaving her any means of support, and that he had not since returned nor been heard of by her; and that during all the time she had lived separate from him, and had traded and contracted as a sole trader and single woman, and as such was lawfully possessed, &c.; the defendant rejoining that the husband was a natural born subject, &c. and had not abjured the realm, or been exiled, or banished, or religated therefrom. *Boggett v. Frier*, T. 49 G. 3. 150

INCLOSURE.

An inclosure made from the waste 12 or 13 years before, and seen by the steward of the same lord from time to time, without objection made, may be presumed by the jury to have been made by licence of the lord: and ejectment cannot be brought against the tenant as a trespasser, without previous notice to throw it up. *Doe, Lessee of Foley v. Wilson*, E. 49 G. 3. 41

INDICTMENT,

See HIGHWAY, 2. NEW TRIAL, 1.

See CONVICTION, 5. FELONY, or TRESPASS, 11. PAWNBROKERS.

Where the water of the public river *Avon* was deteriorated by means of harbour works executed thereon, by which all the inhabitants of *Bristol* deriving their water from the river were aggrieved, the only remedy would have been by indictment, (which was taken away by the *Bristol dock act*, 43 G. 3. c. 140,) and the owners of a brewery whose brewhouse was before supplied with water by pipes laid under low water mark, not claiming the use of the water by way of easement to a particular tenement, were not entitled to compensation for the special injury under the general words of the act, s.

107. *Rez v. The Directors of the Bristol Dock Company*, T. 50 G. 3. 523

INQUISITION,

See ESCHREAT, INQUEST OF.

INSOLVENT DEBTOR.

A defendant in custody under a writ de excommunicato capiendo, for contumacy in not paying a sum for alimony, and also for costs, in the ecclesiastical court, is not entitled to his discharge as an insolvent debtor under the stat. 33 G. 3. c. 5. s. 4, which extends only to persons in custody on such writ for non-payment of costs and expences only. *The King v. Samson*, E. 49 G. 3. 119

INSURANCE,

See ACTION OF THE CASE, 10. LIFE INSURANCE. VOYAGE.

- 1 A policy of insurance from *Bristol* to *Monte Video*, or other port in the river *Plate*, where the ship, after arriving off *Maldonado* at the mouth of the *Plate*, was immediately ordered off by the *British* commander there, (the enemy having before gotten possession of every other port in the river;) will not cover a loss which happened to the goods insured by a peril of the sea after the ship's departure from thence in her way to *Rio Janeiro*, which was the nearest friendly port, and to which she was under a necessity of going for water and repairs. *Parkin v. Tunno*, E. 49 G. 3. 26
- 2 Insurance on provisions "from *London* to *Helsingburg*, the *Sound*, *Copenhagen*, all or either;" which provisions were intended for the supply of the *British* fleet and army then engaged in the expedition against *Copenhagen*, (of which they were then in possession, but were about to evacuate it,) and were consigned to merchants there, and at *Elseneur*: held good, although in consequence of expected hostilities with *Denmark*, an order of the king in council had issued, prohibiting the clearing out of any *British* ships to a *Danish* port, and a clearance was in consequence taken out for *Helsingberg* a *Swedish* and neutral port in the neighbourhood of *Denmark*; the adventure being legal, and not contravening the spirit of the order of council. *Atkinson v. Abbott*, E. 49 G. 3. 77
- 3 A *British* ship insured from *Hull* to *St. Petersburg*, having sailed under convoy to the *Sound*, was afterwards stopped in her course by a king's ship in the *Baltic*, from an apprehension of hostilities, for eleven days; and then proceeded to a point of rendezvous for convoy, where she waited seven days longer, and then sailed under convoy, till the king's officer received intelligence that a hostile embargo was laid on *British* ships at *St. Peters-*

burgh, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to *Hull*; held that this loss of the voyage was not attributable to the arrest or detainment of *Kings*, &c. but immediately to the fear of the hostile embargo in the port of destination, and therefore not within the policy; though if the ship had not been detained in the first instance by the king's officer, she would have arrived in time at *St. Petersburg* to have delivered her cargo before the embargo. *Forster v. Christie*, E. 49 Geo. 3. 107

4 Freighters chartered a foreign ship to take a cargo from *London* to *St. Petersburg*, and to load a cargo there and immediately returned to *London*, paying so much freight per ton; and it was covenanted that if political or other circumstances should prevent the shipping a return cargo, or discharging the outward cargo, the freighters might detain the ship at *St. P.* for 40 running days; and if that time elapsed without the outward cargo being delivered, and consequently without the return cargo being put on board, the master should be at liberty to return to *London*, and the freighter should pay him 2500*l.* immediately upon the arrival of the ship at *London*. The freighters then procured a policy of insurance, whereby the underwriters agreed to pay a total loss in case the ship was not allowed by the Russian government to load a cargo at *St. P.* on the chartered voyage. In fact the Russian Government, when the ship arrived at *St. P.*, presuming that the outward cargo was British, refused permission to unload her, and consequently she could not take in a Russian cargo: on which the master, judging for the best, proceeded immediately to *Stockholm*, where, after disposing of the outward cargo to disadvantage, he brought home a Swedish cargo to *London*, and earned freight thereon. Held,

1st, That the insurance was legal in the terms of it.

2dly, That the refusal of the Russian Government to permit the ship to unload her outward cargo was, in effect, and within the meaning of the contracting parties, a refusal to allow her a cargo at *St. P.*; and consequently that a total loss within the policy was incurred.

3dly, That the proceeding directly from *St. P.* to *London* was not a condition precedent to the master's right to recover from the freighters the dead freight of 2500*l.*; but that he was entitled to the same notwithstanding the intermediate voyage to *Stockholm*, under the circumstances; and consequently that the freighters were entitled to recover the same from the underwriters. But

4thly, That as the freighters would be entitled to deduct from the sum payable to the master for dead freight the amount of the freight received by him on the cargo

from *Stockholm* to *London*; though such intermediate voyage were not originally contemplated by the contracting parties, but was undertaken upon the emergency; therefore the underwriters were entitled to make the same deduction from the total loss stipulated for by the policy in the event which had happened; every contract of insurance being in its nature a contract of indemnity. *Puller v. Staniforth*, E. 49 G. 3. 119

5 A ship from *Stockholm* to *New-York* was by the course of the voyage to touch at *Elsineur* for convoy, and to pay the *Sound dues*: and the owner of sheep on board took in a short stock of provender for them at *Stockholm*, and laid in the rest at *Elsineur* before the *Sound dues* could be paid: held that the voyage not being thereby delayed; though the occurrence was foreseen and intended; the policy was not avoided, but the underwriters were liable for a subsequent loss of the ship by the perils of the sea. *Cormack v. Gladstone*, T. 49 G. 3. 171

6 After a proclamation by the king in council to detain and bring into port all Danish vessels, a hired armed ship of his majesty took and carried into *Lisbon* a Danish vessel, and sold her cargo there towards defraying in part the expence of necessary repairs, but without the authority of a Court of Admiralty: and afterwards took in a cargo on freight for *England*, and sailed on the 3d of *November* from *Lisbon*; on which day hostilities were declared against *Denmark* by another proclamation of the king in council; after which an insurance was made on the ship and freight by order and on account of the captors. Held that a statement in a case reserved, that the insurance was on account of the captors, precluded the consideration whether a count in the declaration could be sustained, averring the interest to be in the crown, and the insurance to be made on account of his majesty; and that the captors had no insurable interest, as they could claim nothing of right, but only exgratia of the crown; the *Dane* having been seized and detained before any declaration of war against *Denmark*, and the captors having no claim to prize under the prize acts. But as there was no fraud in the captors in effecting the policy, nor any thing illegal in the voyage or insurance; held that the assured were entitled to recover back the premium, which had not been paid into court. *Routh v. Thompson*, T. 49 G. 3. 207

7 Where a party insured to a certain amount, in one policy, goods to be thereafter specified; and in the specification afterwards made by him were included some goods, the exportation of which was prohibited under pain of forfeiting the goods themselves and treble their value, and which also induced a forfeiture of the ship; the policy was held to be avoid-

- ed in toto. *Parkin v. Dick*, M. 50 G. 3. 241
- 8 A ship being insured at and from *Surinam*, and all or any of the *West-India* islands, to *London*; a warranty to sail on or before the 1st of *August* is satisfied by the ship sailing from *Surinam*, her last port of loading, before the 1st of *August*, and going into *Tortola* on the 4th to seek convoy; though she did not sail from *Tortola*, which is one of the *West-India* islands, direct for *London*, till afterwards. *Wright v. Shiffner*, M. 50 G. 3. 247
- 9 As to what shall be deemed one entire and distinct voyage, see *LIVERPOOL DOCK DUTY*, 1.
- 10 A prize taken by the navy and army conjointly is insurable, on account of the interest of the captors, under the stat. 45 G. 3. c. 72. s. 3, which grants the prize so taken to the conjoint captors after condemnation, subject only to the apportionment of the crown as to the respective shares. *Stirling Bart. v. Vaughan*, M. 50 G. 3. 294
- 11 The plaintiff having shipped goods on an adventure to *St. Petersburg* on board a vessel chartered for the purpose, made insurance on ship and goods in the common printed form, in blank; and by a written memorandum in the policy "the underwriters agreed to pay a total loss in case the ship *Anna* should not be allowed by the *Russian* government to discharge her cargo at *St. P.*, on which voyage the vessel had then sailed chartered by the plaintiffs." Held, that the insured were entitled to recover upon this policy, upon an allegation that the vessel on her arrival at *St. P.* was not allowed by the *Russian* government to discharge her cargo, but was obliged to return back with it, by which the value of the cargo was reduced below the amount of the invoice price, together with the charges paid thereon, and the premiums of insurance, &c. *Puller v. Glover*, H. 50 G. 3. 382
- 12 An insurance on goods shipped on a certain voyage is not avoided by the ship, while lying in a roadstead at anchor under orders of the convoy, and after a signal to prepare for sailing, and about the time when the signal for weighing was made, taking in other goods on board; by which it was found that no delay was occasioned, and that the ship got under weigh as soon as she could otherwise have done. *Laroche v. Oswin*, H. 50 G. 3. 386
- 13 A licence to export goods to certain places within the influence of the enemy interdicted to *British* commerce, granted to *H. N.* on behalf of himself and other *British* merchants, &c. is sufficient to legalize an insurance on such adventure, if it appear that *H. N.* was the agent employed by the *British* merchants really interested in it to get the licence, though he had no property in the goods himself. *Rawlinson and Others v. Janson*, E. 50 G. 3. 427
- 14 An insurance having been made on goods, at and from a port in *Russia* to *London*, by an agent residing here for a *Russian* subject abroad; which insurance was in fact made after the commencement of hostilities by *Russia* against this country, but before the knowledge of it here, and after the ship had sailed, and been seized and confiscated: held that the policy was void in its inception; but that the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities. *Oom and Others v. Bruce*, E. 50 G. 3. 428
- 15 A ship was insured from *London* to any port or ports in the river *Plate*, until her arrival at her last port of discharge in that river: and the master, intending to discharge her cargo at *Buenos Ayres*, passed *Maldonado*; but hearing that *Buenos Ayres* was then in the hands of the enemy, he went to *Monte Video*, with intent to make a complete discharge, if the market were favourable; but after discharging a part, and not finding the market there so favourable as he expected, he had not abandoned his original intention of going to *Buenos Ayres*, if it should afterwards be practicable: but while he was still discharging part of his cargo at *Monte Video* a loss happened by a peril of the sea: held, that as *Buenos Ayres*, to which other port only in the *Plate* he had contemplated to go, was at the time of his arrival in the *Plate* (and in fact continued up to the time of the loss) in the hands of the enemy, so that he could not legally go there, *Monte Video* must be taken to be the ship's last port of discharge, and that on her arrival there the policy was discharged. *Brown v. Vigne*, E. 50 G. 3. 455
- 16 As the king cannot licence the importation of enemy's property, the produce of a foreign country, into this realm in neutral vessels contrary to the navigation laws, a licence in fact granted for such purpose will not legalize an insurance upon the property so imported. And if a policy be made upon the supposed efficacy of such a licence, for the purpose of covering the importation of *British* as well as enemy's, property in that manner (the former of which is legalized by the stat. 43 G. 3. c. 153. s. 15, 16, and 45 G. 3. c. 34,) the underwriters cannot at any rate recover the premiums for more than the amount of the *British* interest insured; the assured not resisting their claim to that extent. *Shiffner v. Gordon and Another*, E. 50 G. 3. 461
- 17 In another case, where a licence was granted to cover a *British* adventure out and home to and from the *Spanish South American* colonies, upon condition that the licensee should export a certain proportion of *British* manufactures for the voyage out; and it afterwards appeared that the greatest part of the outfit was made up of *Spanish* goods, and only a very small quantity, merely nominal, of *Brit-*

- ish manufactures; this was deemed to be colourable and in fraud of the licence, and therefore did not protect an insurance thereon. *Gordon v. Vaughan*, E. 49 G. 3. B. R. cited, *ib*. 464
- 18 Where an assured, a British merchant, in an action on a policy of insurance on goods bound to an enemy's port in Holland, sought to protect the adventure under the king's licence to trade with the enemy, it was not sufficient to give in evidence at the trial, and to prove his possession in fact before the voyage commenced of, a general licence, dated three months before, licensing six neutral vessels, under certain neutral flags to pass unmolested to or from any port of Holland, from or to any port of this kingdom, with certain goods (including the goods insured;) which licence was directed to R. S. and other British merchants; with a condition annexed, that they should cause the licence to be delivered up to them or their agents when the ship should enter any port of this kingdom; without also giving probable evidence to account for his possession of the licence, and to shew that his user of it was lawful; as by shewing from whom and when he received it, and thereby connecting his own particular adventure with such general licence. *Barlow v. M'Intosh*, E. 50 G. 3. 468
- 19 Goods insured upon a valued policy having been seized, confiscated and sold, by order of the enemy's government, on their own account, but the necessary documents to verify the loss not having arrived here; the underwriters on application to pay their subscriptions agreed to adjust and pay immediately 50l. per cent. on account; but no abandonment was made by the assured; and in the mean time the foreign consignees of the goods, in consequence of remonstrances to the enemy's government, obtained a restoration of half the proceeds of the goods which had been so seized and sold; which half amounted to more than the whole sum at which they were valued in the policy; yet held, that the underwriters were not entitled to recover back the 50l. per cent. they had paid on account; the assured having in fact sustained a loss of half his goods, for which he was no more than indemnified by the 50l. per cent. he had received; and there having been no abandonment to the underwriters; and the superior value of the other half of the proceeds arising from the benefit of the market, in which the underwriters had no concern. *Tunno v. Edwards*, T. 50 G. 3. 551
- 20 Where a ship was chartered to take a cargo of lead from London to St. Petersburg, and there immediately receive a return cargo from the freighter's agent, and bring it to London; with a proviso, that if political circumstances should prevent a return cargo from being loaded, the master, after waiting at St. P. 40 running days, without the outward cargo being unloaded, and consequently without the return cargo being loaded, should be at liberty to return to London or any port in England: and the ship not having been permitted to unload at St. P. by the Russian government, the master, after waiting there the 40 running days, loaded a return cargo for his own benefit upon the outward cargo, both of which he brought home, and earned new freight on the homeward cargo; which freight was adjudged to him by the judgment of the court of C. B. in an action between him and the freighters, over and above the dead freight stipulated to be paid by the charter-party; held that the freighters were entitled to recover the whole of such dead freight from the underwriters upon a policy of insurance, whereby they agreed to pay a loss in case the master should not be allowed by the Russian government to unload the outward cargo at St. P.; the vessel having sailed chartered by the freighters on a voyage from London to St. P. and back: and that the underwriters were not entitled to deduct such returned freight earned by the master on his own account, and adjudged to him by C. B.: they having agreed with the assured pending this action, and pending the action in C. B. that in case the plaintiffs (to whom they had paid a per centage loss) should not be able to obtain so large an allowance as the full return freight paid to the master, by reason of any demurrages or expenses being allowed against the said freight, the difference should be paid by the underwriters by further per centage, whether the same were settled between the plaintiffs and the master of the ship by arbitration, or by legal decision. *Puller and Another v. Halliday*, T. 50 G. 3. 554
- 21 The broker effecting a policy, being the common agent of the assured and of the underwriter, while the premium remains in his hands for the one party, and the policy for the other; and having received notice of events which entitled the assured to a return of premium before action brought by the underwriter to recover the full premium; is authorized to deduct such return, and only to pay over the difference to the underwriter. *Shee v. Clarkson*, T. 50 G. 3. 560
- 22 The rule for estimating any loss of goods insured by an open policy is to take the invoice price at the loading port, together with the premium of insurance and commission, as the basis of the calculation of the value of the goods; and the rule for estimating a partial loss in the like case is (the same as upon a valued policy,) by taking the proportional difference between the selling price of the sound, and that of the damaged part of the goods, at the port of delivery, and applying that proportion, (be it a half, a quarter, an eighth, &c.) with reference to such estimated value at the loading port, to the

damaged portion of the goods. *Usher v. Noble*, T. 50 G. 3. 619

- / 23 An American ship insured from *New York to London*, warranted free from American condemnation, having, for the purpose of eluding her national embargo, slipped away in the night, was by force of the ice, wind and tide, driven on shore, where she sustained partial damage, but was seized the next day, and afterwards with great difficulty and expence got off and finally condemned by the American government for breach of the embargo: held, that as there was ultimately a total loss by a peril excepted out of the policy, the insured could neither recover for a total loss, nor for any previous partial loss arising from the stranding, &c. which in the event became wholly immaterial to the assured: aliter, in case of actual disbursements made for repair of damage occasioned by sea perils before the total loss, which appear to be covered by the general authority given to the assured to "labour and travail, &c. for the defence, "safeguard and recovery of the property "insured." *Livie v. Janson*, T. 50 G. 3. 624

INTEREST.

Though an agreement for the sale of goods, which were afterwards delivered, gave a certain day of payment for the price, interest does not run upon the sum due from that day. *Gordon v. Swan*, E. 50 G. 3. 517

JOINDER IN ACTION,

See ACTION ON THE CASE, 10.

JOINT TENANTS AND TENANTS IN COMMON,

See EJECTMENT, 8.

JOINT TENANTS AND TENANTS IN COMMON.

- 1 Where one devises land to five trustees to sell and apply the money to certain uses, and afterwards makes the same persons his executors; they do not take the land as executors, but as devisees in trust and joint tenants. And at any rate the case is not helped by the stat. 21 H. 8. c. 4. so as to pass the whole estate upon production of a conveyance purporting to be executed by the five, but the execution of which by three only could be proved. But taking it to be a conveyance by the three only, it would sever the joint tenancy and convey 3-5ths of the estate, to be held in common with the two remaining parts. *Denne, Lessee of Bowyer v. Judge*, T. 49 G. 3. 144
- 2 In ejectment brought upon the joint demise of several trustees of a charity, it is not enough for the defendant, who had paid one entire rent to the common clerk of the trustees, to shew that

the trustees were appointed at different times, as evidence that they were tenants in common; for as against their tenant, his payment of the entire rent to the common agent of all is, at all events, sufficient to support the joint demise, without making it necessary for them to shew their title more precisely. *Doe d. Clarke and Others v. Grant*, E. 50 G. 3. 426

JUDGE'S ORDER.

A judge's order, "that upon payment of debt and costs by a certain day all proceedings should be stayed," is only conditional on the defendant. *Fricker v. Eastman*, T. 49 G. 3. 159

JUDGMENT.

See BANKRUPT, 1. FOREIGN JUDGMENT, PLEADING, 8.

The plaintiffs, a *Frenchman* and a *Swiss*, carrying on trade at *Lisbon* under the name of the defendant, a *Portuguese*, shipped a cargo from thence for a port of *France*; which cargo being captured by a *British* cruizer, and libelled for condemnation in the court of Admiralty, as *French* and enemy's property, was ordered to be restored to the defendant, on his putting in and establishing, with the plaintiff's privity and consent, a claim to it as his own property: held that the plaintiffs were, by thus colluding with defendant to withdraw from the Admiralty the decision of the true question by establishing a false fact, estopped from maintaining an action for money had and received against the defendant for the proceeds, by shewing the true fact, that the property was their own, and that the defendant was their agent. *De Melton and Another v. De Mello*, E. 50 G. 3. 433

JURISDICTION,

See CONSUANCE. JUDGMENT.

By the act for making and maintaining the *Glamorganshire* canal, power is given to the canal company to make all such works as they shall think necessary and proper for "effecting, completing, "maintaining, improving, and using the "canal, and other works;" and the company were required to lay before the sessions an account of the sums expended in making and completing the canal, up to the time of its completion; and after that, an annual account of the rates collected, and of the charges and expenses of supporting, maintaining, and using the navigation and its works: and the sessions are authorized, in case it appears to them that the clear profits exceed the percentage limited by the act on the sums mentioned in the first account to have been expended by the company (i. e. in making and completing the canal and its works,) to reduce the canal rates; held that the ses-

sions, even after the period fixed for the completion of the canal, and after the first account delivered of the capital expended in the undertaking, and on which the dividends were to be calculated, were not authorized to reject charges and expenses, stated in the annual account of disbursements, for new works, such as a reservoir and steam engine, which the company deemed necessary, and proved by evidence to have been erected for the support and improvement of the original line of canal, and for the better supplying it with water in dry seasons. Though it seems that if the new works had been shown to be merely colourable, and erected for purposes collateral to the navigation authorized by the act of parliament, such charges would have been rightly rejected by the sessions. *The King v. The Glamorganshire Canal Company*, H. 50 G. 3.

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JURY.

- 1 The son of a jurymen summoned and returned, having answered to his father's name when called on the panel, and served as one of the jury on the trial of a cause, is not of itself a sufficient ground for setting aside the verdict as for a mistrial. *Hill v. Yates*, E. 50 G. 3. 430
- 2 So even upon the trial of a capital felony, it is a mere matter of challenge, and after verdict cannot be taken advantage of by the convict as a mistrial. *Curry's case*, at *Newcastle*, in 1783, cited *ib.* 431

JUSTICE OF PEACE.

- 1 The stat. 43 G. 3. c. 141, does in no instance extend to protect justices of peace in the execution of their office against actions for acts of trespass or imprisonment, unless done on account of some conviction made by them of the plaintiffs in such actions by virtue of any statute, &c. *Massey v. Johnson*, H. 50 G. 3. 357
- 2 But whether certain proceedings alleged by the plaintiff to have been set on foot against him by the defendant, a justice of the peace, ex mero motu, without any information laid on oath before him, (though falsely alleged to be on the information on oath of J. S.) on which the plaintiff was taken and imprisoned, were a conviction within the meaning of the act; so that the plaintiff was thereby confined to seek redress by an action on the case framed as the act directs; the court would not inquire of on affidavit, but sent the case to a new trial to have the fact of such conviction ascertained. And it appearing on a second trial, that an information on the oath of T. O. on a charge of vagrancy against the plaintiff, was laid before the magistrate on a certain day, when the plaintiff was examined and heard upon that charge, and that the magistrate then made out a warrant of commitment until the next sessions; in which warrant it was wrong-

ly stated that the plaintiff had been charged on the oath of T. S., (who negatived having made any such oath;) but which allegation it was held might be rejected as surplussage; and afterwards drew up a conviction dated on the same day, but not exhibited till a month afterwards at the sessions: held that this was sufficient evidence of a conviction connected with the imprisonment, however informally such conviction, or warrant of commitment operating as a conviction, were drawn up; and, therefore, that at all events the magistrate was protected against this action of trespass. *Massey v. Johnson*, H. 50 G. 3. 357

- 3 The magistrate is liable to answer in an action for such part of an imprisonment suffered under his warrant as was within six calendar months before the action commenced against him. *ib.*

KING'S WAITERS IN THE PORT OF LONDON.

See OFFICE, 1.

LANDLORD AND TENANT.

See EJECTMENT, 8, 9. FINE, 3; or FORFEITURE, 1. LEASE. POWER.

See DISTRESS, 1. WASTE, 1.

- 1 An undertenant, whose goods were distrained and sold by the original landlord for rent due from his immediate tenant, cannot maintain an action for money paid to the use of the latter; for immediately on the sale under the distress, the money paid by the purchaser vested in the landlord in satisfaction of the rent, and never was the money of the undertenant. *Moore v. Pyrke*, E. 49. G. 3. 40
- 2 An inclosure made by a copyholder from the lord's waste, 12 or 13 years before, and seen by the steward of the same lord from time to time, without objection made, may be presumed by the jury to have been made by licence of the lord; and if presumed, ejectment does not lie against the tenant as a trespasser, without previous notice to throw it up. *Doe, Lessee of Foley v. Wilson*, E. 49 G. 3. 41
- 3 One being in possession of premises as tenant from year to year under an agreement for a lease of 14 years, and the rent being in arrear, enters into an indenture with his landlords, whereby, reciting such tenancy and arrears of rent accrued, and that he had agreed to quit and to deliver up the premises to them, and that a valuation should be made of his effects on the premises by two indifferent persons, to be chosen, &c. and that the same should in the mean time be assigned and delivered up to a trustee for the landlords; the deed assigned his effects on the premises to such trustee, in trust to have the valuation made, and out of the amount to retain the arrears of rent, and pay the residue to the tenant; held that the tenant not having in

fact quitted the possession, nor any valuation having been made of his effects; such agreement to quit, &c. being conditional, and the condition not performed, nor the agreement in any manner acted upon, did not operate as a surrender of the tenant's legal term from year to year, and, consequently, that the right of the landlords to distrain for the arrears of rent continued after six months from the making of the indenture. *Coupland and Another, Assignees of Leedham a Bankrupt v. Maynard*, H. 50 G. 3. 387

- 4 A tenant having agreed with his landlady, that if she would accept another for her tenant in his place, (he being restrained from assigning the lease without her consent,) he would pay her 40*l.* out of 100*l.* which he was to receive for the good-will if her consent were obtained; and having received the 100*l.* from the new tenant, who was cognizant of this agreement, is liable to the landlady in an action for money had and received for her use; the consideration being executed, and therefore the case being taken out of the statute of frauds, as a contract for an interest in land. *Griffith v. Young*, T. 50 G. 3. 562

LATH, INHABITANTS OF.

See SMUGGLING.

LEASE.

See POWER, 3, 4. DEVISE, 22.

- 1 A lease of lands by deed, since the new stile, to hold from the feast of *St. Michael*, must be taken to mean from *New Michaelmas*, and cannot be shewn by extrinsic evidence to refer to a holding from *Old Michaelmas*: and a notice to quit at *Old Michaelmas*, though given half a year before *New Michaelmas*, is bad. *Doe, Lessee of Spicer v. Lea*, T. 49 G. 3. 156
- 2 An instrument containing words of present demise will operate as a lease, if such appear to be the intention of the parties, though it contain a clause for a future lease or leases; as where the one thereby agrees to let and the other agrees to take land for 61 years at a certain rent for building, and the tenant agreed to lay out 2000*l.* within four years in building five or more houses; and when five houses were covered in, the landlord agreed to grant a lease or leases; (which might be for the more convenient underletting or assignment of the lease or leases:) but this agreement was to be considered binding till one fully prepared could be produced. *Poole v. Bentley*, H. 50 G. 3. 402
- 3 A proviso in a lease for 21 years, that if either of the parties shall be desirous to determine it in 7 or 14 years, it shall be lawful for either of them, his executors or administrators, so to do, upon 11 months' notice to the other of them, his heirs,

executors, or administrators, extends, by reasonable intendment, to the devisees of the lessor, who was entitled to the rent and reversion. *Roe d. Bamford v. Hayley*, T. 50 G. 3. 539

LICENCE, evidence of, see TRESPASS, 7.

LICENCE TO TRADE WITH ENEMY.

See INSURANCE, 13, 16, 17, 18.

LIFE INSURANCE.

Where one, as a member of a life insurance society for the benefit of widows and female relations, entered into a policy of assurance with the society for a certain annuity to his widow after his death, in consideration of a quarterly premium to be paid to the society during his life; and the society covenanted to him and his executors, &c. that if he should pay to their clerk the quarterly premiums, on the quarter-days, during his life, and if he should also pay his proportion of contributions which the members of the society should, during his life, be called to make, in order to supply any deficiencies in their funds; then, on due proof of his death, the society engaged to pay the annuity to his widow; and by the rules of the society, if any member neglected to pay up the quarterly premiums for 15 days after they were due, the policy was declared to be void, unless the member (continuing in as good health as when the policy expired,) paid up the arrears within six months, and 5*s.* per month extra: held that a member insuring, having died, leaving a quarterly payment over due at the time of his death, the policy expired: and that a tender of the sum by the member's executor, though made within 15 days after it became due, did not satisfy the requisition of the policy and the rules of the society, which required such payment to be made by the member in his lifetime, continuing in as good health as when the policy expired. *Want and Another, Executors, &c. v. Blunt*, H. 50 G. 3. 410

LIGHTHOUSE.

See POOR'S RATE, 2, 3.

LIGHTS.

Where lights had been put out and enjoyed without interruption for above 20 years, during the occupation of the opposite premises by a tenant: that will not conclude the landlord of such opposite premises, without evidence of his knowledge of the fact; which is the foundation of presuming a grant against him; and consequently will not conclude a succeeding tenant, who was in possession under such landlord, from building up against such encroaching lights. *Daniel v. North*, T. 49 G. 3. 182

LIMITATION, STATUTES OF.

A possession of crown land commencing at least 55 years ago by encroachment on the crown, in the time of the lessor of the plaintiff's father, maintained by the father till his death 19 years ago, and afterwards continued for two years by his widow, when the defendant obtained the possession would be sufficient evidence for the jury to presume a grant from the crown to the lessor's father, if the crown were capable of making such a grant, in order to support a demise in ejectment from the eldest son and heir of such first possessor, against the defendant, who had no apparent title, and whose possession was not defended by the crown, nor found to be by license from it.

But it appearing upon a second trial, that by the stat. 20 Car. 2. c. 3. all future grants of land by the crown in the forest of *Dean*, within which the land in question lay, were avoided, and consequently no presumption could be made of a valid grant; the lessor of the plaintiff, who can only recover in ejectment by the strength of his own title, was held not entitled to recover even against a stranger, whose possession, adverse to him, was not defended by the crown. And this, notwithstanding a part of the premises was first held by the lessor's father 60 years ago; and by the stat. 9 G. 3. c. 16. the suit of the crown is barred after a continuing adverse possession for 60 years under the original trespasser; for from the death of the father 19 years ago the possession was adverse to his heir, the lessor of plaintiff, or at least the defendant's possession for the last 17 years was adverse; and the act of Geo. 3. does not give a title to the first wrongful possessor and those claiming under him, but only bars the remedy of the crown against them after 60 years continuing adverse possession by them. And as it does not repeal the stat. 20 Car. 2. c. 3. no presumption of a grant to legalize the possession of the lessor's father for the first 41 years, on which alone the lessor's claim could be founded, can be made against that statute. And the jury, it seems, may presume that the possession of the lessor's father for the first 41 years, and that of the defendant (adverse to the heir) for the last 17 years, were both legally holden by the licence of the crown. *Goodtitle, Lessee of Parker, v. Baldwin*, M. 50 G. 3. 234

LIVERPOOL.

Under the *Liverpool* dock acts of 8 Ann and 2 Geo. 3., tonnage duties are payable to the dock company on all vessels sailing *with cargoes outwards or inwards*; which rate varies according to the several descriptions of voyages in the acts, one of which is to and from *America*, generally: so as no ship shall be liable

to pay more than once *for the same voyage out and home*; held that a voyage out from *Liverpool* with a cargo to *Hali-fax* in *North America*, where the ship delivered it, and took in another cargo there for *Demarara* in *South America*, and after delivering that, returned to *Liverpool* with a cargo from *Demarara*, was all the same *voyage out and home*, within the meaning of the act, and chargeable only with one tonnage rate for the use of the docks. *Gildart v. Gladstone*, in *Error*, T. 50 G. 3. 528

LIVERPOOL DOCK DUTY.

By the *Liverpool* dock acts of 8 Ann. 2 Geo. 3. certain tonnage duties are payable to the dock company on all vessels sailing *with cargoes outwards or inwards*, so as no vessel shall be liable to pay more than once *for the same voyage out and home*. This is one entire duty imposed upon one entire voyage out and home, if there be either an outward or an inward cargo in such voyage, but without making any advance if there should be both. Thus, a *Liverpool* ship carrying a cargo out to the *West Indies*, and returning with another cargo to *Liverpool*, is only liable to pay one duty, namely, the duty outwards; and a foreign ship bringing a cargo to *Liverpool*, and carrying another cargo out is only liable to pay the duty inwards. But where a ship was built in another port, on account of the owner residing at *Liverpool* where she was registered, and sailed to the *West Indies*, without first coming to *Liverpool*, but brought her return cargo there, as to her home; this was held to be one entire and distinct voyage within the meaning of the acts, for which the duty inward was payable, and did not privilege the ship from payment of the duty again when next she sailed with another cargo upon her outward voyage to the *West Indies*, though in fact she had only used the dock inwards on her first voyage; for the privilege of using the dock with an outward and inward cargo, upon one payment of duty is confined to the same voyage out and home. *Gildart v. Gladstone*, in *Error*, M. 50 G. 319

LONDON DOCK COMPANY.

See COMPENSATION, 2. MONOPOLY.

MANDAMUS.

See CORONER, 1.

COMPENSATION.

- 1 A mandamus for a highway rate to reimburse inhabitants on whom a fine for non-repair had been levied after indictment, must be made in reasonable time. *Vide* HIGHWAY-RATE.
- 2 A rate to reimburse churchwardens such sums as they had expended, or might thereafter expend, on the parish church,

would be bad on the face of it, as in part *retrospective*; and therefore the court would not grant a mandamus to the chapelwardens of a township within the parish to make such a rate for raising their accustomed proportion of the whole; and their refusal to make such a rate, when demanded, applying as well to the form as to the substance of the demand, the court would not grant the mandamus to raise the money in the common form of such a rate *prospectively*, out of which the churchwardens might repay themselves. *The King v. The Chapelwardens of Haworth, in Bradford*, T. 50 G. 3. 589

3 For other instances, see particular heads.

MANOR.

See CUSTOM.

MARRIAGE.

All marriages, whether of legitimate or illegitimate children, are within the general provisions of the marriage act 26 G. 2. c. 33, which requires all marriages to be by banns or licence: and, by three judges, a marriage of an illegitimate minor had by licence with the consent of her mother is void by the 11th section; the words father and mother in that section meaning legitimate parents by one judge, it is *casus omissus* in the act, and the marriage good. *Priestly v. Hughes*, E. 49 G. 3. 17

MASTER AND APPRENTICE.

See APPRENTICE.

MASTER AND SERVANT.

Damages, ultra the mere loss of service, having been given against the defeadant, for debauching and getting with child the adopted daughter and servant of the plaintiff, by which he lost her service, the Court refused to set aside the inquisition. *Irwin v. Dearman*, E. 49 G. 3. 27

MISDEMEANOR.

A security for the fair expences of the prosecution, agreed to be given, at the recommendation of the Court of Quarter Sessions, by a defendant who stood convicted before them of a misdemeanor in ill-treating his parish apprentice, for which the parish officers had been bound over by recognizance to prosecute him under the stat. 32 G. 3. c. 57; and the giving of which security was considered by the Court in abatement of the period of imprisonment to which he would otherwise have been sentenced; is legal. *Beeley v. Wingfield*, E. 49 G. 3. 37

MIS-TRIAL.

See NEW TRIAL.

MITTIMUS.

See PRACTICE, 14.

MODUS.

Prohibition denied to the spiritual court upon its rejection of a modus set up there of 1d. for every turkey laying eggs, or of every tenth egg, &c. in lieu of the tithe of turkies, at the option of the vicar; such modus not ascertaining any certain time which the money payment in lieu of the eggs, was to be made, in case the option were made to take it in money. *Roberts v. Williams*, H. 50 G. 3. 342

MONOPOLY.

See CONDITION IMPLIED.

Where private property, by the consent of the owner, is invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest or privilege conferred for their benefit. Therefore where the *London Dock Company*, having built warehouses in which wines were deposited upon payment of such a rent as they and the owners agreed upon, afterwards accepted a certificate from the board of treasury under the general warehousing act of the 43 G. 3. c. 132, whereby it became lawful for the importer to lodge and secure the wines there, without paying the duties for them in the first instance; and it did not appear that there was any other place in the port of *London* where the importers had a right to bond their wines: though if the exclusive privilege had been extended to a few others, it did not appear that it would have varied the case; held that such a monopoly and public interest attaching upon their property, they were bound by law to receive the goods into their warehouses for a reasonable hire and reward. But whether, having accepted such certificate, they could afterwards repudiate it at pleasure, qu. *Allnutt and Another v. Inglis, Treasurer of the London Dock Company*, T. 50 G. 3. 569

MUSIC.

See COPYRIGHT.

NEWSPAPERS.

See EVIDENCE 1.

NEW STILE.

A lease of lands by deed, since the new stile, to hold from the feast of *St. Michael*, must be taken to mean from *New Michaelmas*, and cannot be shewn by extrinsic evidence to refer to a holding from *Old Michaelmas*. *Doe, Lessee of Spicer, v. Lea*, T. 49 G. 3. 156

NEW TRIAL.

1 All the defendants convicted upon an indictment for a conspiracy must be present in court when a motion for a new trial is

- made on behalf of any of them. *The King v. Teal and Others*, T. 49 G. 3. 153
- 2 Where a witness on such trial admitted herself to have been connected with different men, and the judge thought it immaterial to hear witnesses tendered by the defendant to shew her connexion with other men, as leading to the same conclusion, as to her character of being a common woman: the Court being satisfied that this could have had no influence on the verdict, refused a new trial on that account. *ib.*
- 3 The son of a juryman summoned and returned, having answered to his father's name when called on the panel, and served as one of the jury on the trial of a cause, is not of itself a sufficient ground for setting aside the verdict, as for a mistrial. *Hill v. Yates*, E. 50 G. 3. 430
- 4 Not even in the case of a trial for a capital felony; for it is only matter of challenge, and cannot be taken advantage of by the party convict as a mistrial. *Curry's case at Newcastle*, in 1783, cited *ib.* 431

NON EST FACTUM—Evidence thereon.
See COVENANT, 2.

NOTICE TO QUIT.
See TITHES, 2.

- A proviso in a lease for 21 years, that if either of the parties shall be desirous to determine it in 7 or 14 years, it shall be lawful for either of them, his *executors or administrators*, so to do, upon 12 months' notice to either of them, his *heirs, executors, or administrators*, extends, by reasonable intendment, to the *devisee* of the lessor, who was entitled to the rent and reversion, *Roe d. Bamford v. Hayley*, T. 50 G. 3. 539

NUSANCE.
See ACTION ON THE CASE, 2.
3 HIGHWAY.

OCCUPATION.
See POOR'S RATE, 3.

OFFICE AND OFFICER.
See ESCHER, INQUEST, 1.

- 1 The several king's waiters in the port of London hold separate offices by different patents; and though the fees are in the first instance paid by the merchant in one entire sum to a common receiver for all; yet the aliquot shares of each are separate, and each is entitled to call for his share when in fact the sum so received is capable of being divided. These shares are now fixed by the statute 38 Geo. 3. c. 86, at 19, and as the patentees die, the emoluments of each office are to be carried to a superannuation fund, for the benefit of aged and disabled officers of the customs, and are not to be applied to the benefit of the surviving patent king's waiters, which before that act had been

- practiced. *Hudson and Others v. Mucklow*, E. 50 G. 3. 451
2. *St. Albans*, having first received a recorder by a charter of Charles 1., a subsequent charter of Charles 2., after nominating J. S. to be the first and modern recorder under that charter declared that it should be lawful *pro predicto J. S. moderno recordatore* to nominate a sufficient person *fore et esse deputatum suum in officio recordatoris: et quod hujusmodi deputatus sic factus, &c. habeat et habebit as ample power in the absence of the recorder aforesaid, as the recorder for the time being*, by virtue of those or any former letters patent *habet aut habere et exercere possit et debet*. Held that this did not extend the power of appointing a deputy to the successors of J. S. in the office of recorder; and that this, which was the plain meaning of the clause, was confirmed by another clause, "*quod recordator pro tempore existens in perpetuum sit et erit justiciarius pacis*"; and by another clause, whereby power is given to T. Richards the town clerk, *et cuilibet communi clerico successori*, to appoint a deputy with the approbation of the mayor and aldermen: and also by the fact that no deputy had been appointed by any succeeding recorder after the first named, until a recent instance before the present appointment: though this however was attempted to be accounted for by shewing a by-law (admitted, however, to be had,) passed not long after the charter of Charles 2., by which the recorder's appointment of a deputy was subjected to the approbation of the mayor and aldermen. *The King v. the Mayor of St. Albans*, T. 50 G. 3. 583

OFFICERS.
See SHERIFF, 1.

ORDER OF COUNCIL.
See INSURANCE, 2.

ORDER OF REMOVAL.
See POOR-REMOVAL.

- ORDER OF JUSTICES.
The parish, in whose favour an order of removal is made, may by consent abandon it without waiting to appeal to the sessions, and having it quashed there. And after such order cancelled by the removing magistrates, with the consent of both parishes before the time of appeal, another order made by them, removing the pauper to a different parish, was held good. *The King v. The Inhabitants of Diddlebury*, E. 50 G. 3. 491

ORDER OF FILIATION.
See APPEAL, 1.

- OUTLAWRY.
1 Upon a writ of error, prosecuted by the

party in person to reverse an outlawry in a civil action, for a common law error, the recognizance of bail is to be taken in the common alternative form, to pay the condemnation money, or render the principal, and not absolutely to pay the condemnation money, as in case of reversals of outlawry upon the stat. 31 Eliz. c. 3, for want of proclamations, or upon the stat. 4 & 5 W. M. 3. 18. s. 3, on appearance by attorney and by motion. *Havelock v. Geddes*, T. 50 G. 3. 611

2 Error assigned that the party was beyond sea at the time of the exigent promulgated is sufficient, though he was not out of the realm during the whole process of outlawry. *Servold v. Hampsey*, M. 16 G. 2. B. R. cited *ib.* 612

3 On reversal of the outlawry on writ of error for such error assigned in a case where special bail was required in the original action, the court will direct the recognizance of bail in answer to the new action to be taken in the alternative, to pay the condemnation money, or rendered the principal, and not absolutely to pay the condemnation money. *ib.*

OUTSTANDING TERM.

See TERM OUTSTANDING.

OXFORD.

Claim of conusance made by the vice-chancellor of the university, in the vacancy of the office of chancellor by death, on behalf of the university, allowed in a plea of trespass. *Williams v. Brickenden*, M. 50 G. 3. 259

PANEL.

See JURY.

PARENTS,

See MARRIAGE, 1.

PARISHIONER.

See EVIDENCE, 13.

PARLIAMENT.

Where an election committee had under the stat. 28 G. 3. c. 52, reported to the House of Commons that two several petitions against the return of members to serve in parliament for *East Grimstead* were frivolous and vexatious; whereupon the then speaker, on application of the parties grieved, had referred the costs to be taxed on both petitions jointly, and had first granted a certificate of the amount of such joint taxation, and afterwards another amended certificate, referring to the former, and apportioning how much of the costs were incurred in opposing each petition separately, and how much jointly; held that both these certificates being invalid, by reason that the act only authorizes the costs to be taxed separately on each distinct petition, a new and valid

certificate, ascertaining the separate costs incurred on each petition might be granted by the speaker of a new parliament; the act mentioning the speaker generally, *Starchey, Bart. v. Turley*, E. 49 G. 3. 102

PARTNERS.

1 A. being partner with B. in one mercantile house, and with C. in another; the house of A. and B. indorse a bill of exchange to the house of A. and C. after which B., acting for the house of A. and B., receives securities to a large amount from the drawer of the bill, upon an agreement by B., that the bill should be taken up and liquidated by B.'s house, and if not paid by the acceptors when due, should be returned to the drawer: Held that the securities being paid and the money received by B. in satisfaction of the bill, A. was bound by this act of his partner B., whether in fact known to him or not at the time, not only in respect of his partnership interest in the house of A. and B., but also individually in other respects; and therefore that he could not, in conjunction with C., his partner in the other house, maintain an action as indorsees and holders of the bill against the acceptors, after such satisfaction received through the medium of and by agreement with B. in discharge of the same. *Jacaud and Another v. French and Others*, E. 50 G. 3. 471

2 A. and B., general partners in trade being indebted to C. for advances paid by him on the joint account of the three in the purchase of tobacco, which had been sent out on a special joint adventure to Spain; with a view to liquidate that balance, C. agreed with A. and B. to join with them in another adventure to Lisbon, of which he was to have one moiety; and it was agreed that A. and B. should purchase goods for the adventure, to be shipped on board a certain vessel and pay for them and the returns of such adventure were to be made to C., to go in liquidation of his demand on them; but C. was to bear his proportion of the loss, if any, and also to receive his share of the profit, if any, after reimbursing himself out of the returns the amount of his advances previously made to A. and B.: held that this agreement constituted a partnership between the three in the adventure at and from the time of the purchase of the goods for the adventure by A. and B.; although C. did not go with them to make the purchase, nor authorize them to purchase on the joint account, but A. and B. alone in fact made the purchase; and although C. also purchased in his own name, and paid for goods to be sent out at the same time, in which B. was to share the profit or loss, and these goods were consigned for sales and returns to the same person who went out as supercargo on the joint account of the three

Gouthwaite v. Duckworth and Others, E. 50
G. 3. 514

PATENT.

- 1 One having obtained a patent for a certain manufacturing machine, of which he duly inrolled a specification, afterwards obtained another patent for certain improvements in the said machine, in which the grant of the former patent was recited; and the latter patent contained the usual condition, that it should be void, if the patentee did not within one month inroll a specification particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed: held that a specification containing a full description of the whole machine so improved, but not distinguishing the new improved parts from the old parts, or referring to the former specification, otherwise than as the second patent recited the first, was a performance of that condition. *Harman v. Playne*, E. 49 G. 3. 62
- 2 Where a patent was granted for a new invented lace called *French or ground lace*, and the specification went generally to the mixing silk and cotton thread upon the same frame; proof that silk and cotton had been before mixed upon the same frame for lace, though not in the particular mode practised by the patentee, was held to avoid the patent. *Rez v. Blue*, *Sittings at Westminster after Michaelmas 1785*, cor. *Buller J.* cited.

PAWNBROKERS.

The pawnbrokers' act 39 & 40 G. 3. c. 90 having enacted that they shall and may take, by way of profit, a certain rate of interest on pledges, and no more, the taking of more is an offence within the act, cognizable by a justice of peace on summary information within the 26th section; which, (after providing specific penalties for specific offences) says that "for every other offence against this act, where no forfeiture or penalty is provided or imposed on any particular or specific offence against any part of this act," the pawnbroker offending against this act shall forfeit not less than 40s. nor more than 10l. in the discretion of the justice. *The King v. Beard*, T. 50 G. 3. 635

PAYMENT.

Goods sold by a broker for a principal not named, upon the terms, as specified in the usual *bought and sold* notes, (delivered over to the respective parties by the broker) of "payment in one month, money," may be paid for by the buyer to the broker within the month; and that, by a bill of exchange accepted by the buyer and discounted by him within the month, though having to run a longer time before it was due. But where the buyer was also indebted to the same broker for another

parcel of goods, the property of a different person, and he made a payment to the broker, generally, which was larger than the amount of either demand, but less than the two together; and afterwards the broker stopped payment; such payment to the broker ought to be equitably apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer. *Favenc v. Bennett*, E. 49 G. 3. 32

PEDIGREE.

See EVIDENCE, 11.

PENAL ACTION.

See SHERIFF, 1.

PENALTY,

See SMOULING, 1, 2.

PERMIT.

See ASSUMPSIT, 3.

PLEADING.

See CONSUANCE. SHERIFF, 1.

TRESPASS, per tot.

See BANKRUPT, 7.

- 1 Where the plaintiff had lands abutting on one side of a public highway, called *Shepherd's Lane*, (which is prima facie evidence that the nearest half of the lane was his soil and freehold,) he may declare generally for a trespass in his close called *Shepherd's Lane*; and the defendant must plead soil and freehold in another, in order to drive the plaintiff to new assign the trespass complained of in the part of the lane which was his exclusive property. *Stephens v. Whistler*, E. 49 G. 3. 39
- 2 In debt, by bill, the declaration is good, though the sums demanded in the several counts amount altogether to more than the sum at first demanded in the *queritur*; for that is superfluous and may be rejected. *Lord v. Houston*, E. 49 G. 3. 44
- 3 In trespass *quare clausum fregit*, if the defendant plead soil and freehold in another, by whose command he justifies the trespass, such command may be traversed by the plaintiff. *Chambers v. Donaldson*, E. 49 G. 3. 465
- 4 Debt on bond, which was conditioned to perform an award; plea, no award; replication, setting out an award: rejoinder, stating the whole award, (in which were recited the bonds of submission, whereby it appeared that the award was not warranted by the submission;) and then demurring. Held that the rejoinder was not inconsistent with, nor a departure from, the plea. *Fisher v. Pimbley*, E. 49 G. 3. 100
- 5 To an indictment against the inhabitants of a parish for non-repair of a highway within it, a plea stating that the parish was immemorially divided into seven

- townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that *part* of the highway indicted, was within the township of *G. B. &c.*, and that the residue, &c. was within the township of *L. B. &c.* and that the respective parts ought to be repaired by the inhabitants of the respective townships, &c. is bad; without specifying *what part* of the highway lay within one township, and what part within the other. *The King v. The Inhabitants of Bridekirk*, T. 49 G. 3. 152
- 6 A plea to an action against the marshal for the escape of a prisoner in custody for a debt, after stating the return of the prisoner into custody after such escape, before action brought, &c. ought to shew a detention of him by the officer down to the commencement of the action, or a legal discharge from that detention: and therefore, though the plea only stated, that after the return of the prisoner into custody, the defendant did thereupon *then and afterwards keep and detain* the said prisoner in his custody in execution, &c. under and by virtue of the commitment, &c.; and the replication traversed that after the prisoner's return the defendant did *keep and detain* him in custody in execution, &c. in manner and form as stated in the plea; a *detention down to the commencement of the action*, or until a legal discharge from such detention, is virtually implied in the plea and included in the traverse; and therefore the plea is negatived by shewing in evidence, that after the prisoner's return he again escaped and died out of custody. *Chambers v. Jones*, T. 49 G. 3. 197
- 7 To a declaration for several trespasses on the plaintiff's land, on divers days, &c. the plea alleged, that at the said several days, &c. the defendant committed the said several trespasses by licence of the plaintiff: and the latter replied, that the defendant of his own wrong, and *without the cause alleged*, committed the said several trespasses, &c. held that evidence of a licence which covered *some*, but *not all* of the trespasses proved, within the period laid in the declaration, did not sustain the justification upon the issue taken by the replication. *Barnes v. Hunt*, T. 49 G. 3. 218
- 8 Where a plaintiff in scire facias demanded execution for a certain sum recovered by judgment of *B. R.* for damages and costs, with a prout patit per recordum, and also a certain other sum adjudged to him in the Exchequer-chamber for his damages and costs of a writ of error, *without a prout patit*, &c.: held that the demand being divisible, and no objection lying to the sum first demanded, a demurrer to the *whole* declaration was bad, and the plaintiff was entitled to judgment generally, on such demurrer; the objection to the latter sum demanded being merely formal, and not available but on special demurrer. *Powdick v. Lyon*, M. 50 G. 3. 270
- 9 Every deed should be pleaded according to its legal effect; and therefore if the plaintiff declare in covenant, and set forth the particular covenant in its own absolute terms; and there be other parts of the deed, the legal effect of which is to qualify the generality of the part declared on; it seems the defendant may take advantage of the variance on non est factum. *Hewell v. Richards*, M. 50 G. 3. 300
- 10 Where an agreement between an outgoing and an incoming tenant was, that the latter should buy the hay, &c. of the former upon the farm, and that the former should allow to the latter the expenses of repairing the gates and fences of the farm; and that the value of the hay, &c., and of the repairs, should be settled by third persons; held that the balance settled to be due to the outgoing tenant for his hay, &c., after deducting the value of the repairs, might be recovered by him, in a count, upon a general indebitatus assumpsit for goods sold and delivered: having failed upon his count on the special agreement, for want of including in it that part of the agreement which related to the valuation of the repairs. *Leeds v. Burrows*, H. 50 G. 3. 327
- 11 A count in an action on the case, stating that the defendants, being owners of a ship at *Liverpool*, bound on a voyage from thence to *Waterford*, the plaintiff shipped goods on board to be carried upon the said voyage by the defendants and to be delivered at *W.* to the plaintiff's assigns; and thereupon the plaintiff insured the goods at and from *L. to W.*; and then averring that it was the duty of the defendants as such owners to cause the ship to proceed on the voyage from *L. to W. without deviation*; and alleging a breach of such duty, by their causing the ship to deviate from the course of that voyage; after which she was lost, with the goods; and the plaintiff, by reason of such deviation, lost his goods and the benefit of his policy, &c.: cannot be sustained, for want of alleging that the goods were delivered to or received by the defendants for the purpose of carriage, or that they had notice of shipment; from whence a promise or duty, founded upon an agreement to carry the goods, might be inferred: and also for want of an allegation that the defendants undertook to carry the goods directly to *W. from L.*; for though the ship's ultimate destination might be *W.*, yet she might have been first destined to other places on a coasting voyage. *Max v. Roberts*, H. 50 G. 3. 367
- 12 To trespass and false imprisonment, a

- plea of alien enemy is not allowed to be pleaded, together with a special justification inconsistent therewith, and the general issue *Truckenbrodt v. Payne*, H. 50 G. 3. 419
- 13 Pleading of a *reisin in fee simple*, as it is to be understood in the annuity act, vide *ANNUITY*, 1.
- 14 The plea of an attorney to an action sued against him by bill, stating his privilege not to be compelled to answer any bill to be exhibited against him in the custody of the marshal, &c. and concluding that the Court would not take further cognizance of the action aforesaid against him (instead of praying judgment of the bill, and that it might be quashed,) will not be taken as a plea to the jurisdiction, but only as objecting to the Court's taking cognizance of the action against one of its attorneys in that form; and therefore the Court will adjudge the bill to be quashed. *Challand v. Thornley*, T. 50 G. 3. 576
- 15 To an action on a replevin bond, conditioned for the defendant to prosecute his suit below with effect, and alleging a breach in his not prosecuting it according to the tenor and effect of the condition, but therein failing and making default, it is a good defence to plead; that the defendant did appear at the next county court, and there prosecute his suit which he had there commenced against the now plaintiff, and which suit was still depending and undetermined: and such plea is not avoided by replying that the defendant did not prosecute his suit as in the plea mentioned, but wholly abandoned the same, and that the said suit is not still depending; without shewing how it was determined and ceased to depend. *Brackenbury v. Pell*, T. 50 G. 3. 596

PLENE ADMINISTRATIVIT.

On plea of plene administravit, proof of an admission by the executor, that the debt was just and should be paid as soon as he could, is not evidence to charge him with assets. *Hindsley v. Russell*, E. 50 G. 3. 433

POOR'S RATE.

See RATE.

- 1 Commissioners under the *Beverly and Barmstons* drainage act, who purchased land and erected buildings in the parish of *Sculcoates* for the outlet of the drainage, but who received no benefit from such property in *Sculcoates*, but the whole benefit was derived to the owners of lands in other parishes, drained by means of such outlet, are not rateable in *Sculcoates* for such benefit. *The King v. The Churchwardens, &c. of Sculcoates*, H. 50. G. 3. 345
- 2 The tolls of a lighthouse situated in the township of *Tynemouth*, which tolls were collected out of the township in the several ports at which the vessels passing by the coast afterwards arrived, are not rateable, *qua tolla*, in the township. *The King v. The Inhabitants of Tynemouth*, H. 50. G. 3. 348
- 3 And the residence in such lighthouse by one as servant of the owner, at an annual salary, to take care of the light, is the occupation of the master, who alone can be rated in respect of such occupation of the tollhouse. *The King v. The Inhabitants of Tynemouth*, H. 50. G. 3. 348
- 4 An act of parliament having empowered the Duke of *Bridgewater* to erect a lock upon the *Rockdale* canal; and to receive at such lock certain rates or tolls upon goods in vessels navigated from that canal into his own, as a compensation for the profits arising to him from certain wharfs at *Manchester*, which were sacrificed for the public benefit in that navigation; held that a poor's rate on the trustees, occupiers of the "*Rockdale* canal lock, tunnel, dues, or rates;" (which dues or rates are only other names for the lock rated therewith) is good, though the trustees were found not to be inhabitants of the township for which the rate was made. *The King v. Sir A. Mackdonald and Others*, E. 50 G. 3. 474
- 5 Though the sessions find that certain persons in the township were possessed of visible stocks in trade there, and were personally liable to be rated in respect thereof, if by law such property were liable to be rated: yet if they also state that they were not satisfied, from the evidence offered before them, that their was any surplus profit on such stocks, by which they could amend a rate which omitted them; that concludes the question. 58
- 6 The lessee and occupier of an ancient and exclusive ferry, not being an inhabitant resident within the township in which one of the termini of the ferry is situated, is not liable to be rated there for any share of the tolls of such ferry: for supposing a ferry to be real property, it is not such real property as is mentioned in the statute of 43 Eliz. c. 2, the occupancy of which subjects the party to be rated to the relief of the poor of the place. And all the cases where parties have been held rateable in respect of the occupancy or receipt of tolls (apart from the question of inhabitancy) have been where they at the same time occupied real visible property connected with such tolls in the place where they were rated. *The King v. Nicholson*, E. 50. G. 3. 478
- 7 The owner of a ferry residing in a different parish, but taking the profits of the ferry on the spot by his servants and agents, is not rateable for such tolls in the parish where they were so collected, and where one of the termini of the ferry was situated, and on which shore the ferry boats were secured by means of a post in the ground; the soil itself at

- the landing places being the king's common highway; and the owner of the ferry having no property in, or exclusive possession of it. *Williams, Executrix, &c. v. Jones*, E. 50 G. 3. 485
- 8 Landlords not resident within the parish, having leased lead mines and other minerals, with liberty to the tenants to dig, &c.; reserving a certain annual rent, and also certain proportions of the ore which should be raised, are not at any rate assessable to the relief of the poor for such certain rent, no ore being raised; whatever the question might be as to the proportion of ore reserved when in fact any should be found. *The King v. The Bishop of Rochester and Others*, E. 50 G. 3. 488
- 9 The lessee of the tolls of a public bridge is not rateable as such, whatever rent he may pay; it not appearing that he was the occupier of any local visible property within the parish, nor that he was an inhabitant resident there, deriving profit there from such tolls beyond the rent paid by him for the same, which was applicable to the public purposes of the bridge. *The King v. Eyre*, E. 50 G. 3. 516
- 10 Where the appellant disputed before the sessions the quantum of the rate, as well as the rateability of the property for which he was assessed, which was tithe rents and compositions under an inclosure act; it is not enough for the parish officers to shew that he was in the receipt of such rents (assuming the property to be rateable), of the probable amount of which, as rated, they gave no evidence. *The King v. Topham*, T. 50 G. 3. 577
- 11 A rate to reimburse churchwardens such sums as they had expended, or might thereafter expend, on the parish church, would be bad on the face of it, as in part retrospective; and therefore the court would not grant a mandamus to the chapelwardens of a township within the parish to make such a rate for raising their accustomed proportion of the whole: and their refusal to make such a rate, when demanded, applying as well to the form as to the substance of the demand, the court would not grant the mandamus to raise the money in the common form of such a rate prospectively, out of which the churchwardens might repay themselves. *The King v. The Chapelwardens of Hamorth, in Bradford, &c.* T. 50 G. 3. 582
- chargeable within the intent of the act, only makes the fact of such pregnancy presumptive or prima facie evidence of her chargeability; which is open to be rebutted by evidence of her substance or the like; shewing that she was not an object of the poor laws, or that she could secure the parish against the contingent charge of maintaining herself and her bastard. *The King v. The Inhabitants of Holm East Waver Quarter, in Holm Cultram*, T. 49 G. 3. 186
- 2 An order of removal, executed and unappealed against, is conclusive as to the settlement of the pauper at the time of such order, even as between third parishes no parties to the former order. *The King v. The Inhabitants of Corsham*, T. 49 G. 3. 190

POOR-REMOVAL, ORDER OF.

The parish, in whose favour an order of removal is made, may by consent abandon it, without waiting to appeal to the sessions and having it quashed there. And after such order cancelled by the removing magistrates, with the consent of both parishes before the time of appeal, another order made by them, removing the pauper to a different parish, was held good. *The King v. The Inhabitants of Diddlebury*, E. 50 G. 3. 491

PORTERAGE.

See WEST INDIA DOCK, 2.

POST HORSE DUTY.

By the post horse duty act of the 44 G. 3. c. 96, schedule B, if the hiring be by the day, and the distance be ascertained; as where the hiring is to go from one certain place to another: the duty is payable by the mile; if the distance be not ascertained, it is then payable by the day; and the post master letting the horses, and not accounting for the duty accordingly in the stamp-office weekly account, is liable to a penalty of 10*l*. *Sergeant v. White*, M. 50 G. 3. 253

POWER.

- 1 One having power to appoint lands by will amongst children, and having other lands, by his will (not referring to the power) gives legacies to his several children; and then devises all the rest, residue and remainder of his lands, &c. and personal estate, after payment of his debts, legacies, and funeral expences, to his eldest son; held that the power was not thereby executed. *Doe, Lessee of Hellings and Wife, v. Bird*, E. 49 G. 3. 58
- 2 One, after devising certain lands to trustees and their heirs, to pay debts in aid of the personal estate, devised the surplus, and all his other lands, &c. to his 1st, 2d, 3d, and other sons, successively, for life; with successive remainders to

POOR-REMOVAL.

- 1 An order of removal, merely adjudging that the person removed was with child and unmarried, without drawing the conclusion that she was chargeable, is bad; as the statute 35 G. 3. c. 101, which first gives the general rule, that no person shall be removed till actually chargeable; and then (s. 6.) says, that an unmarried woman with child shall be deemed to be

- trustees and their heirs, to preserve subsequent estates during the lives of the several tenants for life; with several remainders successively to the first and other sons of the bodies of the testator's several sons in tail male; with like remainders to his daughter *S.* for life, to trustees, &c. and to her first and other sons, successively, in tail male: with a proviso, that each of the testator's sons, as he came into possession, might from time to time grant or appoint all or any part of the lands whereof he should be so seized and possessed to trustees, on trust, by the rents and profits to pay a jointure to any wife, &c. for the term of each such wife's natural life only. There were also powers by deed to charge the lands with portions for daughters and younger children, and to lease for 21 years.
- The eldest son, having married, by deed, reciting the will and power, conveyed certain of the lands to trustees and their heirs, on trust by the rents and profits to raise and pay a jointure to his wife during her natural life only; and charged the lands with portions for younger children, if any: which deed also contained a covenant for quiet enjoyment during the wife's life: held that by such deed the trustees took a fee. *Wykham v. Wykham*, M. 50 G. 3. 221
- 3 Under a power to lease for 21 years reserving the best rent, so as the lease should not contain any clause whereby authority should be given to the lessee to commit waste, or whereby he should be exempted from punishment for committing waste; and so as such lease should contain such other conditions, covenants, and restrictions, as were generally inserted according to the usage of the counties where the premises were: held that a lease was good, though the lessor thereby took the repairs of the mansion house (excepting the glass windows) on himself, and covenanted if he did not repair it within three months after notice, the tenant might, and deduct the charges out of the rent reserved to the lessor; and though the lessor covenanted, in consideration of a large sum to be laid out by the lessee in repair of the premises in the first instance, to renew during his (the lessor's) life, at the request of the lessee, his executors, &c. on the same terms: because the covenant only bound the lessor himself, and if the best rent were not reserved upon such renewal, the lease would be void against the remainder-man. *Doe d. Sir R. Bromley, Bart. v. Bettison*, E. 50 G. 3. 465
- 4 The sufficiency of the rent must be governed by the consideration on whom the onus of repair is thrown. *ib.*
- 5 Power to trustees to lease, *See* DEVISE. 4.
- 1 The rule to declare in replevin may be served at any day before the time in the rule is expired; and the plaintiff must declare within four days after such service. *Edwards v. Dunck*, E. 49 G. 3. 97
- 2 If a defendant be served with a writ by a wrong christian name of *W.*, and do not appear to it, the plaintiff cannot file common bail for him in his right name of *E. sued by the name of W.*, nor declare against him *de bene esse* in that form: and the proceedings were set aside for irregularity, after interlocutory judgment signed for want of a plea. *Dring v. Dickenson*, E. 49 G. 3. 116
- 3 On a four-day rule for bail in scire facias to appear and plead, in term, *Sunday*, though an intermediate day, is not to be reckoned. *Wathen v. Beaumont*, E. 49 G. 3. 137
- But this mode of computation does not extend to rules for pleading in actions in general. *Roberts v. Quickenden*, M. 50 G. 3. 137
- The practice appears to be this; in rules to plead in actions in general, a *Sunday*, or a holiday, reckons as a day, except it be the last: but in rules for judgment, and in proceedings in scire facias against bail, a *Sunday*, or a holiday, does not reckon, though it be not the last day.
- 4 Rules for changing the venue to be drawn up on reading the declaration. *Regula Generalis*, T. 49 G. 3. 138
- 5 An attorney, not having delivered any bill to his client before action brought, but having delivered a bill of particulars of his demand under a judge's order after action brought, is entitled to recover items of charge for money paid for his client's use, having no reference to his business of an attorney; although other items in the bill of particulars might be taxable, and within the provision of the stat. 2 G. 2 c. 23, s. 23, requiring a bill to be delivered a month before the action brought. *Monbray, One, &c. v. Fleming*, T. 49 G. 3. 143
- 6 Where a writ of error is allowed before the expiration of the time permitted to the bail to render their principal, the bail are entitled to stay the proceedings against them pending the writ of error, on the terms of undertaking to pay the damages recovered, or to surrender the defendant within four days of the determination of the writ, if determined in favour of the original plaintiff. *Sprang v. Monprieatt*, T. 49 G. 3. 158
- 7 A judge's order, "that upon payment of debt and costs by a certain day all proceedings should be stayed," is only conditional on the defendant. *Fricke v. Eastman*, T. 49 G. 3. 159
- 8 If bail to the sheriff be put in above, and exception taken before an assignment of the bail bond, they are bound to justify, notwithstanding such assignment. *Hill v. Jones*, T. 49 G. 3. 160

- 9 After declaration filed conditionally in a town cause until special bail should be put in and perfected, and notice thereof served, the defendant has only four days for pleading in abatement; and if he put in special bail on the 4th day, which are accepted to on the 5th, and not justified till the 9th, he is too late then to plead in abatement; and the plaintiff having demanded a plea, and none other being pleaded, is entitled to sign judgment as for want of a plea. *Bisss v. Morgan*, T. 49 G. 3. 200
- 10 Affidavit, intitled 'In the King's Bench,' upon which the Attorney General had filed an information ex officio against the defendant, permitted to be read in aggravation, after judgment by default. *The King v. Morgan*, M. 45 G. 3. 221
- 11 The sheriff having been served in proper time with a rule to return the writ of test. si. fa. which expired on the last day of term, is attachable at the rising of the Court on that day if no return be made before. And the rule for the attachment is regular, though he make his return on a subsequent day in vacation, before he was actually served with the rule; and though immediately after such service he tendered the sum levied, deducting his poundage. *The King v. the Sheriff of Surry*, M. 50. G. 3. 263
- 12 As to the time of preferring a claim of co-nusance. Vide CONUSANCE, 1. art 3.
- 13 Upon an appeal to the sessions against an order of filiation, the respondents are to begin, by supporting their order, as in all other cases. *The King v. Knill*, H. 50. G. 3. 349
- 14 It is the practice of the court at *Chester* to grant a special jury, on application, in a cause which is sent to trial there by mittimus out of B. R.: and it seems that the objection, if any, is secured by the party's appearance. *Massy v. Johnson*, H. 50. G. 3. 357
- 15 Serving notice of declaration filed, together with the writ, at the same time, is irregular. *Steward v. Lund*, H. 50. G. 3. 379
- 16 The affidavits made in answer to a rule nisi for an attachment must be entitled on the civil side of the court in the cause out of which the motion arises; but after the rule for the attachment is granted, the affidavits in any matter concerning such attachment are entitled on the crown side. *Whitehead v. Firth*, H. 50. G. 3. 401
- 17 To trespass and false imprisonment, a plea of alien enemy was not allowed to be pleaded, together with a special justification inconsistent therewith, and the general issue. *Truckenbrodt v. Payne*, H. 50. G. 3. 419
- 18 The Court will not try an action upon a wager on an abstract question of law or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest. *Honkin v. Guerss*, E. 50. G. 3. 439
- 19 The stat. 48 G. 3. c. 149. sched. 2. requiring an office copy of the declaration to be written in the usual and accustomed manner, on which the duty of 4d. per sheet is imposed; and it not having been the practice to write such copies on both sides of the stamped sheet of paper: held that an office copy so written and delivered to a prisoner was irregular, and entitled him to be discharged out of custody. *Champneys v. Hamlin*, E. 50. G. 3. 460
- 20 Upon a motion to refer it to the Master to compute principal, interest, and costs, upon a bill of exchange, drawn in Scotland upon and accepted by the defendant in England, the Court will not direct the Master to allow re-exchange. *Napier v. Shneider*, E. 50. G. 3. 518
- 21 Where the defendant was residing in London before and at the commencement of the action, eight days notice of executing a writ of inquiry is sufficient, though the defendant had in the intermediate time permanently removed above 40 miles from London (to Tortola,) if he did not give the plaintiff previous notice of such removal. *Rockfort v. Robertson*, E. 50. G. 3. 522

PREROGATIVE,

See BRIDGES, 1. ESCHEAT, INQUEST OF.

PREROGATIVE—Order of the King in Council as to matters of Trade.

See INSURANCE, 2.

PRESUMPTION OF TITLE, for or against the Crown.

See EVIDENCE, 3. EJECTMENT. 5.—Against others. See LIGHTS, 1.

PRINCIPAL AND AGENT.

See VENDOR AND VENDEE, 2.

See ASSUMPSIT, 11.

PRISONER.

See PRACTICE, 19.

PRIVILEGE FROM ARREST.

See ARREST, 1.

PRIZE,

See ASSUMPSIT, 11.

- 1 One who at the time of a prize taken by a custom house cutter bore the commission of mate, but was acting commander on board, under an order from the commissioners, communicated by letter to the collector of the port to which the cutter belonged, and by him communicated by letter to such mate, is entitled to the commander's share of the prize under the king's warrant of the 26th of November 1803, referring to his former warrant of the 4th of July 1803: which speaks

generally of the share to be given to the commander, officers, and crew, as a reward for their service: and this, though the former commander, whose commission as such, had before been withdrawn and cancelled by order of the commissioners, on some supposed misconduct, was afterwards restored, and a new commission granted to him, bearing the same date as his former commission, which was before the prize taken. And such acting commander was held to be entitled to the full share of commander, without deducting the share of a *deputed mariner*, who at the time of such capture made was on board acting as mate by like authority. *Pill v. Taylor*, T. 49. G. 3. 201

2 After a proclamation by the king in council to detain and bring into port all Danish vessels, a hired armed ship of his majesty took and carried into Lisbon a Danish vessel, and sold her cargo there towards defraying in part the expence of necessary repairs, but without the authority of a Court of Admiralty: and afterwards took in a cargo on freight for England, and sailed on the 3d of November from Lisbon; on which day hostilities were declared against Denmark by another proclamation of the king in council; after which an insurance was made on the ship and freight by order and on account of the captors. Held that a statement in a case reserved, that the insurance was on account of the captors, precluded the consideration whether a count in the declaration could be sustained, averring the interest to be in the crown, and the insurance to be made on account of his majesty; and that the captors had no insurable interest, as they could claim nothing of right, but only ex gratia of the crown; the Dane having been seized and detained before any declaration of war against Denmark, and the captors having no claim to prize under the prize acts. But as there was no fraud in the captors in effecting the policy, nor any thing illegal in the voyage or insurance; held that the assured were entitled to recover back the premium, which had not been paid into court. *Routh v. Thompson*, T. 49 G. 3. 207

1 A prize taken by the navy and army conjointly is insurable, on account of the interest of the captors, under the stat. 45 G. 3. c. 72. s. 3, which grants the prize so taken to the conjoint captors after condemnation, subject only to the apportionment of the crown as to the respective shares. *Stirling, Bart. v. Vaughan*, M. 50 G. 3. 294

PROHIBITION, See MODUS.

PROMISSORY NOTES, See BILLS OF EXCHANGE.

PROMOTIONS,

Mr. Pecknell and Mr. Frere called Serjeants.
E. 49 G. 3. 137

PROPERTY, See DEVISE, 7.

PROPERTY TAX.

A distinct covenant in a lease, whereby the tenant bound himself to pay the property tax, and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by the stat. 46 G. 3. c. 65. s. 115, will not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, &c. generally; for such general words will be understood of such taxes as the tenant might lawfully engage to defray. *Gaskell v. King*, E. 49 G. 3. 89

PUBLIC COMPANIES, how strictly confined to the spirit and letter of their institution, see CANAL COMPANY.

QUEEN ANNE'S BOUNTY.

See AUGMENTED CURACY.

QUO WARRANTO,

See CORPORATION.

RATE—for a Town Corporate.

A high constable may be appointed and a rate in the nature of a county rate levied, for a town corporate having an exclusive commission of the peace, tho' not a county of itself, by virtue of the stat. 13 G. 2. c. 18; though no such officer had been appointed or such rate levied before: the corporation having defrayed the expences out of their own funds. And in an action of trespass for distraining goods in satisfaction of such rate, the Court would not inquire into the necessity of making such a rate, nor as to the application of the corporate funds for the same purpose. *Weatherhead v. Drewry*, E. 49 G. 3. 91

RATE,

See CANAL, 1. COUNTY RATE.

HIGHWAY RATE. POOR'S RATE.

21 Upon an appeal against a rate made under a private act of parliament, the respondent appearing to answer the appeal, and admitting, when called upon by the sessions, that he had made the rate by virtue of a certain act of parliament; a printed copy of which, in the common form, was produced in court by the appellants; and the sessions having thereupon entered into the merits of the appeal, and decided upon them, notwithstanding an objection made by the respondent that the appellants had not given legal evidence of the jurisdiction of the

sessions to receive the appeal, for want of proof of the printed copy having been examined with the rolls of parliament; this court refused to quash their order, which was removed by certiorari. *The King v. Shaw*, T. 50 G. 3. 547

RECEIVER.

It seems that a receiver appointed by the court of Chancery with a general authority to let the lands to tenants from year to year, has also authority to determine such tenancies by a regular notice to quit. 353

RECORD,

See EVIDENCE, 12.

RECORDER,

See OFFICER, 2.

RECOVERY,

See CONDITION, 1. USES AND TRUSTS EXECUTED.

RE-EXCHANGE,

See BILLS OF EXCHANGE, 5.

REMOVAL,

See POOR-REMOVAL.

RENEWAL OF LEASE,

See POWER.

REPAIR,

See POWER, 3. 4.

REPLEVIN,

See PRACTICE, 1.

REPLEVIN BOND.

To an action on a replevin bond, conditioned for the defendant to prosecute his suit below *with effect*, and alleging a breach in his not prosecuting it according to the tenor and effect of the condition, but therein failing and making default, it is a good defence to plead; that the defendant did appear at the next county court, and there prosecute his suit which he had there commenced against the now plaintiff, and which suit was *still depending and undetermined*: and such plea is not avoided by replying that the defendant did not prosecute his suit as in the plea mentioned, but *wholly abandoned the same*, and that the said suit is *not still depending*; without shewing how it was determined and ceased to depend. *Brackenbury v. Pell*, T. 50 G. 3. 595

REVENUE OFFICER KILLED.

See SMUGGLING.

RIVER WATER,

See COMPENSATION.

SALE,

See VENDOR AND VENDEE.

1 *A.* having 40 tons of oil secured in the same cistern, sold 10 tons to *B.* and received the price; and *B.* sold the same to *C.*, and took his acceptance for the price at four months, and gave him a written order for delivery on *A.*, who wrote and signed his acceptance upon the said order; but no actual delivery was made of the said 10 tons, which continued mixed with the rest in *A.*'s cistern; yet held that this was a complete sale and delivery in law of the ten tons by *B.* to *C.*; nothing remaining to be done on the part of the seller; though as between him and *A.* it remained to be measured off; and therefore that *B.* the seller, could not, upon the bankruptcy of *C.* the buyer, before his acceptance became due, countermand the measuring off and delivery in fact of the 10 tons to the buyer; nor were the goods in transitu, so as to enable the seller to stop them. *Whitehouse and Others, Assignees of Townshend, a Bankrupt v. Frost and Others*, T. 50 G. 3. 607

SCIRE FACIAS,

See PRACTICE, 3.

An allegation in a declaration, with a prout patet, &c. that the plaintiffs by the judgment of the court recovered against the bail, is not proved by the production of the recognizance of bail, and the scire facias roll, which latter concluded in the common form.—Therefore it is considered that the plaintiffs have their execution thereupon against the bail: for this is an award of execution, or at most a judgment of execution, and not a judgment to recover. *Phillipson v. Mangles*, M. 50 G. 3. 247

SECURITY.

A security for the fair expences of the prosecution, agreed to be given, at the recommendation of the Court of Quarter Sessions, by a defendant who stood convicted before them of a misdemeanor in ill-treating his parish apprentice, for which the parish officers had been bound over by recognizance to prosecute him under the stat. 32 G. 3. c. 57; and the giving of which security was considered by the Court in abatement of the period of imprisonment to which he would otherwise have been sentenced: is legal. *Bealey v. Wingfield*, E. 49 G. 3. 37

SEDUCTION,

See ACTION ON THE CASE, 1.

SEISIN, Evidence of.

See FINE.

SEISIN IN FEE.

See ANNUITY, 2.

SESSIONS.

See APPEAL CANAL, 1; or JURISDICTION, 1.

Upon an appeal to the sessions against an order of filiation, the respondents are to begin, by supporting their order, as in all other cases. *The King v. Knill*, H. 50 G. 3. 349

SET-OFF,
See BROKER.

SETTLEMENT—by Apprenticeship.

- 1 A parish apprentice who was bound by her original master to another master by a new indenture of apprenticeship, without reference to or recognition of the original indenture, which still subsisted in law, does not gain a settlement by serving her new master, as upon a constructive service of the original master under the first indenture; this being only evidence of the first master's consent to the service with the second under a new and distinct contract of apprenticeship. *The King v. The Inhabitants of Christome*, E. 49 G. 3. 59
- 2 An apprentice who went to lodge at his mother's, in an adjoining parish to that of his master, for the purpose of getting cured of a disorder, but who continued to serve his master all the time, by going of errands for him, and attending when wanted, gains a settlement by such service in the parish where he lodged. *The King v. The Inhabitants of Stratford-upon-Avon*, E. 49 G. 3. 94
- 3 An indenture binding out a poor apprentice, executed by W. S. churchwarden, and J. G. overseer of the poor of a hamlet maintaining its own poor separately from the parish at large, not being impeached by evidence negating its execution by a majority of the churchwardens and overseers of the hamlet, shall be deemed good, by intending that there were two overseers for the hamlet as required by stat. 13 & 14 Car. 2. c. 12. s. 21, and only one churchwarden by custom, in the same place; and therefore the apprentice serving 40 days under it gains a settlement. *The King v. The Inhabitants of Hinckley*, E. 50. G. 3. 492

SETTLEMENT—By Hiring and Service.

- 1 Where the master died three weeks after hiring the pauper for a year, the latter abiding in the service with the widow and sons to the end of the year, gains a settlement in the parish where she served. And it is no less an abiding in the service for a year, because one of the sons, on a frivolous pretence that the servant threw more sand on the floor than he deemed necessary, turned her out of doors 3 weeks before the end of the year, she being willing and offering to stay to the end

of the year, but carrying away her clothes the next day, and taking what the son insisted was her full wages for the year according to the agreement, though she demanded a larger sum as her full wages. *The King v. The Inhabitants of Hardham-with-Newton*, H. 50 G. 3. 350

- 2 A hiring at so much a week, for as long time as the master and servant could agree, is only a weekly hiring, under which no settlement can be gained. *The King v. The Inhabitants of Mitcham*, E. 50 G. 3. 487
- 3 A servant, 11 weeks before the end of his year, on a quarrel with his master, applied for his discharge; which his master refused, unless the servant could get another man to stand in his stead; the servant accordingly procured another, to whom he gave money for the purpose out of his own pocket, in addition to the wages which the new man was to receive from the master; and the servant then left the service, and hired himself as a day labourer for the remainder of the year; held that this was proper evidence from whence the sessions might draw the conclusion of a dissolution of the contract; though it was encountered by the evidence of the servant, that his master said to him at the time that if the other man did otherwise than well, he could send for the servant and make him serve out his time; to which the latter assented: which account was, in the judgment of the sessions, impeached by the master's having no recollection of having so said, and saying that he had not any intention to have the servant back, they having parted on bad terms; which latter expression the court received, not as evidence per se of the master's intention, but only as a reason assigned by him, why he was not likely to have said what the servant stated. *The King v. The Inhabitants of Mildenhall*, T. 50 G. 3. 549

- 4 The sessions stated the fact that the pauper was hired on Michaelmas day, 10th of Oct. 1797, for a year ending on Michaelmas day, 10th Oct. 1798: that he continued to serve till the 8th of October, when he married, and his master consented to his leaving his service, and paid him his wages: and on the 9th the pauper hired himself to and went into the service of another master: held by one judge, that these facts would have warranted the sessions in drawing a conclusion of fact, that the master dispensed with the service for the remaining day of the year; but the sessions having impliedly drawn a different conclusion by quashing the order of removal, all the court held that the case, as stated, shewed a dissolution of the contract before the end of the year, and consequently that no settlement could be gained by such hiring and service. *The King v. The Inhabitants of Maidstone*, T. 50 G. 3. 579

SETTLEMENT—derived from parents.

- 1 A woman cannot give evidence of the non-access of her husband, to bastardize her issue; though the husband be dead at the time of her examination as a witness; and therefore an order of sessions, stated by that court to be founded in part upon credence given to her testimony of that fact, was quashed. *The King v. The Inhabitants of Kea*, E. 49, G. 3. 75
- 2 A son apprenticed out by his father to a master living under a certificate in another parish, and not thereby acquiring any settlement of his own, but receiving cloaths from his father, and visiting him from time to time, and returning home to him after the expiration of his apprenticeship, before he was of age: though he went out to service again in two days, after receiving more cloaths; is not emancipated from his father's family; and therefore follows a settlement gained by the father while he was so serving as an apprentice. *The King v. The Inhabitants of Hardwick*, M. 50 G. 3. 277

SETTLEMENT—by taking a Tenement.

- A person renting the tolls and residing in the turnpike house erected by order of the commissioners appointed by the stat. 30 G. 3. 67. for paving, lighting, and regulating the streets of *Durham*, and for other local objects, cannot gain a settlement in the parish, by the general turnpike act, 13. A. 3. c. 84. s. 56. *The King v. The Inhabitants of Elvet*, E. 49 G. 3. 93

SHERIFF.**See ESCAPE.**

- 1 Debt lies upon the stat. 44 G. 3. c. 13. s. 4 by a common informer suing for himself and the king, to recover a penalty against the sheriff for the misconduct of his bailiff in wilfully suffering a seaman to go at large who had been taken out of the king's service by arrest on civil process on which he was afterwards bailed, instead of delivering him over to the charge of a proper naval officer; the statute which speaks of *sheriffs, goalers, or other officers* arresting, apprehending or taking in execution such seamen, or in whose custody they may be, and who are made liable for their escape, meaning by "*other officers*" such as may be charged with the execution of criminal warrants against such seamen, or to whom any process may properly be directed for their arrest, detention, or discharge; and not the inferior officers of the sheriff. And the sheriff may be charged in such action for *wrongfully and wilfully* permitting the escape. *Sturmy, q. t. v. Smith and another Sheriff of Middlesex*, E. 49 G. 3. 28
- 2 In case against a judgment-creditor for maliciously suing out an alias *fi. fa.*; after

a sufficient execution levied upon the plaintiff's goods under the first *fi. fa.*; held that the sheriff's returns indorsed upon the two writs, (which writs had been produced in evidence by the plaintiff as part of his case,) wherein the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, were *prima facie* evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons. *Gusford v. Woodgate*, T. 49 G. 3. 184

SHIP.

- 1 The sole registered owner of a ship gave orders for materials to be furnished and work to be done for the repairs of it; but before all the articles were delivered on board, he conveyed the vessel, with all its furniture, to another by a bill of sale, which was duly registered. Held that the vendee was not liable for any of the goods furnished before the legal title was conveyed to him and registered in the manner prescribed by the registry acts; whatever equitable agreement might have existed before between him and the vendor for the conveyance of the whole or a share of the ship, which was unknown to the tradesmen: nor was the vendee even liable for any of the goods delivered on board after the sale to him, by virtue of the previous orders of the vendor, to whom the credit was personally given: but the vendee was held liable for articles which were ordered by the captain for the use of the vessel after the legal title was transferred to him. *Trehella v. Rowe*, T. 49 G. 3. 211
- 2 The stat. 26. G. 3. c. 60. s. 17. avoiding a bill of sale of a registered ship, which does not truly and accurately recite the certificate of registry, where parties by mistake misrecited in a bill of sale the certificate of registry, by stating *Guernsey* as the port where the certificate was granted instead of *Weymouth*; which mistake was rectified when discovered by consent of all parties, and the deed delivered *de novo*: held that no new stamp was necessary upon such re-execution; the deed taking no effect from its first delivery, and the effect arising not from intention but from mistake, and the alteration merely making the contract what it was originally intended to have been. *Cole and others, Assignees of Doyle, a Bankrupt, v. Parkin*, T. 50 G. 3. 543

SMUGGLING.

- An action of debt for 100*l.* lies upon the stat. 19. G. 2. c. 34. s. 6. against the inhabitants of a lath in *Kent* by the executor of a revenue officer, who being in a boat between high and low water mark in pursuit of a smuggling boat in which were offenders against the act, received

a mortal wound by a shot fired by a person on the shore within the lath; though the officer afterwards died on the high sea beyond the low water mark, and consequently out of the lath; and the act gives the remedy against the inhabitants of the lath, &c. where the fact shall be committed, i. e. where the officer endeavoring to apprehend offenders shall be killed. *Grosvenor, Executor of Ellis, v. The Inhabitants of the Lath of St. Augustine, in the county of Kent*, E. 50. G. 3.

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Qu. The application of the stat. 8. G. 2. c. 16. as to the mode of levying the money recovered, which by the act is directed to be by two justices of the peace of the county, riding, or division, where the fact happened within the jurisdiction of the Cinque Ports, which has an exclusive commission of the peace. *ib.*

STAMP.

- 1 Nothing, being referred to appraisers except the mere value of goods and of the repairs of a farm, an appraisement stamp upon the written valuation is sufficient under the statute 46 G. 3. c. 43. and an award stamp is not necessary. *Leeds v. Burrows*, H. 50. G. 3. 327
- 2 The same paper containing two different contracts for the purchase of different lots by different persons at an auction, one stamp affixed on that part of the paper which contained the contract of the sale with the defendant, and to which the stamp officer's receipt for one penalty referred, is sufficient to legalize the evidence of such contract. *Powell v. Edmunds*, H. 50 G. 3. 330
- 3 The stat. 48 G. 3. c. 149, *sched. 2*, requiring an office copy of the declaration to be written in the usual and accustomed manner, on which the duty of 4d. per sheet is imposed; and it not having been the practice to write such copies on both sides of the stamped sheet of paper: held that an office copy so written and delivered to a prisoner was irregular, and entitled him to be discharged out of custody. *Champneys v. Hamlin*, E. 50 G. 3. 460
- 4 The stat. 26 G. 3. c. 60. s. 17, avoiding a bill of sale of a registered ship, which does not truly and accurately recite the certificate of registry; where parties by mistake misrecited in a bill of sale the certificate of registry, by stating *Guernsey* as the port where the certificate was granted instead of *Weymouth*; which mistake was rectified when discovered by consent of all parties, and the deed delivered de novo: held that no new stamp was necessary upon such reexecution: the deed taking no effect from its first delivery, and the defect arising not from intention but from mistake, and the alteration merely making the contract what it was originally intended to have been. *Cole and Others, Assignees of Doyle, a Bankrupt, v. Parkins*, T. 50. G. 3. 543

STATUTES.

Upon an appeal against a rate made under a private act of parliament, the respondent appearing to answer the appeal, and admitting when called upon by the sessions, that he had made the rate by virtue of a certain act of parliament, a printed copy of which, in the common form, was produced in court by the appellants; and the sessions having thereupon entered into the merits of the appeal, and decided upon them, notwithstanding an objection made by the respondent, that the appellants had not given legal evidence of the jurisdiction of the sessions to receive the appeal, for want of proof of the printed copy having been examined with the rolls of parliament; this court refused to quash their order, which was removed by certiorari. *The King v. Shaw*, T. 50 G. 3. 547

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 SUPERCARGO.
 Where a supercargo and agent on board the vessel, has the like authority in the absence of his principal, even before the vessel sails from this country, to alter the destination, vide *CHARTER PARTY, 2. Davidson v. Gwynne, E. 50 G. 3.* 381
 SURRENDER, CONDITIONAL OF TERM.
 See LANDLORD AND TENANT, 3.
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 See POST HORSE DUTY. PROPERTY TAX.
 TENANTS IN COMMON,
 See JOINT TENANTS.
 See EJECTMENT, 8, 10. JOINT TENANTS AND TENANTS IN COMMON.
 A demand of possession by one tenant in common, and a refusal by the other, stating that *he claimed the whole*, is evidence of an actual ouster of his companion. *Doe, Lessee of Hallings and wife v. Bird, E. 49 G. 3.* 38
 TENANT IN TAIL AFTER POSSIBILITY, &c.
 By settlement before marriage, the husband's estate was conveyed to trustees to the use of the husband for life, sans waste; remainder to the use of the wife for life, for her jointure, and in bar of dower; remainder to the first and other sons of the marriage in tail male; remainder to the first and other daughters in tail mail; remainder to the heirs of the body of the husband and wife: remainder to the right heirs of the husband: the wife survived the husband and had no issue; and after possibility of issue by the husband extinct; held that she was tenant in tail after possibility, &c.; that she was unimpeachable of waste, and was entitled to the property of the timber when cut by her. *Williams v. Williams, E. 50 G. 3.* 421
 TENURE,
 See ESCHEAT, INQUEST OF.
 TERM OUTSTANDING.
 Where an old mortgage term of 1000 years, created in 1727, was recognized in a marriage settlement by the owner of the inheritance in 1751, by which a sum was appropriated to its discharge; and no further notice was taken of it till 1802, when a deed to which the then owner of the inheritance and the representatives of

the termors were parties, reciting that the term was still subsisting, conveyed it to others to secure a mortgage: held that it could not be presumed to have been surrendered against the owner of the inheritance, who was interested in upholding it. *Doe, Lessee of Graham v. Scott, M.* 50 G. 3. 230

TIMBER.

See TENANT IN TAIL AFTER POSSIBILITY, &c.

TITHES.

- 1 Due notices having been given to the parson of the setting out the tithes of fruit and vegetables in a garden; which were accordingly set out on the days specified; and the tithes not having been removed at the distance of a month afterwards, when they had become rotten; a notice then given by the owner to remove the tithed fruits and vegetables within two days, otherwise an action would be commenced against the parson, is sufficient notice of their having been set out, whereon to found an action, if they be not removed. And due notices having been given of setting out tithes of garden vegetables and field barley, on certain days between the 11th and 16th of September, a general notice on the 17th to the parson, to take away all the tithes of his (the plaintiff's) lands within two days, is sufficient whereon to found the like action. *Kemp v. Filwood, Clerk, T.* 49 G. 3. 176

- 2 Where a composition for tithes had been long paid by the farmer, and two years before the action of debt brought on the stat. 2. and 3 Ed. 6. c. 13. for not setting out the tithes, the vicar, in a conversation with the farmer, demanded his tithes vicarial; on which the other tendered him 40s., (the annual composition) which the vicar refused to take, but assigned no reason for his refusal; this was held to be no evidence of a notice to determine the composition, which notice ought to be unequivocal: and held also that the farmer, not having denied the vicar's right to tithes in kind before the action brought, was not precluded from taking the objection to the action at the trial, for want of a proper notice to determine the composition, analagous to a notice to quit land, by putting the vicar to the strict proof of his right to tithe in kind. *Fell v. Wilson, H.* 50 G. 3. 364

- 3 A notice on the 8th to determine a composition for tithes from year to year, commencing on the 29th of September, is not a sufficient notice. *Hewitt and Others v. Adams, Dom. Proc.* 1782. cited *ib.* 365

- 4 Though by the general rule a farmer may not at his pleasure tithe and carry part of a field of corn which has been cut, before the whole be tithed, and then proceed to another field, &c. so as to oblige the

parson to come again to the same field at another time to take his tithe; which general rule, however, being levelled against fraud, vexation, and caprice, must where these have no application, be understood with all necessary exceptions of partial ripeness and weather, the neglect of which would be prejudicial to the crop; yet there is no rule of law which obliges a farmer (all fraud and vexation apart) to tithe the whole of that part of a field which lies in one parish, before he proceeds to tithe any part of the same field lying in another parish. And therefore, where a farmer cut the whole of a field of barley lying in the two parishes of A. and B., and after rolling (i. e. cocking) and tithing part in A., proceeded to roll and tithe part in B., and the weather being catching, he carried that part which was tithed in A. the day before the rest of the field in A. was rolled and tithed; and this without previous notice of his intention to carry such part: held that this being done bona fide was lawful. *Leather, Clerk v. Levinson, E.* 50 G. 3. 435

TITLE,

See COVENANT, 2. POWER 2. PRESUMPTION OF TITLE.

TOBACCO—Dealing in.

See VENDOR AND VENDEE, 1.

TOLLS,

See CANAL COMPANY.

See POOR'S RATE.

TRADING COMPANY.

A bond given to trustees to secure the faithful service of a clerk to the *Globe* insurance company, who were no corporation, may be put in suit by the trustees for a breach of faithful service by the clerk, committed at any time during his continuance in the service of the actually existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer; the intention of the parties to the instrument being apparent, to contract for such service to be performed to the company as a fluctuating body; and the intervention of the trustees removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body. *Metcalf, Bart. and Others v. Bruin, E.* 50 G. 3. 509

TRADING WITH ENEMY.

- 1 A licence to export goods to certain places within the influence of the enemy interdicted to British commerce, granted to H. N. on behalf of himself and other British merchants, &c. is sufficient to legalize an insurance on such adventure,

if it appear that *H. N.* was the agent employed by the *British* merchants really interested in it to get the licence, though he had no property in the goods himself. *Rawlinson and Others v. Janson*, E. 50 G. 3. 427

- 2 An insurance having been made on goods, at and from a port in *Russia* to *London*, by an agent residing here for a *Russian* subject abroad; which insurance was in fact made after the commencement of hostilities by *Russia* against this country, but before the knowledge of it here, and after the ship had sailed, and been seized and confiscated; held that the policy was void in its inception; but that the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities. *Oom & Others v. Bruce*, E. 50 G. 3. 428
 - 3 As the king cannot licence the importation of enemy's property, the produce of a foreign country, into this realm in neutral vessels, contrary to the navigation laws, a licence in fact granted for such purpose will not legalize an insurance upon the property so imported. And if a policy be made upon the supposed efficacy of such a licence, for the purpose of covering the importation of *British*, as well as enemy's property in that manner (the former of which is legalized by the stat. 43 G. 3. c. 153. s. 15., 16 and 45 G. 3. c. 34.) the underwriters cannot at any rate recover the premiums for more than the amount of the *British* interest insured: the assured not resisting their claim to that extent. *Shifner v. Gordon and Another*, E. 50 G. 3. 461
 - 4 In another case, where a licence was granted to cover a *British* adventure out and home to and from the *Spanish South American* colonies, upon condition that the licensee should export a certain proportion of *British* manufactures for the voyage out; and it afterwards appeared that the greatest part of the outfit was made up of *Spanish* goods, and only a very small quantity, merely nominal, of *British* manufactures; this was deemed to be colourable and in fraud of the licence, and therefore did not protect an insurance thereon. *Gordon v. Vaughan*, E. 49 G. 3. B. R. cited, *ib.* 464
 - 5 Where an assured, a *British* merchant, in an action on a policy of insurance on goods bound to an enemy's port in *Holland*, sought to protect the adventure under the king's licence to trade with the enemy, it was not sufficient to give in evidence at the trial, and to prove his possession in fact before the voyage commenced, of a general licence, dated three months before, licensing *six neutral vessels* under certain neutral flags to pass unmolested to or from any port of *Holland*, from or to any port of this kingdom, with certain goods (including the goods insured;) which licence was directed to *R. S.* and other *British* mer-
- chants*: with a condition annexed, that they should cause the licence to be delivered up to them or their agents when the ship should enter any port of this kingdom; without also giving probable evidence to account for his possession of the licence, and to shew that his use of it was lawful; as by shewing from whom and when he received it, and thereby connecting his own particular adventure with such general licence. *Barlow v. McIntosh*, E. 50 G. 3. 463

TRESPASS,

See CONVICTION, 2.

See EVIDENCE, 2.

- 1 Where the plaintiff had lands abutting on one side of a public highway called *Shepherd's Lane*, (which is *prima facie* evidence that the nearest half of the lane was his soil and freehold,) he may declare generally for a trespass in his close called *Shepherd's Lane*; and the defendant must plead soil and freehold in another, in order to derive the plaintiff to new assign the trespass complained of in the part of the lane which was his exclusive property. *Stevens v. Whistler*, E. 49 G. 3. 39
- 2 In trespass *quare clausum fregit*, if the defendant plead soil and freehold in another, by whose command he justifies the trespass, such command may be traversed by the plaintiff. *Chambers v. Donaldson*, E. 49 G. 3. 46
- 3 So in trespass for breaking and entering the plaintiff's cellar, if the defendant plead that the place where, &c. is copyhold, and that the lord, at a court, &c. granted to the defendant a messuage, of which the cellar is parcel; and so justifies the entry; the plaintiff may reply that the defendant entered of his own wrong, and traverse that the cellar, at the time when, &c. was parcel of the customary messuage; without shewing a title in himself. *Cary v. Holt*, M. 19 G. 2. 48
- 4 A feme covert, though deserted by her husband, who had gone abroad, trading as a feme sole, cannot maintain trespass for breaking and entering her dwelling-house. *Boggett v. Frier*, T. 49 G. 3. 150
- 5 Where one who entered under a warrant of distress for rent in arrear, continued in possession of the goods upon the premises for 15 days, during the 4 last of which he was removing the goods, which were afterwards sold under the distress; held that at any rate he was liable in trespass *quare clausum fregit* for continuing on the premises and disturbing the plaintiff in the possession of his house, after the time allowed by law. *Winterbourne v. Morgan*, T. 49 G. 3. 193
- 6 Where goods were distrained in a house, and the person, left in possession during the 5 days till the goods were replevied,

left them dispersed as he found them all over the house, and went into all parts of it himself; no objection being made at the time; *Ld. Mansfield* left it to the jury, in an action of trespass, as evidence of the owner's consent. *Washborn v. Black, Westminster Sittings after Mich. 1774.* 197

7 To a declaration for several trespasses on the plaintiff's land, on divers days, &c. the plea alleged, that at the said several days, &c. the defendant committed the said several trespasses by licence of the plaintiff: and the latter replied that the defendant of his own wrong and *without the cause* alleged, committed the said several trespasses, &c.: held that evidence of a licence which covered *some*, but *not all*, of the trespasses proved, within the period laid in the declaration, did not sustain the justification upon the issue taken by the replication. *Barnes v. Hunt, T. 49 G. 3.* 218

8 A plea to an action of trespass, for killing the plaintiff's dog, cannot justify the act, by stating that the lord of the manor was possessed of a close, and that the defendant, as his gamekeeper, killed the dog when running after hares in that close for the preservation of the hares; such plea not even stating that it was *necessary* to kill the dog for the preservation of the hares; nor stating that it was the dog of an unqualified person. *Vere v. Lord Caudor, M. 50 G. 3.* 272

9 The stat. 43 G. 3. c. 141. does in no instance extend to protect justices of peace in the execution of their office against actions for acts of trespass or imprisonment, unless done on account of some *conviction* made by them of the plaintiffs in such actions by virtue of any statute, &c. *Massey v. Johnson, H. 50 G. 3.* 357

10 The magistrate is liable to answer in an action for such part of an imprisonment suffered under his warrant as was within six calendar months before the action commenced against him. *ib.*

11 After an acquittal of the defendant upon an indictment for a felonious assault upon the plaintiff by stabbing him, the plaintiff may maintain trespass to recover damages for the civil injury, if he be not shewn to have colluded in procuring such acquittal. *Crosby v. Leng, E. 50 G. 3.* 513

TRIAL.

1 Notice having been given for the trial of a cause at *Monmouth*, which arose in *Glamorganshire*, as being in fact the next *English* county since the stat. 27 H. 8. c. 26. s. 4, though *Hereford* be the common place of trial; the Court refused to set aside the verdict as for a mis-trial, on motion; the question being open on the record. *Ambrose v. Reas, T. 49 G. 3.* 182

2 The Court will not try an action upon a

wager on an abstract question of law or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest. *Henkin v. Guerss, E. 50 G. 3.* 439

3 Notice of, see PRACTICE, 21.

TRUST,

See CANAL COMPANY. USES AND TRUSTS EXECUTED.

Under a devise to trustees, their heirs, &c. of freehold and leasehold estate, on trust to permit and suffer the testator's wife to receive and take the rents and profits till his son should attain 21, and then to the use of his son in fee; and a devise of other lands to the trustees, upon trust to receive the rents and profits till his son attained 21; and in the mean time to apply the profits in discharging the interest of a bond of 3000*l.*; and on the son's attaining 21, upon trust by sale, lease, or mortgage of the last mentioned premises, to raise the 3000*l.*, and discharge the bond; and subject thereto, to the use of his son in fee on his attaining 21. And a third devise of other lands, and the residue of his real and personal estate, to the use of the same trustees, in trust by sale, lease, or mortgage of the same, to raise 3000*l.* and pay it to his daughter *Elizabeth*: and after payment thereof, absolutely to sell and dispose of so much of the residue of his said lands, &c. as they should think proper, to raise money to pay his debts, legacies, and funeral expences, and then upon trust to pay the interest and produce of his real and personal estate to his then wife, for the maintenance of herself and two children, till the latter should attain 21, if she continued his widow; but if not, then for the benefit of the two children till 21; and then to transfer to those children such residue; with further trusts if either or both of them died under 21: with a

Proviso, "that it should be lawful for the trustees, and the survivor, at any time or times till all the said lands, &c. devised to them should actually become vested in any other person or persons by virtue of the will or until the same or any part thereof should be absolutely sold as afore-said, to lease the same or any part thereof, for any term of years not exceeding 14, at the best rent:—"

Held that the devise in the first clause to the trustees, upon trust to permit and suffer the testator's wife to receive and take the rents and profits of the lands there described until his son attained 21, vested the legal estate of those lands in her, and was not affected by subsequent leasing power given to the trustees; which was confined to premises originally vested in them as trustees, or over which when afterwards becoming vested in others, the trustees retained a power of sale, &c. *Right d.*

Harriet Phillips and Others v. Smith, T. 50
G. 8. 535

**TRUSTEES FOR UNINCORPORATED
COMPANY,**
See BOND.

TURNPIKE ACT.

The general turnpike act 13 G. 3. c. 84. s. 13, having given a penalty, to be recovered by information before justices of peace, or by action, for using a greater number of horses than is thereby allowed for the draft of waggons, &c. on the road: and the 19th section having provided, that if it appear on oath to the satisfaction of any justice of the peace or court of justice, that the carriage could not be drawn with the ordinary number of horses, by reason of deep snow or ice, then such justice of peace or court may *stop all proceedings* before them respectively; held that such application for a stay of proceedings must be made to the court above in which the action was brought, and that the defence is not available at nisi prius. *Robinson v. Pacock*, M. 50 G. 3. 233

UNIVERSITY,
See CONSUMANCE.

USAGE,
See OFFICE, 2.

USES AND TRUSTS EXECUTED.

Under a devise of land to a trustee and his heirs, out of the rents and profits to pay an annuity to the testator's wife, and the overplus to his nephews; and after his wife's death to the use of his nephews and the survivor for their lives; remainder to the use of the trustee to preserve contingent uses and estates, &c. during their lives; and after their deceases in trust for the heirs male of the body and bodies of the nephews; and in default of such issue, then to the use of another in fee; Held that the limitation in trust for the heirs male of the body and bodies of the nephews was executed by the statute, and therefore united with the prior use executed in them for life; and that a recovery suffered of the whole estate by the survivor of the nephews, after the death of the other nephew without issue, and after the death of his own issue, bound the entail, and defeated the subsequent limitation in fee. *Doe, Lessee of Terry v. Collier*, T. 49 G. 3. 185

USURY.

1 A broker agrees with the defendants to get their bills discounted, and that he shall retain out of the money so raised, the exorbitant brokerage of 10s. per cent.; but the broker was not to advance the money himself, nor was his name on the bills: held that a bill accepted by the de-

fendants, and negotiated by the broker, upon these terms, could not be avoided in the hands of an innocent indorsee, as for an usurious consideration within the stat. 12 Ann. c. 16. *Dagnall v. Wigley*, E. 49 G. 8. 35

2 The defendant being indebted to the plaintiff, his bankers, in nearly 30,000*l.*, about 21,000*l.*, of which was secured by bonds (a considerable part of which was advanced by them when stocks were below 50*l.*) agreed with them that they should place 25,000*l.* to his credit in account: for which he was to purchase 50,000*l.* stock, (then at 51 1-4) in their names and account to them for the dividends upon such stock as from the last dividend-day; after which agreement, the plaintiffs acting upon the basis of it, (thought he defendant never purchased the stock so agreed upon) entered in their books the sum of 25,000*l.* to the credit of the defendant, and continued to honour his drafts from time to time; crediting him also with other sums actually paid by him and wrote off the amount of his bonds to his credit, and delivered them up to him.

Held that this agreement to repay the new credit of 25,000*l.* by the purchase of stock at 50*l.*, when in fact it was more at the time of the agreement made, though it had been less when a considerable part of the money was actually advanced upon his general credit, was usurious and void; but that nevertheless the sum of 25,000*l.*, credited under that agreement by the plaintiffs to the defendant in his banking account, was to be reckoned against them upon balancing the account of debtor and creditor between them. *Boldero and Another v. Jackson*, M. 50 G. 3. 291

VARIANCE

1 An action on the case for setting up a certain mark in front of the plaintiff's dwelling-house, in order to defame him as the keeper of a bawdy-house, is not local in its nature; and if the declaration, after describing the house as situate in a certain street called A. street, in the parish of O. A. (there being no such parish,) afterwards state the nuisance to be erected and placed in the parish aforesaid, it will be ascribed to venue, and not to local description; and therefore the place is not material to be proved as laid. *Jefferies v. Duncombe*, E. 49 G. 3. 117

2 In an action for a malicious prosecution, the copy of the original roll or record of acquittal given in evidence, stated the finding of the bill of indictment against the now plaintiff in B. R., the process to bring in the party, her appearance, and plea of not guilty in Mich. term, and the joining of issue in the same Court; and then it stated the venire facias juratores returnable in Hilary term, and the distringas juratores by which the sheriff is

commanded to have the jury *before our said lord the King at Westminster, on Wednesday next after 15 days from Easter, or before the Lord Chief Justice* if he should come before that time, i. e. on Tuesday next after the end of the term (Hilary), at Westminster, &c. in the great hall of pleas there; and then after giving a day in bank to the prosecutor and defendant, it proceeded—on which day, viz. on Wednesday next after 15 days &c. before our said lord the king, at W., came the parties; and the Chief Justice before whom the said jurors came to try, &c. sent here his record (which is the nisi prius record) in these words; (which are the words of the postea indorsed on the nisi prius record;) viz. afterwards, on the day, and at the place last within mentioned, before the Chief Justice, &c. and so it proceeded to set out the trial, and the verdict of not guilty; (which is the conclusion of the postea on the nisi prius record sent into the court in bank by the Chief Justice :) and then the original roll proceeded—Whereupon, all the premises being seen by the court of our said lord the king now here, it is considered and adjudged by the said court now here, that M. W. (the now plaintiff) do depart here without day, &c.

The form and component parts of the original roll, or record of acquittal, being thus understood: it follows that the words of the postea, “afterwards, on the day and at the place last within mentioned,” stated in the indorsement on the nisi prius record, as sent by the Lord Chief Justice into the court in bank, refer to the day and place last mentioned in the *distingas juratores* set forth in that record; namely to “Tuesday next after the end of the term, (Hilary at Westminster, &c. in the great hall of pleas there,” which was the day and place at nisi prius given; and not to the “Wednesday next after 15 days, &c. before our said lord the king at W.,” which was the return day in bank the subsequent term, and consequently after the trial was bad; though the statement of this return-day intervenes on the roll between the statement of the day and place given to the jury in the *distingas*, and the statement of the postea indorsed on the nisi prius record as sent in by the Lord Chief Justice.

And as by the roll it appeared that the trial was at nisi prius, and the judgment of acquittal in bank; it was therefore held not to prove an allegation in the declaration, that “the defendant (the now plaintiff) on Wednesday next after 15 days, &c. in the court of our said lord the king, before the king himself, at W. before the Lord Chief Justice assigned to hold pleas before the king himself, &c.; W. J. being associated with him, &c. was in due manner and according to the due course of law by a jury of the said county

“of M. acquitted, &c.,” which allegation supposed the trial to have been in bank on the return day there given. *Woodford and Mary his Wife v. Ashley*, M. 50 G. 3. 243

- 3 An allegation in a declaration, with a prout patet, &c. that the plaintiffs by the judgment of the court recovered against the bail, is not proved by the production of the recognizance of bail, and the scire facias roll, which latter concluded in the common form.—Therefore it is considered that the plaintiffs have their execution thereupon against the bail; for this is an award of execution; or at most a judgment of execution, and not a judgment to recover. *Phillipson v. Mangles*, M. 50 G. 3. 247
- 4 For variance between the words of a covenant in a deed as declared on, and the substance and legal effect of such words as qualified by other covenants in such deed; see COVENANT, 2.

VENDOR AND VENDEE.

- 1 A factor selling a parcel of prize manufactured tobacco, consigned to him from his correspondent at Guernsey, of which a regular entry was made on importation, but without having entered himself with the excise office as a dealer in tobacco, nor having any licence as such, may yet maintain an action against the vendee for the value of the goods sold and delivered; and this, though the tobacco were sent to the defendant without a permit, at his desire: there being no fraud upon the revenue, but at most a breach of revenue regulations protected by penalties: even if such factor could, upon this single and accidental instance, be considered as a dealer in tobacco within the meaning of the stat. 29 Geo. 3. c. 68. s. 70, which requires every person, who shall deal in tobacco, first to take out a licence under a penalty. *Johnson v. Hudson*, E. 49 G. 3. 96
- 2 Where turpentine in casks were sold by auction at so much per cwt., and the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest before they were delivered to the purchaser; on which accounts the two last casks were to be sold at uncertain quantities; and a deposit was to be paid by the buyers at the time of the sale, and the remainder within thirty days on the goods being delivered: and the buyers had the option of keeping the goods in the warehouse at the charge of the seller for those 30 days, after which they were to pay the rent: and the buyers having employed the warehouseman of the seller as their agent, he filled up some of the casks out of the two last, but left the bungs out in order to enable the custom-house officer to guage them: but, before he could fill up the rest, a fire consumed the whole in the warehouse within the 30 days; held that the property passed to the buyers in

all the casks which were filled up, because nothing further remained to be done to them by the seller: for it was the business of the buyer to get them gauged, without which they could not have been removed: and the act of the warehouseman in leaving them unbunged, after filling them up, which was for the purpose of the gauging, must be taken to have been done as agent for the buyers, whose concern the gauging was; but the property in the casks not filled up remained in the seller, at whose risk they continued. *Rugg v. Minott*, E. 49 G. 3. 109

- 3 The stat. 17. G. 3. c. 42., which requires bricks for sale to be of certain dimensions, and gives a penalty for a breach of that regulation, being passed to protect the buyer against the fraud of the seller; if bricks be sold and delivered under the statutable size unknown to the buyer, the seller cannot recover the value of them. *Law v. Hodson*, T. 49 G. 3. 150
- 4 The sole registered owner of a ship gave orders for materials to be furnished and work to be done for the repairs of it; but before all the articles were delivered on board he conveyed the vessel, with all its furniture to another by a bill of sale, which was duly registered: held that the vendee was not liable for any of the goods furnished before the legal title was conveyed to him and registered in the manner prescribed by the registry acts; whatever equitable agreement might have existed before between him and the vendor for the conveyance of the whole or a share of the ship, which was unknown to the tradesmen: nor was the vendee even liable for any of the goods delivered on board after the sale to him, by virtue of the previous orders of the vendor, to whom the credit was personally given: but the vendee was held liable for articles which were ordered by the captain for the use of the ship after the legal title was transferred to him. *Trewhella v. Rowe*, T. 49 G. 3. 211

VENUE.

- 1 An action on the case for setting up a mark in front of the plaintiff's dwelling house, in order to defame him as the keeper of a bawdy-house, is not local in its nature: and if the declaration after describing the house as situate in a certain street called *A street*, in the parish of *O. A.* (there being no such parish) afterwards state the nuisance to be erected and placed in the parish aforesaid; it will be ascribed to venue, and not to local description; and therefore the place is not material to be proved as laid. *Jefferies v. Dunscombe*, E. 49 G. 3. 117
- Rule for changing the venue to be drawn up on reading the declaration. *Reg. Gen.* T. 49 G. 3. 138

VERDICT, JOINT or SEVERAL, See ACTION ON THE CASE, 10

VOYAGE.

Under the *Liverpool* dock acts of 8 Ann and 2 Geo. 3., tonnage duties are payable to the dock company on all vessels sailing with cargoes outwards or inwards; which rate varies according to the several descriptions of voyages in the acts, one of which is to and from *America*, generally: so as no ship shall be liable to pay more than once for the same voyage out and home; held that a voyage out from *Liverpool* with a cargo to *Halifax* in *North America*, where the ship delivered it, and took in another cargo there for *Demarara* in *South America*, and after delivering that, returned to *Liverpool* with a cargo from *Demarara*, was all the same voyage out and home, within the meaning of the act, and chargeable only with one tonnage rate for the use of the docks. *Gildart v. Gladstone* in Error, T. 50 G. 3. 528

VOYAGE ENTIRE, See LIVERPOOL DOCK DUTY.

WAGER.

The Court will not try an action upon a wager on an abstract question of law or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest. *Henkin v. Gueress*, E. 50 G. 3. 439

WALES, See TRIAL, 1.

WAREHOUSING ACT, See MONOPOLY,

WARRANTY JOINT OR SEVERAL, See ACTION ON THE CASE.

WASTE, See TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGT.

WASTE.

Where copyholder for life cut trees, though none were applied to the repair of the premises till several months after, and after ejectment brought as for a forfeiture, and most of them still remained unapplied, but parts of the premises were still out of repair; it is a question for the jury whether they were cut bona fide for the purpose of repair, and were in a course of application for that purpose: and there being no evidence that they were to be applied to any other purpose, the Court refused to set aside a verdict for the defendant. *Doe, Lettice of Felty, v. Wilson*, E. 49 G. 3. 41

WAY,
See HIGHWAY.

WEST-INDIA DOCK.

- 1 Stat. 39 G. 3 c. 69 s. 137, giving to *West India* ships, which have discharged there homeward bound cargoes in the docks of the *West-India* Company, "the use of the light dock for a time not exceeding six months from the time of unloading," on payment of the tonnage duty of 6s. 8d. payable on the entrance of such ships into the import dock, does not entitle the owners to ship stores intended for the use of such ships as part of their out fit, over the wharfs of the light dock, without payment of wharfage and portorage, as in case of other goods shipped by way of merchandize on the outward bound voyage: aliter, as to necessaries intended for the immediate use of such ships while lying in the dock during the time allowed by the act. *Blackett v. Smith*, M. 50 G. 3. 255
- 2 And the company were held entitled to retain such portorage as well as wharfage, though the plaintiff had refused the assistance of the company's servants, and had employed his own. *Ibid.* 255

WEST INDIA DOCKS.

The owner of a homeward-bound ship entering the *West India* docks in so leaky a condition as to require immediate unloading and assistance, without waiting her turn to be quayed and unloaded in rotation in the import dock in the manner required by the 39 G. 3. c. 69, is bound to bear the extra expences of labourers for pumping the ship after the crew were discharged, and for delivering the cargo into lighters in the outward dock or basin; also for cooeping previous to such delivery into lighters, and for the hire of such lighters; the company having afterwards unladen the cargo out of such lighters upon the quays in the import

dock, and performed the requisite coo-
perage, &c. upon such unloading, in the
same manner as they would have done if
the cargo had been delivered out of the
ship itself in proper time and place.
*Blackett and Another v. Smith, Treasurer
of the West India Dock Company*, T. 50
G. 3. 565

WHARFAGE AND PORTERAGE,
See WEST INDIA DOCK, 2.

WILD-FOWL,
See ACTION ON THE CASE, 8, 9.

WINES,
See MONOPOLY,

WITNESS.
See EVIDENCE.

- 1 A woman cannot give evidence of the non-access of her husband to bastardize her issue, though he be dead at the time of her examination as a witness; and therefore an order of sessions, stated by that court to be founded in part upon credence given to her testimony of that fact, was quashed. *The King v. The Inhabitants of Kea*, E. 49 G. 3. 75
- 2 A witness admitting herself to have before sworn falsely upon the particular point, but attributing it to the persuasion, of the defendant, is not an *incompetent* witness against him on an indictment for a conspiracy; but the objection goes strongly to her *credit*. *The King v. Teal*, T. 49 G. 3. 153
- 3 The wife of an executor taking no beneficial interest under the will is a competent attesting witness to prove the execution of it, within the description of a *credible* witness in the statute of frauds, 29 Car. 2. c. 3. s. 5. *Bettison and Another v. Sir R. H. Bromley, Bart.* E. 50 G. 3. 441

WOODS,
See BURNING WOODS.

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